

# Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis”

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## INTRODUCTION

DAVID Davis is not included in the *Atlantic Monthly*'s inventory of the one hundred most influential Americans.<sup>2</sup> Nor has “big Judge Davis”<sup>3</sup> made any list of great Supreme Court Justices.<sup>4</sup> His anonymity also makes it unlikely that he will join the Supreme Court Justice bobble-head collection created by *The Green Bag*.<sup>5</sup> These slights are not surprising. But it is somewhat disheartening that Judge Davis's solid resume did not merit his inclusion in a recent symposium on neglected Supreme Court Justices.<sup>6</sup> After all, how many judges can boast that they authored a Supreme Court opinion described as “one of the bulwarks of American liberty,”<sup>7</sup> masterminded Abraham Lincoln's presidential nomination in 1860,<sup>8</sup> and

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2 Ross Douhat, *They Made America*, THE ATLANTIC, Dec. 2006, at 59, available at <http://www.theatlantic.com/magazine/archive/2006/12/the-top-100/5384> (listing the one hundred most influential figures in American history as ranked by a panel of respected historians).

3 According to Abraham Lincoln, David Davis was referred to as “big Judge Davis” in order to distinguish him from another Illinois judge, Oliver L. Davis, otherwise known as “little Judge Davis.” WILLARD L. KING, LINCOLN'S MANAGER: DAVID DAVIS 152 (1960). The moniker ostensibly had nothing to do with David Davis's 300-pound frame.

4 See, e.g., ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES: STATISTICAL STUDIES ON THE SUPREME COURT OF THE UNITED STATES 39 (1978) (ranking Davis as an average Supreme Court Justice).

5 *Green Bag Bobbleheads*, THE GREEN BAG, <http://www.greenbag.org/bobbleheads/bobbleheads.html> (last visited Sept. 12, 2010).

6 See James W. Ely, Jr. & Mark E. Brandon, *The Rankings Game*, 62 VAND. L. REV. 311 (2009). The organizers of the symposium acknowledged that many worthy candidates for neglected justice status did not make the symposium cut. *Id.* at 316.

7 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 149 (Beard Books 1999) (describing the opinion authored by Justice Davis in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)); see *infra* Part I.B.5 (discussing the decision in *Ex parte Milligan*).

8 See *infra* Part I.B.1 (describing Davis's role in securing Lincoln's nomination at the 1860 Republican National Convention).

served as de facto Vice President of the United States?<sup>9</sup>

Except for the usual obligatory reference in works about Abraham Lincoln, the accomplishments of Judge Davis are overlooked and undervalued.<sup>10</sup> This inattention may be due to Davis's un-glamorous work as a transactional and collections lawyer and his low-profile service as a circuit-riding trial judge prior to his appointment to the Supreme Court. Perhaps the routine nature of most legal work in the nineteenth century limited the judge's chance for greatness.<sup>11</sup> Or it just may be that all of Lincoln's associates are doomed to be judged by their usefulness to the greatest President rather than on their individual achievements.<sup>12</sup>

But the neglect of the judicial career of David Davis is most likely due to the fact that he simply has no legitimate claim to be remembered for scholarship, contributions to constitutional theory,<sup>13</sup> or other tangible, resume-filling achievements valued by legal scholars. Nonetheless, Davis did make a substantial contribution to the legal system. His vital, albeit invisible, contribution was to the intangible fabric of the system itself. During his judicial service he consistently exhibited the quality most essential to maintaining the legitimacy of the judiciary: actual impartiality in the exercise of judicial duties.<sup>14</sup> The public recognized Davis's impartiality

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9 See *infra* Part I.B.6 (discussing Davis's service as president of the United States Senate).

10 But see William D. Bader & Frank J. Williams, *David Davis: Lawyer, Judge, and Politician in the Age of Lincoln*, 14 ROGER WILLIAMS U. L. REV. 163, 213 (2009) (concluding that Davis "embodied the unmistakable qualities that comprise a good judge").

11 Donald Grier Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DENV. U. L. REV. 449, 451 (2003) (suggesting that some members of Chief Justice Waite's court, including David Davis, may not have received due acclaim because of the "routine nature of much of nineteenth century judicial business" (citation omitted)).

12 See JAMES GRAY, *THE ILLINOIS 181* (1940) ("For the rest of his life [Davis] was to walk in the shadow of the man he had helped to make."); Bader & Williams, *supra* note 10, at 165 ("Perhaps, also, Davis ironically is eclipsed in reputation by his very close proximity to our mostly highly esteemed American, Abraham Lincoln.").

13 The "war on terror" and trials of "enemy combatants" by military commissions have rekindled scholarly interest in Justice Davis's most significant opinion, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). See, e.g., Kyndra Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 CHAP. L. REV. 449, 462-64 (2009); see also *infra* Part I.B.5 (discussing the *Milligan* decision).

14 As used in this Article, the terms "impartial" and "impartiality" denote a lack of partiality along many dimensions including (1) an "absence of bias or prejudice" for or against parties or their attorneys; (2) decisions unaffected by improper influences such as public clamor, executive and legislative branch pressures, personal preferences, friendship, and loyalties; and (3) open-mindedness. MODEL CODE OF JUDICIAL CONDUCT terminology (2007); *Republican Party of Minn. v. White*, 536 U.S. 765, 775-80 (2002). This definition includes what is often referred to as "judicial independence." See also James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1200 (2006) (describing independence as "a subset of impartiality, isolating only those influences that come from the electorate, the political process, or the other branches of government"); Robert

even though his off-bench life did not foster the appearance of impartiality. His close and longstanding personal and political loyalties could easily have led to the public perception that Davis's alliances would influence his courtroom decisions. But they did not. His fairness was universally recognized notwithstanding the "appearance" that his judicial rulings would be shaped by considerations other than the facts and the law.

In Davis's time, the legitimacy of the judicial system was measured by the degree of impartiality demonstrated by judicial officers in court and not upon secondary cues taken from a judge's personal life. To the extent that the appearance of impartiality was important, it existed as a natural byproduct of actual impartiality.

Regrettably, the American Bar Association (ABA) Canons of Judicial Ethics ("1924 Canons")<sup>15</sup> shifted the emphasis away from reality and toward perception in the effort to sustain judicial legitimacy. The 1924 Canons, and each succeeding version of the ABA Model Code of Judicial Conduct, endeavored first and foremost to promote an "appearance" of judicial impartiality.<sup>16</sup> The ABA Model Codes were designed to regulate every aspect of a judge's off-bench life in order to avoid the possibility that a judge's personal, social, business, political, philosophical, or economic interests could in any way be perceived by the public as influencing judicial decisions. Under these modern rules of judicial conduct, perpetuating the image of the impartial judge has become the primary vehicle for sustaining judicial legitimacy. In the world of appearance-based ethics, efforts to promote actual impartiality have receded into the background as a secondary concern.

Relying on ill-defined, shifting perceptions drawn from a judge's political affiliation, charitable fund-raising activities, fraternal club memberships, or other extrajudicial activities is an ineffective and eventually doomed method of safeguarding public faith in the judicial branch. David Davis teaches that the legal profession must re-emphasize what has traditionally sustained public trust in the courts—actual judicial impartiality. If that can be accomplished, then the appearances will take care of themselves.

The thesis of this Article is taken straight from the life of Judge Davis. Public trust and confidence in the judiciary is best maintained by the exhibition of judicial fairness and impartiality in the courtroom. Simply put, actual impartiality is more important than the appearance of impartiality. Therefore, the judicial ethics community should concentrate its efforts on developing programs, rules, and procedures that enhance judicial

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G. Natelson, *A Reminder: The Constitutional Values of Sympathy and Independence*, 91 Ky. L.J. 353, 384 (2003) (observing that only independent people can use their intelligence to impartially solve problems).

<sup>15</sup> CANONS OF JUDICIAL ETHICS (1924).

<sup>16</sup> See *infra* Part II.B.1–5 (tracing the development of the appearance of impropriety standards in the four ABA Model Judicial Codes).

impartiality and thereby the legitimacy of the third branch. Developing and enforcing rules restricting off-bench activities because the activities might appear to some as inconsistent with judicial impartiality is less important and should be treated accordingly.

This Article proceeds in three Parts. First, if Judge Davis is to serve as an example of how actual impartiality promotes public confidence in the judiciary, even in the face of partisan appearances, it must be demonstrated that (1) Davis's conduct off the bench created an appearance that his private relationships, loyalties, and interests would infect his judicial decisions, and (2) despite such appearances, Davis maintained a reputation for impartiality throughout his judicial career. Part I undertakes this task by describing Davis's personal, professional, and political associations and allegiances, with particular focus on his special relationship with Lincoln the lawyer, candidate, and president. Part I then details the high esteem in which Davis was held by the nineteenth-century legal and lay communities notwithstanding the appearance of partiality created by his off-bench relationships and activities. Finally, Part I evaluates the personal, social, and political activities of Judge Davis through the lens of modern day, appearance-based rules of judicial ethics.

Part II discusses the transition from actual impartiality as the measure of judicial performance in Davis's time to the current overriding concern with protecting the appearance of fairness. The origin and development of a judge's duty to avoid the appearance of impropriety in all personal and professional endeavors is traced through each version of the ABA Model Judicial Code, including the current ABA Model Code of Judicial Conduct ("2007 Code").

Part III suggests strategies by which actual impartiality can regain its rightful status as the most important value in judicial ethics. First, it is proposed that the legal profession recognize and formally acknowledge that impartiality in fact is more important than impartiality in appearance. Just as corporations use branding to reinforce public confidence in their commercial products, the court system needs to "brand" the concept of impartiality into its public identity. Second, judicial disciplinary bodies should be required to impose an increased level of punishment for infractions that demonstrate favoritism, prejudice, or other form of judicial partiality. Third, judicial education must include instruction about cognitive illusions, biases, and other faulty mental processes that subconsciously interfere with truly impartial decision-making. Fourth, impartiality must be expressly acknowledged as the primary criterion in the selection and evaluation of judges. The modest, non-controversial proposals outlined in Part III will reaffirm the irreplaceable cultural norm of the neutral magistrate.<sup>17</sup>

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<sup>17</sup> More complex, controversial, and costly recommendations for improving the fairness of the justice system abound. Some recommendations focus on improving the appearance of impartiality while others seek to improve actual impartiality. Unsurprisingly, numer-

## I. DAVID DAVIS: ON AND OFF THE BENCH

David Davis served as a circuit-riding trial judge in central Illinois from 1848 until 1862.<sup>18</sup> During that time he developed and maintained a close association with lawyers, witnesses, and litigants. He had little choice. He worked, ate, slept, and socialized with the attorneys, parties, jurors, and witnesses who appeared before him.<sup>19</sup> Personally, the judge preferred certain lawyers over others and spent countless hours promoting his favorite lawyer and candidate, Abraham Lincoln.<sup>20</sup> The friendships, loyalties, and alliances developed by the judge would make today's judicial ethicists shutter. Disqualification or impeachment would be demanded based on the "appearance" of partiality created by the off-bench activities of Judge Davis. But even in light of all his extrajudicial entanglements Davis held the reputation, both as a member of the circuit bench and Supreme Court, as a fair and impartial judge. That is because, appearances aside, he was a fair and impartial judge.

A. *Life on the Circuit*

For six months each year, Judge Davis and his small troupe of lawyers traversed the Eighth Judicial Circuit of Illinois holding court in one county

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ous proposals urge the elimination or restructuring of judicial elections. *See, e.g.*, OHIO CODE OF JUDICIAL CONDUCT R. 4.4(J) & (K) (2009) (establishing caps on contributions to judicial campaigns); Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 72–79 (2003) (suggesting the elimination of judicial elections); Maura Anne Schoshinski, Note and Comment, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 858–59 (1994) (recommending full disclosure of campaign contributions and the creation of election monitors); David K. Stott, Comment, *Zero-Sum Judicial Elections: Balancing Free Speech and Impartiality Through Recusal Reform*, 2009 BYU L. REV. 481, 509–10 (proposing that judicial candidates make copies of campaign speeches, ads, and materials available for public inspection); Bryce Farbstein, *Public Financing for Judicial Integrity*, ATLANTA J. CONST., Aug. 16, 2009, at A21 (supporting "a system of public funding for qualified judicial campaigns"). Many proposals significantly expand judicial disqualification rules. *See, e.g.*, JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUSTICE, FAIR COURTS: SETTING RECUSAL STANDARDS 25–35 (2008), available at [http://brennan.ccdn.net/1afco474a5a53df4do\\_7tm6brjhd.pdf](http://brennan.ccdn.net/1afco474a5a53df4do_7tm6brjhd.pdf); Stott, *supra*, at 509–10. One controversial plan to improve actual impartiality suggests the elimination of non-attorney judges. *See* Cathy Lesser Mansfield, *Disorder in the People's Court: Rethinking the Role of Non-Lawyer Judges in Limited Jurisdiction Court Civil Cases*, 29 N.M. L. REV. 119, 133–34 (1999); *see also* William Glaberson, *Overhaul of New York's Small-Town Courts Looks Unlikely*, N.Y. TIMES, Jan. 8, 2010, at A18 (reporting the debate between proponents and opponents of the effort to abolish non-lawyer judges in New York).

<sup>18</sup> Stanley I. Kutler, *DAVID DAVIS*, in 2 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS 520, 521 (Leon Friedman & Fred L. Israel eds., 1997).

<sup>19</sup> *See infra* Part I.A.

<sup>20</sup> FREDERICK TREVOR HILL, LINCOLN THE LAWYER 183 (1906) (describing Lincoln as Davis's favorite circuit lawyer).

seat after another.<sup>21</sup> Davis was personally acquainted with a large number of the residents in the circuit and was friendly with many of the litigants and jurors.<sup>22</sup> Meals were usually taken at one table by the judge, lawyers, parties, jurors, witnesses, prisoners, and sometimes the general public.<sup>23</sup> After dinner, the attorneys invited by Davis would adjourn to his room for storytelling, political talk, and mock trials.<sup>24</sup> According to an attorney who joined the circuit in 1854, on one occasion a defendant on trial for perjury spent evenings with the lawyers in the judge's room,<sup>25</sup> and on another occasion a defendant "took walks with [Davis and the attorneys] and ate in [their] immediate company."<sup>26</sup> Because the opening of court was a highlight of the social calendar in many towns,<sup>27</sup> some evenings the traveling group returned to the courtroom joined by witnesses and townspeople to listen to Lincoln's stories.<sup>28</sup> The fraternity-type association between the circuit-riding lawyers and Judge Davis was very close and personal. As Davis stated, "[i]t was impossible for a body of intelligent gentlemen to associate together, day by day, for six months of the year, without becoming attached to each other, and without mutual benefit."<sup>29</sup>

Out of this intimate contact grew a partiality for the abilities and personalities of certain lawyers. And consistent with his personality, the judge took "no pains to conceal his feelings toward the different members of the bar."<sup>30</sup> For example, Davis excluded lawyers he disliked from the "privileged clique" permitted to attend the nightly gatherings in his room.<sup>31</sup>

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21 When Davis assumed his circuit-riding duties in March 1848, the Eighth Judicial Circuit consisted of fourteen counties in central Illinois. 1849 Ill. Laws 60 (listing the counties as Sangamon, Tazwell, Woodford, McLean, Logan, DeWitt, Piatt, Champaign, Vermilion, Edgar, Shelby, Moultrie, Macon, and Christian). As the population grew, the size of the circuit shrank. By 1861, only three counties remained in the Eighth Circuit. 1861 Ill. Laws 100 (listing the counties as DeWitt, Logan, and McLean).

22 HILL, *supra* note 20 at 181–82 ("Almost every man, woman, and child in the fourteen counties of his circuit knew Judge Davis.").

23 HENRY CLAY WHITNEY, *LIFE ON THE CIRCUIT WITH LINCOLN* 63, 72 (1940).

24 *Id.* at 66–67.

25 *Id.* at 72.

26 *Id.*

27 David Davis, Memorial Address: The Life and Services of John Todd Stuart (Jan. 12–13, 1886), in *PROCEEDINGS OF THE ILLINOIS STATE BAR ASSOCIATION AT ITS NINTH ANNUAL MEETING* app. 47, 49–50 ("Court days were gala-days with the people, and were looked forward to with ever recurring interest. . . . The weeks of Court were events of the year to the people, who generally attended whether they had business or not."); Harry Edward Pratt, *Judge David Davis, 1815–1886*, in *TRANSACTIONS OF THE ILLINOIS STATE HISTORICAL SOCIETY* 157, 164 (1930) ("To go to court and listen to the witnesses and lawyers was among the chief amusements of the frontier settlements.").

28 I MICHAEL BURLINGAME, *ABRAHAM LINCOLN: A LIFE* 328 (2008).

29 Davis, *supra* note 27, at 49.

30 HILL, *supra* note 20, at 183.

31 *Id.* ("Lincoln was the prime favorite of the privileged clique which made the judge's

He scolded others in court.<sup>32</sup> Favored lawyers, including Lincoln, were retained to handle Davis's personal legal affairs even though they regularly appeared before the judge in other matters.<sup>33</sup> The judge's special affinity for his "favorite" is further demonstrated by the fact that Davis appointed Lincoln to take the bench when Davis's business or other commitments prevented his attendance at court.<sup>34</sup> In an unusual move even for the time, Davis vouched for the reasonableness of a bill for legal services that Lincoln sent to the Illinois Central Railroad. The billing statement contained the judge's endorsement that Lincoln rendered the services claimed and that the fee for the services was "very reasonable."<sup>35</sup> Lincoln reciprocated by vouching for Davis. After the *Chicago Daily Tribune* published a letter attacking Davis for working to undermine a Republican congressional candidate and having "no more sympathy with the vitalizing principle of the Republican party than an Egyptian mummy,"<sup>36</sup> Lincoln wrote a long letter to the newspaper in defense of the judge.<sup>37</sup> Davis was very grateful for Lincoln's intervention and testimonial.<sup>38</sup> Because of their friendship,

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room its headquarters."); WHITNEY, *supra* note 23, at 66 (describing how some lawyers were "frozen out" of the nightly meetings by the judge).

32 See, e.g., KING, *supra* note 3, at 83 ("On the third occasion [upon which attorney Linder appeared in court drunk], the Judge admonished him: 'Mr. Linder, I must give you some advice. You must drink less and work more, or you will roll in the gutter.' Linder, outraged . . . responded: 'And I must give your Honor some advice. You must eat less and [in the flattest term] eliminate more or you will bust.'" (alteration in original) (citation omitted)).

33 See *id.* at 94–95 (describing matters in which Lincoln was retained by Judge Davis); WHITNEY, *supra* note 23, at 81–82 (stating that Davis employed Henry Clay Whitney to bring collection actions on the judge's behalf).

34 See KING, *supra* note 3, at 95; Bader & Williams, *supra* note 10, at 176 ("On at least 321 occasions, Judge Davis gave Lincoln the ultimate honor he could bestow by appointing him a substitute judge." (citation omitted)); *David Davis (1815–1886)*, MR. LINCOLN AND FRIENDS, <http://www.mrlincolnandfriends.org/inside.asp?pageID=40&subjectID=3> (last visited Oct. 7, 2010) ("Their relationship was sufficiently close that Mr. Lincoln sometimes replaced Judge Davis on the bench when illness or personal business kept him away."). Lincoln was not the only lawyer who substituted for Davis. KING, *supra* note 3, at 98 ("During 1861, several lawyers sat for Judge Davis at various times. His favorite substitute had gone to Washington." (citation omitted)).

35 Letter from Abraham Lincoln to James F. Joy (Sept. 14, 1855), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 325 & n.1 (Roy P. Basler ed., 1953) [hereinafter COLLECTED WORKS]; see also KING, *supra* note 3, at 90.

36 Letter to the Editor, *Opposition to Lovejoy*, CHI. DAILY TRIB., June 4, 1858, at 2 ("Judge D. [Davis] is a very fair man in his way, but has no more sympathy with the vitalizing principle of the Republican party than an Egyptian mummy.").

37 COLLECTED WORKS, *supra* note 35, at 31–32 (Supp. 1974). Lincoln's letter appeared in the June 11, 1858 issue of the *Chicago Daily Tribune* signed "A Republican." Letter to the Editor, *Judge Davis' Position*, CHI. DAILY TRIB., June 11, 1858, at 2. For a detailed review of the circumstances surrounding the letter attacking Davis and Lincoln's response, see KING, *supra* note 3, at 117–120.

38 KING, *supra* note 3, at 120.

Lincoln kept no secrets from Davis,<sup>39</sup> including the fact that he and Mary were hoping for a girl when son Tad was born.<sup>40</sup> Davis and Lincoln were close friends and confidants<sup>41</sup> and, in the opinion of some historians, Davis was probably Lincoln's best friend.<sup>42</sup>

1. *Life on the Circuit Viewed Through the Lens of Modern-Day Judicial Ethics.*—The after-hours preferential treatment certain lawyers received from Davis could easily create the appearance that the judge would favor those lawyers in court. It is difficult to deny that a lawyer who was “frozen out”<sup>43</sup> of the nightly soirees might appear to be at a disadvantage in court when opposed by one of Davis's favorites who had the judge's ear at the private gatherings. Similarly, the public could reasonably fear that a judge might favor a lawyer personally retained by the judge, or appointed by the judge to preside in court, or who authored a letter in defense of the judge's political activities. The complaining witness in a criminal case might question the objectivity of a judge who dined or took an evening walk with a defendant.

Today, similar associations and relationships would be deemed to inescapably tarnish the public's perception of a judge's impartiality. For example, under modern rules, a judge sitting at a lunch table with a lawyer currently on trial before the judge creates an unacceptable appearance of impropriety even if the seat is the only one left in the cafeteria and no discussion of the case takes place.<sup>44</sup> Indeed, any social contact between a judge and litigants, witnesses, jurors, or attorneys during the course of

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39 DAVID HERBERT DONALD, *LINCOLN* 242 (1995).

40 DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 152 (2005).

41 See Letter from Abraham Lincoln to James F. Babcock (Apr. 14, 1860), in 4 COLLECTED WORKS, *supra* note 35, at 43 (characterizing Davis as one of Lincoln's “confidential friends”); Letter from Abraham Lincoln to Simon Cameron (Aug. 6, 1860), in 4 COLLECTED WORKS, *supra* note 35, at 90–91 (referring to Davis as “my [Lincoln's] very good friend”); Letter from Abraham Lincoln to Joseph Holt (Nov. 12, 1861), in 5 COLLECTED WORKS, *supra* note 35, at 21–22 (“You have with you my good friend Judge David Davis; and allow [me] to assure you, you were never associated with a better man.” (alteration in original)); WARD H. LAMON, *THE LIFE OF ABRAHAM LINCOLN: FROM HIS BIRTH TO HIS INAUGURATION AS PRESIDENT* 312 (Bison Books 1999) (1872) (“[I]t was well understood that no man enjoyed more confidential relations with [Lincoln] than Judge Davis.”); BURLINGAME, *supra* note 28, at 331 (referring to Davis as one of Lincoln's few close friends); GOODWIN, *supra* note 40, at 150 (“The evolution of a warm and intimate friendship with Lincoln is evident in the judge's letters home.”); Kutler, *supra* note 18, at 520 (noting Davis's “close friendship and alliance with Abraham Lincoln”); HILL, *supra* note 20, at 175 (describing Joshua Speed and Davis as “intimate friends” of Lincoln). *But see* DONALD, *supra* note 39, at 146 (1995) (“Davis and Lincoln did not become intimate friends.”).

42 Leonard M. Niehoff, *David Davis*, in *THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES* 1789–1995, at 181, 184 (Clare Cushman ed., 2d ed. 1995) [hereinafter Niehoff, *ILLUSTRATED BIOGRAPHIES*].

43 WHITNEY, *supra* note 23, at 66.

44 See *Wells v. Del Norte Sch. Dist.*, C-7, 753 P.2d 770, 772 (Colo. App. 1987).



a court proceeding is discouraged and considered improper.<sup>45</sup> An equally strict prohibition against business relationships bars a judge from hearing cases involving an attorney who simultaneously represents the judge in a private matter.<sup>46</sup> An endorsement of an attorney's billing statement would violate a multitude of present-day conduct rules.<sup>47</sup>

But in the face of all these suspicious appearances, Davis was able to earn and maintain his reputation as “the most trusted jurist” in antebellum Illinois<sup>48</sup> simply by separating his personal preferences and off-bench relationships from his official duties. He was an impartial judge deciding cases on facts, not favoritism. As demonstrated in the next Section, lawyers and the public saw past appearances and recognized Davis's actual courtroom fairness. Actual impartiality, not appearances, sustained the legitimacy of the judicial branch in the nineteenth century.

*2. The Acknowledged Impartiality of Circuit Judge David Davis.*—According to a newspaper report commenting on the judicial performance of Judge Davis

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45 Ark. Judicial Discipline & Disability Comm'n v. Proctor, No. 09–738, 2010 WL 271343 (Ark. Jan. 25, 2010) (“Certainly, a judge's eating lunch, in or out of his office, with defendants within his jurisdiction would create in reasonable minds the perception that that judge's ability to carry out his judicial responsibilities with integrity, impartiality, and competence is impaired.”); *Demoulas v. Demoulas Super Mkts., Inc.*, 703 N.E.2d 1141, 1147 (Mass. 1998) (finding that even “limited social contact between a judge and a lawyer appearing before [the judge] is to be discouraged”); *id.* at 1147 n.10 (finding that social contact between the judge and litigants during the course of a trial is “disfavored and should not occur”); *Oliver v. State*, 907 S.W.2d 706, 713–14 (Ark. 1995) (describing alleged contact between the judge and jurors at a restaurant as “highly improper”); Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 96 (2000) (“Social contact by the judge with a party or victim in a pending case can lead to claims of the appearance of partiality.”).

46 Illinois Judicial Ethics Comm., Op. 95–2 (1995), available at <http://ija.org/ethics/opinions/95-2.htm> (finding that a judge's impartiality may reasonably be questioned when an attorney representing the judge in a private matter appears before the judge in an unrelated case). See generally Cynthia Gray, *Disqualification: Judge's Attorney Appears in a Case*, JUD. CONDUCT REP., Fall 2002, at 1, 1 (“Most judicial ethics committees that have addressed the issue have advised that a judge is disqualified from a case if one of the attorneys is also representing the judge either in personal matters, including litigation and discipline proceedings, or in lawsuits in which the judge is involved in an official capacity.”).

47 *E.g.*, MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007) (providing that a judge “shall avoid impropriety and the appearance of impropriety”); *id.* R. 1.3 (“A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”); *id.* R. 2.4(C) (“A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.”); *id.* R. 3.1(C) (prohibiting participation “in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality”); *id.* R. 3.1(D) (prohibiting conduct “that would appear to a reasonable person to be coercive”).

48 George Hope, *The Great Independent: Ex-Vice President David Davis Career and Character*, BROOKLYN DAILY EAGLE, May 16, 1886, at 10 (referring to Davis as the most “eminent” judge in the Northwest before the Civil War).

in Danville, Illinois, in 1850, “he was impartial in his decisions, firm in his integrity, had the confidence of the profession, and was deservedly popular with the masses.”<sup>49</sup> A Joliet newspaper printed a resolution of the local bar thanking Judge Davis for his “just decisions” and the “able, efficient and impartial manner in which he has discharged the duties of Judge of this court” while substituting for the resident circuit judge.<sup>50</sup> Twenty-four lawyers signed a letter urging the judge to run for re-election in 1855 because of his ability and impartiality.<sup>51</sup> Thomas Dent, a former President of the Illinois Bar Association, agreed, stating that Judge Davis discharged his trial court duties with such “firmness for the right” and “strong sense of equity” that he gave “satisfaction to the bar and to the people.”<sup>52</sup>

The impartiality of Davis led lawyers to submit cases to the judge without a jury, and his decisions “evoked fewer appeals than[] those of any other judge in the state.”<sup>53</sup> Actual impartiality in decision-making also meant that “[c]hanges of venue in his court were far between.”<sup>54</sup> The judge’s commitment to fairness did not permit special treatment even for Lincoln. According to Davis’s biographer Willard King, no lawyer ever charged Davis with favoring Lincoln in court because “[t]he Judge was scrupulously impartial with his favorite.”<sup>55</sup> In fact, Lincoln was on the

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49 KING, *supra* note 3, at 78. Davis’s popularity with the masses included at least some prison inmates. Letter from Edward Finegan to David Davis (June 3, 1860), *available at* <http://ilhpa.hpa.state.il.us/alplm/docs/DD-027-020.xml> (relating inmate Finegan’s desire that Davis send him a few words of encouragement because Davis was his only friend).

50 *Judge Davis*, CHI. DAILY TRIB., June 14, 1858, at 2 (reprinting part of a Joliet newspaper article reproducing a resolution passed by the Will County Bar Association thanking and complimenting Judge Davis).

51 Letter from Thomas M. Moffett et al. to David Davis (Mar. 30, 1855), *in* 2 COLLECTED WORKS, *supra* note 35, at 310.

52 Thomas Dent, *David Davis of Illinois: A Sketch*, 53 AM. L. REV. 535, 544 (1919).

53 WHITNEY, *supra* note 23, at 80; *The Record of a Civilian: A Man Who Has Strengthened and Not Weakened the Republic*, THE SUN (N.Y.), Mar. 15, 1880, at 1 [hereinafter *The Record of a Civilian*] (noting that few appeals were taken from Davis’s decisions because of his impartiality).

54 *The Record of a Civilian*, *supra* note 53. During the time that Davis served as a trial judge, a litigant was statutorily entitled to a change of judge upon the filing of an affidavit of judicial bias. *McGoon v. Little*, 7 Ill. (2 Gilm.) 42 (Ill. 1845).

55 KING, *supra* note 3, at 91 (citation omitted); *see also* Pratt, *supra* note 27, at 166 (finding no evidence to support the contention that Davis favored Lincoln in court (citation omitted)); LAMON, *supra* note 41, at 312 (noting that while Davis advocated for Lincoln’s political advancement off the bench he acted like a judge towards Lincoln while on the bench); GARY ECELBERGER, *THE GREAT COMEBACK: HOW ABRAHAM LINCOLN BEAT THE ODDS TO WIN THE 1860 REPUBLICAN NOMINATION* 13 (2008) (noting that the bond of friendship between Lincoln and Davis “never interfered with the unbiased dispersal of duties of the judge and attorney in the same courthouse trial”); *David Davis*, *supra* note 34 (“Judge Davis was fond of Mr. Lincoln—but but scrupulously impartial in his legal rulings.”). *But see* USHER F. LINDER, *REMINISCENCES OF THE EARLY BENCH AND BAR OF ILLINOIS 182–83* (2d ed. 1879) (“Judge Davis was a very impartial judge, and though not intending to show a preference for one of his lawyers over another,

losing end of the majority of bench trials that he conducted before Davis.<sup>56</sup> In capturing the essence of his career as a trial judge, the *Chicago Tribune* stated that “[f]or thirteen years Mr. Davis sat upon the Bench, amidst the universal silence of private and party passion”<sup>57</sup>

It was his equal treatment of litigants and attorneys in court that led to public faith in the legitimacy of Davis’s rulings. Actual courtroom fairness trumped any appearance of favoritism created by the judge’s off-bench activities and personal penchant for certain attorneys. But it was not Davis’s close relationship with Lincoln and the other circuit-riding attorneys during the day-to-day practice of law that created the greatest danger of a public perception of judicial partiality. Instead, it was the unqualified and very public political alliance between Lincoln and Davis that most flagrantly violated the modern rules’ design of protecting the appearance of judicial impartiality.

### *B. The Political Alliance between Lincoln and Davis*

The close alliance between the two friends was most evident in the political arena.<sup>58</sup> Lincoln’s “strongest political backer”<sup>59</sup> campaigned for United States Senatorial Candidate Lincoln in 1855 and 1858,<sup>60</sup> and recruited delegates for the future President at the Illinois State Republican Convention in May 1860.<sup>61</sup> But without a doubt the judge’s

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such was the marked difference he showed to Mr. Lincoln that Lincoln threw the rest of us into the shade.”).

Linder’s suspicion was not shared by others nor is it supported by the facts. See Pratt, *supra* note 27, at 166 (“There is not evidence to support the contention of various writers that Davis favored Lincoln in the courtroom.”) (citing PAUL M. ANGLE, *Abraham Lincoln: Circuit Lawyer*, in LINCOLN CENTENNIAL ASSOCIATION PAPERS 35 (1928)); JULIE M. FENSTER, *THE CASE OF ABRAHAM LINCOLN: A STORY OF ADULTERY, MURDER, AND THE MAKING OF A GREAT PRESIDENT* 143 (2007) (stating that no lawyer other than Linder suspected that Davis favored Lincoln).

56 KING, *supra* note 3, at 91; Niehoff, *ILLUSTRATED BIOGRAPHIES*, *supra* note 42, at 183 (“It is a tribute to Davis’s impartiality that, despite his close friendship with Lincoln, he ruled for the opposing party in forty-seven of the eighty-seven nonjury cases that Lincoln tried before him.”).

57 Gath, *Visit to David Davis*, CHI. TRIB., Mar. 23, 1872, at 4.

58 See Kutler, *supra* note 18, at 520 (“Davis’ political activities mark his chief historical significance, and central to all this was his close friendship and alliance with Abraham Lincoln.”).

59 DONALD, *supra* note 39, at 234.

60 Letter from David Davis to Julius Rockwell (Mar. 4, 1855), *available at* <http://www.loc.gov/tr/mss/davis-transcript.html> (stating that Davis had spent “a good deal of time at Springfield getting things arranged for Lincoln[’s]” election to the Senate); Niehoff, *ILLUSTRATED BIOGRAPHIES*, *supra* note 42, at 183 (“Davis enthusiastically campaigned for Lincoln in his two losing bids for the U.S. Senate . . .”).

61 ALBERT A. WOLDMAN, *LAWYER LINCOLN* 264 (1936) (“[Davis] laid aside his judicial robes to devote all his time to lining up the Illinois delegates at the Republican State Convention at Decatur, May 9 and 10, 1860 . . .”).

greatest contribution to the political fortunes of Lincoln was developing and implementing a strategy to secure his nomination at the Republican National Convention in 1860.

1. *The Republican Convention of 1860*.—In mid-May 1860, Judge Davis adjourned court in Danville, Illinois, in order to attend the Republican National Convention as a Lincoln delegate.<sup>62</sup> Upon arriving in Chicago, four days before the convention was to begin, Davis learned that all presidential contenders, “except Lincoln, had established headquarters” and deployed operatives.<sup>63</sup> The judge immediately rented hotel rooms at the Tremont House at his own expense,<sup>64</sup> created a strategy, and launched an organization designed to move delegates into the Lincoln camp, if not on the first ballot, then on the second.<sup>65</sup> He worked tirelessly and brilliantly to accomplish what more seasoned convention organizers said was impossible for a rookie like Davis—his candidate’s nomination.<sup>66</sup> Lincoln biographer Albert Woldman concluded: “more than any other man [Davis] became responsible for Lincoln’s winning the Republican nomination for President.”<sup>67</sup>

2. *The Political Activities of Judge Davis—Nomination to Inauguration*.—Davis remained chief campaign adviser and coordinator during the period between Lincoln’s nomination and election. He assumed primary responsibility for fund-raising<sup>68</sup> and traveled to the pivotal states of Indiana, Pennsylvania,

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62 Letter from David Davis to Abraham Lincoln (Aug. 30, 1860), *available at* <http://www.lawpracticeofabrahamlincoln.org/Documents.aspx> (explaining that Davis did not decide the “Davenport case” as planned because he “adjourned the court for the Chicago convention”).

63 KING, *supra* note 3, at 135.

64 *The Record of a Civilian*, *supra* note 53 (reporting that Davis paid \$100 a night for the two rooms, expended about \$700 of his own money during the convention, and refused Lincoln’s offer of reimbursement); Leonard Swett, Memorial Address: The Life and Services of David Davis (Jan. 11-12, 1887), in CONSTITUTION OF THE ILLINOIS STATE BAR ASSOCIATION AND ITS OFFICERS AND COMMITTEES 75, 79 (stating that Davis paid a “bonus” to evacuate guests from the rooms); KING, *supra* note 3, at 135.

65 See KING, *supra* note 3, at 135–42.

66 See *id.* at 139.

67 WOLDMAN, *supra* note 61, at 264; see also GOODWIN, *supra* note 40, at 173 (“Judd, along with Davis, would do more than anyone else to assure Lincoln’s nomination at the Chicago convention . . .”); *Death of David Davis*, BROOKLYN DAILY EAGLE, June 26, 1886, at 2 (opining that without Davis’s “foresight and fidelity [Lincoln’s nomination] would not have occurred”).

68 Davis requested and received funds from Thurlow Weed for use in the New York and Pennsylvania campaigns. BRUCE CHADWICK, LINCOLN FOR PRESIDENT: AN UNLIKELY CANDIDATE, AN AUDACIOUS STRATEGY, AND THE VICTORY NO ONE SAW COMING 186, 189, 202 (2009). He also raised money for campaign expenditures in Indiana through his friend John Z. Goodrich, who served as Massachusetts Republican National Committeeman. KING, *supra* note 3, at 154.

and New York as Lincoln's surrogate to negotiate with state and party leaders.<sup>69</sup> The political activity of Davis in Illinois in the months before the November 1860 election was virtually non-stop: "All that summer Davis thought of little other than the [presidential] campaign, going to rallies, making speeches, raising funds, . . . attending weekly meetings of the [Republican] State Central Committee, [and] smoothing out disputes between local candidates . . . ." <sup>70</sup> On Election Day, Davis accompanied Lincoln and a small group of friends to the Illinois State Capital building, and later to the telegraph office, to await vote totals.<sup>71</sup> At Lincoln's invitation, Davis joined the inaugural train trip to Washington.<sup>72</sup> While in transit, he participated in Lincoln's decision to travel through dangerous Baltimore at night to forestall a rumored assassination attempt.<sup>73</sup> Davis was also an early reviewer of the first inaugural address.<sup>74</sup> In the months before the inauguration Davis continued in his advisory role on personal and governmental matters and served as an "intermediary in the complicated and politically treacherous task of Cabinet-making."<sup>75</sup> For example, on December 20, 1860, Lincoln, Davis, and Leonard Swett<sup>76</sup> spent the entire day with Thurlow Weed to obtain the New York political boss's view of secessionist threats and recommendations for cabinet posts.<sup>77</sup> During the period between Lincoln's election and inauguration, Davis did not hesitate to suggest candidates for government jobs<sup>78</sup> and probably "secured more

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69 See KING, *supra* note 3, at 154 (describing Davis's consultations with Thurlow Weed, Governor Edwin D. Morgan, Horace Greeley, and Henry Winter Davis in New York); *id.* at 152–53 (describing Davis's trip to Pennsylvania to meet with Senator Simon Cameron, newspaper editor Russell Errett, and others); *id.* at 157 (stating that Davis met with twenty or thirty Republican leaders in Indianapolis); see also CHADWICK, *supra* note 68, at 179–205 (detailing the campaign activities of Davis in Illinois, Indiana, New York, and Pennsylvania).

70 KING, *supra* note 3, at 149. When the courts reconvened in September 1860, Davis found a replacement so he could continue his Republican campaign activities. *Id.* at 156.

71 GOODWIN, *supra* note 40, at 276–77.

72 DONALD, *supra* note 39, at 273; KING, *supra* note 3, at 175.

73 3 JOHN G. NICOLAY & JOHN HAY, ABRAHAM LINCOLN: A HISTORY 311–15 (1904).

74 DOUGLAS L. WILSON, LINCOLN'S SWORD: THE PRESIDENCY AND THE POWER OF WORDS 57–58 (2006); RONALD C. WHITE, JR., THE ELOQUENT PRESIDENT: A PORTRAIT OF LINCOLN THROUGH HIS WORDS 67 (2005) ("Davis . . . appreciated the speech and made no suggestions.").

75 Kutler, *supra* note 18, at 522. Kutler also describes Davis as "the nearest thing to an *eminence grise* Lincoln ever had." *Id.*

76 Leonard Swett was a political ally of Lincoln and a business partner of Thurlow Weed. *Thurlow Weed (1797–1882)*, MR. LINCOLN'S WHITE HOUSE, <http://www.mrlincolnwhitehouse.org/inside.asp?ID=40&subjectID=2> (last visited Sept. 12, 2010).

77 See KING, *supra* note 3, at 167.

78 See, e.g., Letter from David Davis to Abraham Lincoln (Mar. 6, 1861), *available at* <http://www.lib.rochester.edu/index.cfm?page=538&Print=316> (recommending Joseph E. Streeeter for a Nebraska judgeship); Letter from David Davis and Leonard Swett to Abraham Lincoln (Nov. 22, 1860), *available at* <http://ilhpa.hpa.state.il.us/alplm/docs/DD-028-015.xml> (recom-

positions for friends than any other man.”<sup>79</sup> Davis was “recognized as a power in the new administration and was almost as much sought after as Lincoln.”<sup>80</sup>

3. *The President and the Supreme Court Justice.*—The close personal and political association between the two friends continued after Lincoln appointed Davis to the Supreme Court in October 1862.<sup>81</sup> The newest Associate Justice provided advice on numerous and varied governmental matters. For instance, he suggested to Lincoln that cabinet members Salmon Chase and Montgomery Blair should be fired<sup>82</sup> and that the President change his emancipation policy.<sup>83</sup> Davis also recommended military promotions,<sup>84</sup> criticized Attorney General James Speed,<sup>85</sup> and suggested a replacement for Chief Justice Taney.<sup>86</sup> As Doris Kearns Goodwin concluded, Abraham Lincoln “listened carefully” to David Davis when he was on the Supreme Court.<sup>87</sup>

As the election of 1864 approached, Davis resumed his role as campaign manager. He held strategy meetings with the President and others and was asked by Lincoln to attend the National Convention of the Union Party (a coalition of Republicans and war Democrats) scheduled for June in Maryland.<sup>88</sup> Davis kept close tabs on delegate counts, and when the New York and Ohio delegates received instructions to vote for the President, Davis knew that Lincoln would be re-nominated and decided not to travel to Baltimore.<sup>89</sup> If a “speck of opposition” appeared, then Justice Davis

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mending George W. Lawrence for the office of “Navy Agent at Boston[] or Consul General of the British Possessions of North America”).

79 KING, *supra* note 3, at 175 (citation omitted).

80 *Id.* at 179.

81 The close friendship did not prevent Davis from getting on Lincoln’s nerves from time to time. For example, Davis’s constant supplication of Lincoln to grant a furlough and military promotion to William Orme (a partner of Leonard Swett) caused some “constraint” between the President and the judge. KING, *supra* note 3, at 205. In Lincoln’s words, “[Davis] bothers me nearly to death.” *Id.* at 206 (citation omitted).

82 *Id.* at 208.

83 *Id.*

84 *Id.* at 205 (discussing a letter from Davis to Lincoln requesting that William Orme be promoted to brigadier general).

85 *Id.* at 228.

86 *Id.* at 223-24.

87 GOODWIN, *supra* note 40, at 504; *see also* DONALD, *supra* note 39, at 483 (stating that Davis remained a “political advisor” to Lincoln while serving on the Supreme Court); DAVID M. SILVER, LINCOLN’S SUPREME COURT 81 (1956) (“Justice Davis did not hesitate to write to Lincoln about political matters and on several occasions intervened to support certain candidates for office or to obtain political favors.”).

88 KING, *supra* note 3, at 213-17.

89 Letter from David Davis to Abraham Lincoln (June 2, 1864) (on file with author) (“I [Davis] had intended going [sic] to the Baltimore convention, but since the New York and

would have again personally directed convention efforts.<sup>90</sup>

4. *Examining the Political Activity of Judge Davis under Modern Standards.*— Under twentieth and twenty-first century standards, the activities of Judge Davis present a tutorial on how to violate nearly every appearance-based rule designed to shelter the public from discovering a judge’s political leanings. The 1924 Canons made political involvement taboo because “it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another.”<sup>91</sup> The most recent version of the ABA Model Judicial Code continues to dictate that judges must, “to the greatest extent possible, be free and appear to be free from political influence and political pressure” because “[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges . . . are perceived to be subject to political influence.”<sup>92</sup> To avoid any possible perception that partisan entanglements have corrupted a judge, the political activity routinely engaged in by Davis is now outlawed.<sup>93</sup>

Judges today are generally prohibited from publicly endorsing candidates;<sup>94</sup> acting as a leader in a political organization;<sup>95</sup> speaking on behalf of a political organization;<sup>96</sup> soliciting funds for, or donating funds to, a candidate or political group;<sup>97</sup> attending political events;<sup>98</sup> publicly

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Ohio conventions, the necessity for doing so is foreclosed.”).

90 *Id.*

91 CANONS OF JUDICIAL ETHICS Canon 28 (1924).

92 MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmts. 1, 3 (2007).

93 The type of political activity in which state judges are permitted to engage depends to some extent upon whether the particular state’s judiciary is chosen by partisan elections, non-partisan elections, or appointment. *Judicial Campaigns and Elections: Campaign Conduct*, AMERICAN JUDICATURE SOCIETY, [http://www.judicialselection.us/judicial\\_selection/campaigns\\_and\\_elections/campaign\\_conduct.cfm?state](http://www.judicialselection.us/judicial_selection/campaigns_and_elections/campaign_conduct.cfm?state) (last visited Oct. 8, 2010) (summarizing differences among states in permitted campaign activity by judges). Federal judges are strictly prohibited from acting as a leader or office-holder in a political organization; making speeches for a political organization or candidate; publicly endorsing or opposing candidates; soliciting funds for, paying an assessment to, or making a contribution to a political candidate or organization; attending a political event; or engaging “in any other political activity.” CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5 (2009).

94 See MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(3) (2007). Rule 4.2 of the 2007 Code allows a candidate for elective judicial office to publicly endorse or oppose another candidate for the same judicial office. *Id.* R. 4.2(B)(3). See also ILL. SUP. CT. R. 67(B)(1)(b)(iv) (2009) (permitting a judicial candidate to endorse or oppose any other candidate in a public election in which the judicial candidate is running).

95 MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(1) (2007).

96 *Id.* R. 4.1(A)(2).

97 *Id.* R. 4.1(A)(4). Rule 4.2 of the 2007 Code permits a candidate for elective judicial office to contribute to a political organization or candidate. *Id.* R. 4.2(B)(6).

98 *Id.* R. 4.1(A)(5). Rule 4.2 of the 2007 Code permits a candidate for elective judicial

identifying themselves as a candidate of a political party;<sup>99</sup> and serving as a delegate to a political convention.<sup>100</sup> Some states prohibit a judge from attending a nominating caucus<sup>101</sup> or signing a nominating petition.<sup>102</sup> Stretching the appearance standard even further, judges are prohibited from publicly supporting the candidacy of a spouse or child, apparently on the theory that the public will view such support as based upon party loyalty rather than family loyalty.<sup>103</sup>

The modern rules proscribing political activity are clearly designed to protect the appearance of judicial impartiality rather than impartiality itself. Consider, for example, that each of the four successive versions of the ABA Model Code prohibits a judge from *publicly* endorsing or opposing another candidate for public office.<sup>104</sup> By contrast, private endorsements are not precluded.<sup>105</sup> In upholding the ban on public endorsements, the Nevada Supreme Court pulled no punches in stating that the purpose of the rule serves the state's interest in protecting the appearance of judicial impartiality.<sup>106</sup> In the Nevada court's view "[i]t is the public pronouncement of support that most offends our notions of impartiality. A private promise of support to a candidate, like a private contribution of money, creates less of a perception of partiality."<sup>107</sup> Thus, under the appearance theory, a judge may support a candidate or ideology as long as he or she keeps it a secret from the general public. Such a rule hides a partisan or political bias but does nothing to ensure that it will not infect judicial decision-making.<sup>108</sup> Indeed,

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office to attend functions sponsored by a political organization or candidate. *Id.* R. 4.2(B)(4).

99 *Id.* R. 4.1(A)(6). Rule 4.2 of the 2007 Code permits a candidate in a partisan judicial election to be identified as a candidate of a political organization. *Id.* R. 4.2(C)(1).

100 *In re* Disciplinary Proceedings Against Blauvelt, 801 P.2d 235, 237-38 (Wash. 1990).

101 *E.g.*, Colorado Judicial Ethics Advisory Bd., Op. 2008-2 (2008).

102 *E.g.*, Florida Comm. on Standards of Conduct Governing Judges, Op. 92-32 (1992), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/ninet2/92-32.html>.

103 *See* MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 5 (2007) ("A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office.").

104 *Id.* R. 4.1(A)(3) (2007) (prohibiting a judge from endorsing or opposing a candidate for public office); MODEL CODE OF JUDICIAL CONDUCT CANON 5(A)(1)(b) (1990) (same); CODE OF JUDICIAL CONDUCT CANON 7(A)(1)(b) (1972) ("A judge or a candidate for election to judicial office should not . . . endorse a candidate for public office."); CANONS OF JUDICIAL ETHICS CANON 28 (1924) ("[A judge] should avoid . . . the public endorsement of candidates for political office."); *see also supra* note 92 and accompanying text.

105 MODEL CODE OF JUDICIAL CONDUCT CANON 5(A)(1)(b) cmt. (1990) ("[Canon] 5(A)(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.").

106 *In re* Vincent, 172 P.3d 605, 608-10 (Nev. 2007).

107 *Id.* at 610.

108 *Siefert v. Alexander*, 597 F. Supp. 2d 860, 873 (W.D. Wis. 2009) (finding that the endorsement prohibition "does not eliminate potential bias, but only hides it").



an argument could be made that public confidence would be strengthened, not hindered, by disclosing a judge's close political relationships.<sup>109</sup>

Unencumbered by rules regulating appearances, Justice Davis wore his partisan political opinions and allegiances on his sleeve for all to see. Any objective nineteenth, twentieth, or twenty-first century observer would agree that Davis appeared to have unbreakable bonds of loyalty to President Lincoln and the Republican Party when he came face to face with the most significant case of his judicial career.

## 5. *Ex Parte Milligan*.—

### a. The Facts

On October 5, 1864, Lambdin P. Milligan was arrested by U.S. Army officials in Indiana and charged with inciting insurrection, communicating with the enemy, and conspiracy to seize Union munitions and free Confederate prisoners.<sup>110</sup> In January 1865, he was tried, convicted, and sentenced to death by a military commission that “President Abraham Lincoln had unilaterally created.”<sup>111</sup> Two weeks after Lincoln's death, President Andrew Johnson approved the sentence.<sup>112</sup> Milligan's lawyers filed a petition for a writ of habeas corpus in the Indiana federal district court. Local district court judge David McDonald and Justice David Davis, while performing circuit duties, jointly heard the petition.<sup>113</sup> McDonald and Davis agreed to disagree on whether a military court had jurisdiction to try a civilian. As a result, a “certificate of division” was filed in the case, which allowed the matter to advance to the Supreme Court.<sup>114</sup> Unsurprisingly, the case received national attention.<sup>115</sup> After all, the President's war powers and reputation were at stake. Moreover, Republicans were depending on the Supreme Court to sustain the operation of the military courts in order to bolster their reconstruction plans.<sup>116</sup>

Appearances belied any hope that Davis could decide the case

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<sup>109</sup> *Id.*

<sup>110</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 6-7 (1866).

<sup>111</sup> William G. Howell, *Wartime Judgments of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778, 1796 (2009) (citation omitted).

<sup>112</sup> Kutler, *supra* note 18, at 524.

<sup>113</sup> George Geib & Donald Kite, *Federal Justice and Moral Reform in the United States District Court in Indiana, 1816–1869*, 37 IND. L. REV. 619, 627 (2004).

<sup>114</sup> Brief for Civil War Historians as Amicus Curiae Supporting Petitioner at 29, *Al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (No. 08–368) (stating that McDonald and Davis “feigned disagreement and certified their supposed split decision to the Supreme Court”); KING, *supra* note 3, at 250.

<sup>115</sup> See *infra* Part I.B.5.c.

<sup>116</sup> Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1056 n.190 (2003).

impartially. Not only had Davis and the deceased President maintained a longstanding personal, professional, and political alliance, but also Davis had spent a good portion of his adult life actively and publicly promoting Lincoln's interests.<sup>117</sup> Additionally, the judge had helped build the Republican Party,<sup>118</sup> whose members vehemently desired a decision upholding the authority of Congress to install military commissions in the South. He owed his Supreme Court appointment to Lincoln, had publicly rebuked Copperheads like Milligan,<sup>119</sup> knew Justice Field's brother was on Milligan's defense team,<sup>120</sup> and realized he would be the only Republican member of the Court voting to overturn the military commissions. To top off all appearances, Davis was serving as the administrator of the late President's estate<sup>121</sup> and, at Robert Lincoln's insistence, would be appointed Tad Lincoln's guardian.<sup>122</sup> These overwhelming personal and partisan considerations completely destroyed any appearance of impartiality. But Davis rose above appearances and provided a lesson in actual impartiality.

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117 See 2 WILLIAM H. HERNDON & JESSE W. WEIK, ABRAHAM LINCOLN: THE TRUE STORY OF A GREAT LIFE 211 (New York, D. Appleton & Co. 1895) ("It is not extravagance, taking their long association together in mind, to say that Davis had done more for Lincoln than any dozen other friends he had.")

118 Frank Sullivan, Jr., *Indianapolis Judges and Lawyers Dramatize Ex parte Milligan, a Historical Trial of Contemporary Significance*, 37 IND. L. REV. 661, 662 (2004) (describing Davis as a founder of the Republican party).

119 As part of his charge to the Indianapolis grand jury in May 1863, Davis singled out Copperhead organizations like the Knights of the Golden Circle and Sons of Liberty by instructing the jurors:

It is charged that there are secret organizations . . . having for their objects—resistance to Law, and the overthrow of the Government . . . . If anywhere in this State bad men have combined together for such wicked purposes, I pray you, bring them to light and let them receive the punishment due to their crime.

KING, *supra* note 3, at 210 (alteration in original) (internal quotation marks omitted). Davis expressed the same sentiment in the *Milligan* opinion. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 130 (1866).

120 Justice Stephen Field's brother, David Dudley Field, was one of the attorneys representing Milligan. BRIAN MCGINTY, LINCOLN AND THE COURT 252 (2008); see also John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 617 (1947) (noting that apparently no objection was raised to Justice Field's practice of remaining on cases in which his brother was involved) (citation omitted); Adrian M. Tocklin, *Pennoyer v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 108 n.220 (1997) (stating that the author was unable to find an instance in which Justice Field disqualified himself from a case argued by his brother).

121 Pratt, *supra* note 27, at 174 (stating that Davis became the administrator of Lincoln's estate on June 14, 1865).

122 *Id.* at 175 (stating that Davis became Tad Lincoln's guardian in 1867).

### b. The Decision

The Court vacated Milligan's conviction, finding that the military tribunal had no jurisdiction over a citizen of a non-seceding state in which civilian courts were open. In finding that the military commissions created by Lincoln were unconstitutional, Davis, writing for the majority, "chastised" the late President:<sup>123</sup>

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.<sup>124</sup>

The four Democrats on the Court (Nelson, Grier, Clifford, and Field) signed onto Davis's majority opinion. Three Republican Justices (Swayne, Miller, and Wayne) joined in a concurring opinion authored by a fellow Republican, Chief Justice Salmon Chase. Chase agreed with Davis that a President could not authorize a military commission, but to the delight of Republicans wrote that Congress could do so under its war powers.<sup>125</sup>

### c. The Aftermath

Davis and his opinion were brutally attacked by members of the political party that he had helped to found. The Republican Party produced a pamphlet "condemning the opinion in scalding terms."<sup>126</sup> Davis was charged with erroneous statements of fact and "feeble and false" assertions of law.<sup>127</sup> Reconstructionists in Congress detested the opinion because it jeopardized their ability to replace civilian courts in the South with military tribunals.<sup>128</sup>

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<sup>123</sup> Ralph Ruebner, *Democracy, Judicial Review and the Rule of Law in the Age of Terrorism: The Experience of Israel—A Comparative Perspective*, 31 GA. J. INT'L & COMP. L. 493, 501 (2003) ("Justice Davis chastised the President for acting outside the law in time of war . . .").

<sup>124</sup> *Milligan*, 71 U.S. at 120–21.

<sup>125</sup> *Id.* at 137.

<sup>126</sup> KING, *supra* note 3, at 256. The pamphlet was entitled "Review of the Decision of the United States Supreme Court in the cases of Lambdin P. Milligan and others, *The Indiana Conspirators*," and was published by the Union Congressional Executive Committee. 6 CHARLES FAIRMAN, *Reconstruction and Reunion 1864–88*, in HISTORY OF THE SUPREME COURT OF THE UNITED STATES 232 n.165 (1971).

<sup>127</sup> KING, *supra* note 3, at 257 (internal quotation marks omitted).

<sup>128</sup> Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation*

Congressman Thaddeus Stevens showed the depth of Republican hostility by classifying the opinion as “far more dangerous” than the Dred Scott decision and claiming that it “unsheathed the dagger of the assassin, and place[d] the knife of the rebel at the throat of every man who dare[d] [to] proclaim himself . . . a loyal Union man.”<sup>129</sup> Republican Representative James Wilson of Iowa was not much kinder when he described the opinion as a “piece of judicial impertinence which we are not bound to respect.”<sup>130</sup> He further singled out “Davis and his concurring associates” as manifesting “most singularly crude ideas of the great questions they are discussing.”<sup>131</sup>

Republican newspapers joined the assault. The *New York Herald* followed Congressman Stevens’s lead by comparing the “two-faced,” “utterly preposterous” majority opinion to the Dred Scott decision.<sup>132</sup> After declaring that treason found a new home “in the bosom of the Supreme Court,” the *Washington Chronicle* observed that its editors had not “met a Republican who does not speak with contempt of the language of Justice Davis.”<sup>133</sup> The *Philadelphia North American* personalized the attack by claiming that Lincoln “made a mistake in appointing a Judge of the fatal name of Davis.”<sup>134</sup>

Davis’s response to the mugging by the Republican Party, legislators, and press was what one would expect from an individual dedicated to resolving factual and legal questions in an independent, non-partisan manner. In a letter to his cousin, Davis wrote:

[T]his court wd [sic] be a hell on earth to me, unless I can decide questions according to the light which God has given me. I hope that God will give me strength to utter my convictions & never to quail before any political tempest. Courts are made to interpret the will of the people as manifested through Laws & Constitutions.<sup>135</sup>

But even the brutal and unwarranted attack upon Davis did not destroy his

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*of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515, 1594 n.288 (1986) (“*Ex parte Milligan* was the major case creating Congress’ fear of the Court’s reaction to the Reconstruction program.”); Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79, 104–05 (2008) (stating that replacing civilian courts in the South with military commissions was a “central tenet” of Republican reconstruction plans (citation omitted)); Pratt, *supra* note 27, at 173 (“The Reconstructionists in Congress objected seriously to [the opinion].”).

<sup>129</sup> CONG. GLOBE, 39TH CONG., 2D SESS. 251 (1867) (statement of Rep. Thaddeus Stevens).

<sup>130</sup> CONG. GLOBE, 40TH CONG., 2D SESS. 1484 (1867) (statement of Rep. James Wilson).

<sup>131</sup> *Id.* at 1484–85. Congressman Wilson agreed with Chase’s concurring opinion. *Id.*

<sup>132</sup> 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 431–32 (rev. ed. 1937).

<sup>133</sup> *Id.* at 433 (internal quotation marks omitted).

<sup>134</sup> *Id.* at 433 n.1 (internal quotation marks omitted).

<sup>135</sup> Letter from David Davis to Julius Rockwell (Feb. 24, 1867), in FAIRMAN, *supra* note 126, at 234.

reputation for impartiality. Upon leaving the Supreme Court thirteen years after the *Milligan* decision, he would take his well-earned reputation for non-partisanship to the United States Senate.

6. *Public Life after the Supreme Court.*—In 1877, the Illinois state legislature elected Justice Davis to replace John Logan as United States senator.<sup>136</sup> The selection process ended on the fortieth ballot when the Democrats abandoned their candidate and united with independents to choose Davis.<sup>137</sup> Although he did not seek the office, Davis accepted it.<sup>138</sup> He resigned from the Supreme Court and took a seat on the Republican side of the Senate but did not attend either party's caucus.<sup>139</sup> As some Republicans noted, the new Senator was less political than any of the other candidates in the Illinois senatorial race and was “about as much Republican as Democratic.”<sup>140</sup> Davis, considered a true independent, voted his mind on the basis of issues, not party affiliation.<sup>141</sup> He supported the Democrat, Winfred S. Hancock, in the 1880 presidential election, and the Republican, James G. Blaine, in the 1884 contest.<sup>142</sup>

After succeeding slain President James Garfield in September 1881, Chester Arthur called a special meeting of the Senate in order to elect a new presiding officer.<sup>143</sup> Upon motion of the Republicans, Davis was elected president pro tempore of the Senate.<sup>144</sup> Both political parties viewed Davis

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136 ELBERT WILLIAM R. EWING, *HISTORY AND LAW OF THE HAYES-TILDEN CONTEST BEFORE THE ELECTORAL COMMISSION: THE FLORIDA CASE 1876-77*, at 40–43 (1910). Davis's election as United States senator prevented him from serving on the fifteen-member commission created by Congress to decide the disputed presidential election of 1876. With seven Republicans and seven Democrats on the commission, Davis was to be the “non-partisan, impartial member” who would, in effect, choose the next president. *See id.* (stating that the Democrats “were not so sure of Davis' politics as they were of his sterling honesty”); *see generally, Closeness of Vote: A Reminder of 1876*, N.Y. TIMES, Nov. 9, 1916, at 6.

137 *Decided: The Senatorial Contest Comes to an End on the Fortieth Ballot*, CHI. DAILY TRIB., Jan. 26, 1877, at 5 [hereinafter *Decided*]. Davis was seen as a “dark horse” in the Senate campaign. *State Affairs*, CHI. DAILY TRIB., Jan 12, 1877, at 1.

138 Pratt, *supra* note 27, at 178; *Decided, supra* note 137 (reporting Davis's statement that “he not been consulted regarding the use of his name as a [senatorial] candidate”).

139 Pratt, *supra* note 27, at 178.

140 *Decided, supra* note 137.

141 Pratt, *supra* note 27, at 178; *David Davis: Ex-President Lincoln's Friend, Alarmingly Ill*, RICHMOND DISPATCH, May 15, 1886, at 4 (“[Davis] was elected to the Senate as an Independent, and acted as one while a member.”); CHARLES A. CHURCH, *HISTORY OF THE REPUBLICAN PARTY IN ILLINOIS 1854–1912*, at 131 (1912).

142 Kutler, *supra* note 18, at 527; *see also Senator David Davis*, BROOKLYN DAILY EAGLE, Aug. 9, 1880, at 2 (quoting portions of a letter written by Davis in support of presidential candidate Winfred Hancock).

143 KING, *supra* note 3, at 301.

144 *Id.*

as above partisan rivalries.<sup>145</sup> In accepting his new office, the president pro tempore emphasized his lifelong approach to public service in both the judicial and legislative branches, stating, "I am profoundly gratified for this work of confidence and it shall be my endeavor, as it will be my duty to administer the trust with impartiality and with entire fairness."<sup>146</sup>

According to *Harper's Weekly*, Davis maintained his independent status by winning and retaining the respect of Republicans and Democrats.<sup>147</sup> As presiding officer of the Senate, Davis stood next in the line of succession for the presidency and was addressed by President Garfield and the *New York Times* as "Mr. Vice President."<sup>148</sup>

The reputation of David Davis for impartiality rested upon the manner in which he performed his official duties as a circuit judge, Supreme Court Justice, and later as a United States Senator. Appearances created by private activities and relationships did not diminish that reputation.

## II. THE ASCENDANCY OF APPEARANCES

How did we travel from the point where a judge's extrajudicial activities were essentially ignored in assessing his or her judicial impartiality, to the point where appearances are now the benchmark in determining a judge's faithfulness to his or her oath? The journey from reality to perception is briefly surveyed in this Part.

### A. *Judicial Ethics in the 1800s*

Codes of judicial conduct did not exist during Davis's tenure on the bench. Instead, performance of the judicial function was evaluated by the generally accepted cultural norms of nineteenth-century America. Prominent seventeenth-century judge Sir Matthew Hale summarized the norms prevalent in his era in his *Rules for Judicial Guidance*.<sup>149</sup> Simply put, actual impartiality was Hale's judicial performance standard. Hale's *Rules* advised judges (1) to lay aside personal passions while judging,<sup>150</sup> (2) to avoid prejudging cases and to withhold judgment until all parties are heard;<sup>151</sup>

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<sup>145</sup> See DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* 56 (1999).

<sup>146</sup> *A Successful Scheme: David Davis Made President of the Senate*, *DAILY GLOBE* (St. Paul, Minn.), Oct. 14, 1881, at 1 (quoting David Davis).

<sup>147</sup> *David Davis*, *HARPER'S WEEKLY*, July 3, 1886, at 420.

<sup>148</sup> KING, *supra* note 3, at 302. See also *Illness of Judge David Davis*, *N.Y. TIMES*, May 6, 1886, at 4 (referring to "ex-Vice-President David Davis").

<sup>149</sup> *In re Code of Judicial Conduct*, 643 So. 2d 1037, 1038 n.2 (Fla. 1994) (citing Matthew Hale, *Lord Hale's Rules for His Judicial Guidance: Things Necessary to be Continually Had in Remembrance*).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

(3) not to be “biased with compassion to the poor or favor to the rich”;<sup>152</sup> (4) not to be influenced by “popular or court applause, or distaste”;<sup>153</sup> (5) to keep “exactly . . . to the rules of justice”;<sup>154</sup> (6) to set aside all distraction and cares while attending to court business;<sup>155</sup> (7) to “abhor all private solicitations”;<sup>156</sup> and (8) to administer justice “uprightly,” “deliberately,” and “resolutely.”<sup>157</sup>

A century after Hale announced his Rules, the identical standard of freedom from partiality was the central theme expressed at the dedication of the first territorial court of the Northwest Territory in Marietta, Ohio. At the September 2, 1788, opening of the court, the sheriff, with sword drawn and accompanied by lawyers, townspeople, and judges, proclaimed that the territorial “court is opened for the administration of even-handed justice to the poor and the rich, to the guilty and the innocent, without respect of persons, no one to be punished without a trial by their peers, and then in pursuance of the laws and evidence in the case.”<sup>158</sup>

Davis’s contemporary, the highly respected and influential lawyer, Rufus Choate placed impartiality at the center of judicial ethics when he told the delegates of the 1853 Massachusetts Constitutional Convention that a judge

shall know nothing about the parties; everything about the case. He shall do everything for justice; nothing for himself; nothing for his friend; nothing for his patron; nothing for his sovereign. If, on one side, is the executive power, and the legislature, and the people—the sources of his honors, the givers of his daily bread—and on the other an individual nameless and odious, his eye is to see neither, great nor small; attending only to the “trepidations of the balance.”<sup>159</sup>

David Davis and Rufus Choate would agree with Lord Hale that secondary appearance cues are not helpful in determining whether a judge possesses the trait of judicial impartiality. Hale believed that if a judge was partial to a party or cause, “his Partiality and Injustice will be evident to all By-

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> GEORGE FIEDLER, *THE ILLINOIS LAW COURTS IN THREE CENTURIES 1673–1973*, at 104 (1973).

<sup>159</sup> 2 OFFICIAL REPORT OF THE DEBATES AND PROCEEDINGS IN THE STATE CONVENTION, ASSEMBLED MAY 4TH, 1853, TO REVISE AND AMEND THE CONSTITUTION IN THE COMMONWEALTH OF MASSACHUSETTS 800 (1853) (statement of Rufus Choate on July 14, 1853). Mr. Choate’s address to the Convention is reproduced in *The Tenure of Judicial Office*, 13 HARV. L. REV. 1 (1899).

standers.”<sup>160</sup> Appearances created by friendships, political activity, civic involvement, or other extrajudicial behavior simply did not influence the nineteenth-century public’s perception of a judge’s fairness in carrying out official duties.

The fact that appearances were of little concern during the nineteenth century is illustrated by the absence of rules prohibiting the bane of all appearance-based judicial ethics — political activity by judges. Appearances of political partisanship were of little concern in the 1800s, and as a result, judges engaged in political activity rather freely. Davis’s intense campaign involvement was not unusual. For example, Brooklyn Municipal Court Judge Erastus Dean Culver was among the dignitaries seated on the dais during Lincoln’s famous Cooper Union address. By popular demand Judge Culver addressed the crowd after Lincoln.<sup>161</sup> Likewise, Judge William Robertson continued in politics with gusto while serving as a county judge in New York from 1855 until 1867.<sup>162</sup> During that time he supported the candidacy of Lincoln, served as a member of two electoral colleges, and was the de facto leader of the Republicans in Westchester County.<sup>163</sup> Under the 1844 New Jersey Constitution, it was not unethical for judges to participate directly in politics by making donations and campaign speeches.<sup>164</sup> Most notably, Davis’s fellow Supreme Court Justices actively engaged in politics while on the bench. Although never nominated, Justice John McLean sought the presidential nomination in 1836, 1848, 1852, 1856, and 1860.<sup>165</sup> Justice Salmon Chase campaigned for a party nomination four times.<sup>166</sup> Justice Stephen Field entered the fray in 1880 and 1884.<sup>167</sup> Not to be outdone by his bench mates, Justice Davis received, and eventually declined, the presidential nomination of the Labor Reform Party in 1872.<sup>168</sup>

Written judicial ethics codes, with their heavy reliance on avoiding improper appearances, would not arrive until the early part of the next century.

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<sup>160</sup> MATTHEW HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* 163 (Charles M. Gray ed., 1971).

<sup>161</sup> See HAROLD HOLZER, *LINCOLN AT COOPER UNION* 106, 146–47 (2006).

<sup>162</sup> Kenneth H. Lange, *Our First President Judge William H. Robertson the “Bismarck of Katonah,”* 35 *WESTCHESTER B.J.* 29, 32 (2008) (“There were no legal or ethical constraints in the nineteenth century on political activity by judges . . .”).

<sup>163</sup> *Id.*

<sup>164</sup> *In re Gaulkin*, 351 A.2d 740, 744 (N.J. 1976).

<sup>165</sup> Peter Alan Bell, *Extrajudicial Activity of Supreme Court Justices*, 22 *STAN. L. REV.* 587, 593 n.41 (1970).

<sup>166</sup> *Id.* (stating that Justice Chase sought the presidential nomination in 1856, 1860, 1864, and 1868).

<sup>167</sup> *Id.*

<sup>168</sup> Kutler, *supra* note 18, at 527. Davis declined the nomination when the Liberal Republican convention later that same year bypassed Davis and nominated Horace Greeley. *Id.*



*B. Appearances in Modern Judicial Ethics*

The appearance of impropriety concept in American jurisprudence is derived from the purported statement of Saint Paul admonishing the Thessalonians to “[a]bstain from all appearance of evil.”<sup>169</sup> But Paul cannot be credited or blamed for creating the appearance standard: just like many contemporary public figures, he was misquoted. Modern biblical texts correct the mistranslation found in the King James Version of the Bible and now accurately report Saint Paul’s actual admonishment—to “abstain from every *form* of evil.”<sup>170</sup> By the time the mistake came to light, however, there was no turning back. Early twentieth-century courts became comfortable with the notion that in order “[t]o keep the fountain of justice pure and above reproach, the very appearance of evil should be avoided.”<sup>171</sup> The admonition was used in reference to the duty of lawyers,<sup>172</sup> jurors,<sup>173</sup> and sometimes judges.<sup>174</sup> But the warning in these early cases that judges should avoid bad appearances merely served a hortatory purpose. Neither judicial discipline nor disqualification rested upon appearances alone. To catapult the fear of bad appearances from obscurity to the forefront of judicial ethics would require the off-bench conduct of an un-saintly federal judge.

1. *Judge Kenesaw Mountain Landis*.—In 1920, while serving as a federal district court judge in Chicago, Judge Kenesaw Mountain Landis was appointed the first commissioner of Major League Baseball.<sup>175</sup> He held both jobs simultaneously, earning annually \$7,500 as a judge and \$42,500 as baseball commissioner.<sup>176</sup> The ABA considered the dual employments

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169 1 *Thessalonians* 5:22 (King James); *In re Harriss*, 4 N.E.2d 387, 388 (Ill. 1936) (“[The 1924 Canons of Judicial Ethics] were all succinctly summed up by St. Paul centuries ago when he advised the Thessalonians to abstain from all appearance of evil.”); FIEDLER, *supra* note 158, at 397 (“Many writings on judicial ethics begin with Paul’s exhortation to the Thessalonians: ‘From all appearance of evil refrain yourselves.’” (citation omitted)).

170 *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) (“Abstain from every form of evil.”); *see also* 1 *Thessalonians* 5:22 (New International Version) (“Avoid every kind of evil.”).

171 *Eastham v. Holt*, 27 S.E. 883, 894 (W. Va. 1897).

172 *E.g.*, *In re Duncan*, 42 S.E. 433, 441 (S.C. 1902) (warning young lawyers “to avoid even the appearance of evil”).

173 *Ayrhart v. Wilhelmy*, 112 N.W. 782, 783 (Iowa 1907) (“[Jurors] should be careful not only to avoid actual impropriety, but to keep themselves clear of the very appearance of evil. . . .”); *Bonnett v. Glatfeldt*, 11 N.E. 250, 253–54 (Ill. 1887) (finding that a juror created an appearance of evil by accepting a ride home from the plaintiff).

174 *See, e.g.*, *Dorlon v. Lewis*, 9 How. Pr. 1 (N.Y. Sup. Ct. 1851) (“A referee . . . owes it to himself, not only to avoid all improper influences, but even ‘the appearance of evil.’”).

175 J.G. TAYLOR SPINK, *JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL* 72 (1947).

176 George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge’s Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-*

a disgrace and sought to sanction Landis.<sup>177</sup> The critics' efforts were temporarily stymied, however, because Landis violated no law or rule of ethics and apparently performed both jobs satisfactorily.<sup>178</sup> The conclusion that Landis had committed no actual wrongdoing was supported by the United States Attorney General's investigation into the matter, which determined that "nothing as a matter of general law" prohibited a district judge from receiving compensation as an arbitrator or commissioner.<sup>179</sup> Moreover, one of the judge's main detractors, Congressman Benjamin Welty, admitted that there was no evidence that the duties of baseball commissioner interfered with the timely performance of Landis's judicial duties.<sup>180</sup> That left the ABA with one possible basis upon which to condemn the judge—appearances. In September 1921, the ABA censured Landis for "conduct unworthy of the office of judge, derogatory to the dignity of the Bench, and undermining public confidence in the independence of the judiciary."<sup>181</sup> In other words, the judge was sanctioned for creating, in the collective mind of the members of the ABA, appearances detrimental to the legal profession.

As a result of the Landis affair, the ABA created a committee to draft the first code governing the conduct of judges.<sup>182</sup> The committee chose to rely primarily on the prohibition against improper appearances, on and off the bench, to regulate judicial behavior.<sup>183</sup> Thanks to Judge Landis's simultaneous public and private employments, which looked bad to some but violated no ethical precept, the 1924 Canons of Judicial Ethics placed the prohibition against the appearance of impropriety on equal footing with the nineteenth-century prohibition against actual impropriety.

2. *The 1924 Canons of Judicial Ethics.*—The 1924 Canons embodied one overriding purpose: "to encourage judges to avoid any professional or personal conduct that could be perceived to damage the ideal image of a judge as an impartial decisionmaker and model citizen."<sup>184</sup> Reflecting that

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*Making Process*, 72 ST. JOHN'S L. REV. 291, 313 (1998).

177 See Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1923–24 (2010).

178 *Id.*

179 DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS* 197 (1998) (citation omitted).

180 See *id.* at 203.

181 REPORT OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 61 (1921).

182 Peter W. Morgan, Essay, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593, 598 (1992) ("[T]he Landis matter induced the ABA to take action to bolster public confidence in the judiciary; the ABA responded in 1924 by issuing its Canons of Judicial Ethics." (citation omitted)).

183 See *infra* notes 184–185 and accompanying text.

184 McKoski, *supra* note 177, at 1925.

purpose, the Canons instructed judges to live their lives “beyond reproach,” to avoid the “appearance of impropriety,” and to ward off any suspicion or impression that the judge’s political, business, charitable, personal, or social relationships influence the judge, interfere with judicial duties, or “warp” court decisions.<sup>185</sup> Sixteen separate times, the 1924 Canons cautioned judges against conduct that created a bad appearance, impression, or suspicion.<sup>186</sup> Not even the casual reader could miss the central thesis of the first ABA Model Code of Judicial Conduct.

3. *The 1972 Code of Judicial Conduct.*—Although some states adopted the 1924 Canons as enforceable disciplinary rules,<sup>187</sup> they were intended only to serve as aspirational guidelines.<sup>188</sup> That changed in 1972 when the ABA adopted a new Code of Judicial Conduct (“1972 Code”).<sup>189</sup> The Preface to the 1972 Code clearly stated that the “canons and text establish mandatory standards” enforceable through disciplinary proceedings.<sup>190</sup> Canon 2 set forth the Code’s overriding and binding principle: “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.”<sup>191</sup> But the 1972 Code went one monumental step further by dramatically broadening the narrow disqualification rules of the 1924 Canons.

The 1924 Canons only required a judge to disqualify himself when (1) a near relative appeared as a litigant, or (2) the judge’s direct “personal interests” were involved.<sup>192</sup> The drafters of the 1972 Code felt compelled to significantly enlarge the grounds for disqualification due to the uproar created by the forced resignation of Supreme Court Justice Abe Fortas and the defeat of the nomination of Clement Haynsworth to fill the Fortas vacancy.<sup>193</sup> Neither violated any law, rule, or disqualification guideline, but both created an improper appearance by remaining on cases in which they had an insignificant or indirect financial interest.<sup>194</sup> The Fortas and Haynsworth matters dictated that the 1972 Code contain not only a list of

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185 *Id.* at 1925 (citations omitted) (internal quotation marks omitted).

186 CANONS OF JUDICIAL ETHICS Canons 4, 13, 19, 24, 25, 26, 27, 28, 30, 31, 33 & 34 (1924).

187 Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605, 606 (1996) (“[The 1924] Canons were officially adopted for use by a number of states, although they were rarely enforced.” (citation omitted)).

188 JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03 (4th ed. 2007) (“The 1924 Canons . . . were intended to be an ideal guide of behavior, rather than an enforceable set of rules.” (citation omitted)).

189 CODE OF JUDICIAL CONDUCT (1972).

190 *Id.* at *Preface*.

191 *Id.* Canon 2.

192 CANONS OF JUDICIAL ETHICS Canons 13, 29 (1924).

193 *See* McKoski, *supra* note 177, at 1926–30 (detailing the relationship between the Fortas and Haynsworth defeats and the disqualification rules of the 1972 Code).

194 *Id.* at 1927–29.

specific disqualifying factors similar to the 1924 Canons, but also an all-purpose category of disqualification.<sup>195</sup> The broad prohibition against the appearance of impropriety seemed to be the perfect catch-all standard to serve as the overarching principle of judicial disqualification.<sup>196</sup> Any conduct appearing to reflect adversely on a judge's impartiality would constitute grounds for disqualification. Thus, Canon 3C(1) of the 1972 Code required disqualification "in a proceeding in which [the judge's] impartiality might reasonably be questioned."<sup>197</sup> Appearances became the gate-keeper of the judge's docket.

Under the 1972 Code, appearances governed every aspect of a judge's personal and professional life. Canon 2 subjected a judge to discipline for any judicial or extrajudicial behavior that created an appearance of impropriety.<sup>198</sup> Canon 3 required disqualification from matters in which a judge appeared less than impartial.<sup>199</sup> With most states adopting the 1972 Code,<sup>200</sup> appearances officially commanded the field of judicial ethics.

4. *The 1990 Model Code of Judicial Conduct.*—A revised and updated Model Code of Judicial Conduct was promulgated by the ABA in 1990 ("1990 Code").<sup>201</sup> Canon 2 of the 1990 Code retained the mandate that a judge avoid impropriety and the appearance of impropriety in all professional and personal activities.<sup>202</sup> The drafters of the revised code believed that the appearance prohibition continued to serve a critical function: "to

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195 *Id.* at 1930 (concluding that the two episodes indicated that the emerging governing principle of judicial disqualification would be appearance-based).

196 See E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60-61 (1973) (explaining the relationship between the appearance of impropriety and the disqualification provisions of the 1972 Code).

197 CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

198 *Id.* Canon 2 ("A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities").

199 *Id.* Canon 3C(1) ("A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned . . .").

200 ALFINI ET AL., *supra* note 188, § 1.03 ("Before 1990, the 1972 Code had been adopted, in whole or in large part, by 47 states, the District of Columbia, and the Federal Judicial Conference." (citation omitted)). In 1974, Congress revised its judicial disqualification statute to track the language of the 1972 Code by requiring judges to disqualify whenever their impartiality "might reasonably be questioned." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609 (codified at 28 U.S.C. § 455(a) (2006)). The amendment was designed "to foster the Appearance of impartiality." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

201 MODEL CODE OF JUDICIAL CONDUCT (1990). The 1990 Code was adopted by the ABA House of Delegates on August 7, 1990. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 63 (1992).

202 MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990). The title to Canon 2 provided, "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." *Id.*

caution judges to avoid certain prospective conduct even if the conduct only appears suspect, and to proscribe any act that is harmful even if it is not specifically prohibited in the Code.”<sup>203</sup> Canon 3E(1) of the 1990 Code continued to require disqualification “in a proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>204</sup> Like the 1972 Code, the 1990 Code was replete with repetitive cautions to avoid bad appearances. For example, Canon 4 dictated that a judge must not participate in extrajudicial activities which cast doubt on the judge’s impartiality;<sup>205</sup> solicit memberships in charitable groups if the solicitation might be perceived as “coercive”;<sup>206</sup> engage in financial dealings that might be “perceived to exploit” the judge’s position;<sup>207</sup> accept gifts that could be “perceived as intended to influence the judge”;<sup>208</sup> or receive an expense reimbursement if it “give[s] the appearance of influencing the judge’s performance . . . or otherwise give[s] the appearance of impropriety.”<sup>209</sup>

5. *The 2007 Model Code of Judicial Conduct.*—In 2003, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission) began to revise the 1990 Code.<sup>210</sup> Some Joint Commission members favored retaining the “appearance of impropriety” prohibition as a disciplinary standard, while others preferred reducing the vague concept to the status of an aspirational guide.<sup>211</sup> After three and one-half years of debate, flip-flopping proposals, a *New York Times* editorial, and intense input from law-related organizations, the ABA House of Delegates decided to treat the appearance prohibition as an overarching principle of judicial conduct and as a disciplinary rule.<sup>212</sup> As a result, Canon 1 of the 2007 Code provides that “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>213</sup> Disciplinary Rule 1.2 makes this guiding sentiment an enforceable regulation by mandating that

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203 MILORD, *supra* note 201, at 13.

204 MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

205 *Id.* Canon 4A(1).

206 *Id.* Canon 4C(3)(b)(iii).

207 *Id.* Canon 4D(1)(a).

208 *Id.* Canon 4D(5)(b).

209 *Id.* Canon 4H(1).

210 Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 JUST. SYS. J. 257, 257 (2007).

211 *Id.* at 262 (internal quotation marks omitted) (describing the competing tensions that dominated the Joint Commission’s evaluation of the appearance of impropriety standard).

212 *See id.*; *see also* McKoski, *supra* note 177, at 1932–36 (describing the history and debate surrounding the enactment of Canon 1 and Rule 1.2 of the 2007 Code).

213 MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007).

“[a] judge . . . shall avoid impropriety and the appearance of impropriety.”<sup>214</sup> The 2007 Code continues the duty to disqualify in any situation where a “judge’s impartiality might reasonably be questioned.”<sup>215</sup>

The debate that raged within the Joint Commission regarding the proper role of the appearance standard has not carried over to the states. To date, the eighteen states adopting a new code based on the 2007 ABA Model Code have included the appearance prohibition as a guiding principle and disciplinary rule.<sup>216</sup>

6. *The Practical Effect of the Emergence of the Appearance Standard.*—Most jurisdictions embraced the appearance-based rules found in the various ABA Model Codes because “whatever the ABA recommends comes with a presumption of authority, and state and federal courts are likely to adopt it.”<sup>217</sup> In addition, the democratic nature of the appearance test appealed to those responsible for enacting and enforcing judicial conduct rules. Judging by appearances requires no special knowledge, training, or experience. Neither does application of the test require an understanding of ethics rules or the reasons behind the rules. Everyone’s opinion is entitled to equal weight when the “truth” lies in the eye of the beholder.<sup>218</sup> With the ABA’s stamp of approval and the egalitarian underpinnings of the appearance standard, it is not surprising that the focus on evaluating judicial impartiality shifted from actualities to perceptions.

For example, no claim of improper appearances arose in 1865 when David Dudley Field argued before the Supreme Court on behalf of Lambdin Milligan while the attorney’s brother, Justice Stephen Field, listened from the bench.<sup>219</sup> But by 1946, Justice Robert Jackson freely criticized fellow Justice Hugo Black for sitting on a case argued by a lawyer who

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214 *Id.* R. 1.2.

215 *Id.* R. 2.11(A).

216 ARIZ. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); ARK. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); COLO. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); CONN. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); DEL. JUDGES’ CODE OF JUDICIAL CONDUCT R. 1.2 (2010); HAW. CODE OF JUDICIAL CONDUCT R.1.2 (2010); IND. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); IOWA CODE OF JUDICIAL CONDUCT R. 51:1.2 (2010); KAN. CODE OF JUDICIAL CONDUCT R.1.2 (2010); MD. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); MINN. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); MONT. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); NEB. REV. CODE OF JUDICIAL CONDUCT § 5–301–2 (2010); NEV. CODE OF JUDICIAL CONDUCT R. 1.2 (2010); OHIO CODE OF JUDICIAL CONDUCT R. 1.2 (2010); UTAH CODE OF JUDICIAL CONDUCT R. 1.2 (2010); WASH. STATE CODE OF JUDICIAL CONDUCT R. 1.2 (2010); WYO. CODE OF JUDICIAL CONDUCT R. 1.2 (2010).

217 Ronald D. Rotunda, *Judicial Ethics, The Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1359 (2006).

218 *E.g.*, *Del Vecchio v. Ill. Dep’t of Corr.*, 31 F.3d 1363, 1371 (7th Cir. 1994) (en banc) (“Appearances are usually for the eyes of the beholder.”); *Andrews v. Agric. Labor Relations Bd.*, 623 P.2d 151, 156 (Cal. 1981). (“Appearance, after all, is generally in the eye of the beholder.”).

219 *See supra* note 120 and accompanying text.

two decades earlier engaged in a law practice with Black.<sup>220</sup> Similarly, while judges in the 1800s openly engaged in political activity, by 1964 the New York City bar association, seeking to protect the appearance of impartiality, felt justified not only demanding that a judge abstain from political activity but also insisting that he either keep his wife out of politics or resign from the bench.<sup>221</sup> Former federal circuit judge and law school dean Howard T. Markey recognized the stranglehold that appearances maintained on the debate over how best to protect judicial legitimacy, stating that “[p]erhaps ninety percent of the problems that arise in relation to judicial ethics arise from appearances, not from reality.”<sup>222</sup> And the stranglehold tightens.

Today, judges suffer accusations of creating an appearance of partiality under virtually limitless circumstances. A seventy-five year old Illinois Supreme Court Justice was criticized<sup>223</sup> for authoring an opinion holding the state’s mandatory judicial retirement age of seventy-five unconstitutional.<sup>224</sup> This type of charge is especially troubling because it is reminiscent of the claims that African American judges should be disqualified from hearing civil rights cases,<sup>225</sup> and female judges should be barred from sex discrimination lawsuits filed by female plaintiffs.<sup>226</sup> In an equally disturbing application of appearances, a Virginia judge was advised not to serve as a “pastor or minister at a regular church service” because he might give the appearance of partiality toward litigants of his own faith.<sup>227</sup> In a blow to

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220 The case was *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945). Justice Jackson’s concurring opinion in denial of a petition for rehearing includes a disguised criticism of Justice Black’s participation in the case. See *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring in denial of rehearing); John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 605–06 & nn.2-3 (1947) (explaining Justice Jackson’s criticism).

221 Robert E. Tomasson, *Bar Asks Judge to Quit or Get Wife Out of Politics*, *N.Y. TIMES*, Dec. 12, 1964, at 1 (reporting that the New York City bar association urged a judge to either “persuade his wife to give up partisan politics or to resign his judgeship” in order to avoid a suspicion of bias).

222 Howard T. Markey, *A Judicial Need for the 80’s: Schooling in Judicial Ethics*, 66 *NEB. L. REV.* 417, 426 (1987).

223 Abdon M. Pallasch, *Never Too Old: Justices Throw Out Age Limit on When Judges Can Seek Retention*, *CHI. SUN-TIMES*, June 19, 2009, at 14 (quoting a law professor as opining that an appearance of impropriety is created when a supreme court justice who has reached the state’s statutorily mandated retirement age authors an opinion finding the statute unconstitutional).

224 *Maddux v. Blagojevich*, 911 N.E.2d 979, 992 (Ill. 2009).

225 See, e.g., *Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs*, 388 F. Supp. 155, 162–66 (E.D. Pa. 1974).

226 See, e.g., *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

227 Va. Judicial Ethics Advisory Comm., Op. 08–1 (2008), available at [http://www.courts.state.va.us/agencies/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/agencies/jirc/opinions/2008/08_1.html) (“The Committee is . . . of the opinion that a judge should not act as a pastor or minister at a regular church service . . . as [it] may raise a question about the judge’s ability to act impartially or may create an appearance of impropriety.”). The Virginia Judicial Ethics Advisory Committee withdrew Opinion 08–1 on February 17, 2010, and is currently considering whether to issue a revised opinion. VIRGINIA JUDICIAL

legal education, the Nebraska Judicial Ethics Committee determined that a judge's presentation at a criminal defense education conference would create an appearance of partiality toward defendants and their lawyers.<sup>228</sup>

But the danger lies not only in misapplication of the appearance standard to situations that could have no conceivable impact on actual impartiality. Nor is the only concern the unjustified treatment of appearance and reality as equally important in the arena of judicial conduct. The real danger today is the elevation of the appearance of impartiality over actual impartiality.<sup>229</sup> Some commentators have already indicated that the appearance of fairness is possibly more important than its actuality.<sup>230</sup> The overtaking of reality by perception is undeniably foreshadowed by a recent opinion of the Florida Supreme Court Judicial Ethics Advisory Committee.

#### a. Virtual Friends in Florida

In an opinion that gained national attention,<sup>231</sup> the Florida Judicial Ethics

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SYSTEM, [http://www.courts.state.va.us/agencies/jirc/opinions/2008/08\\_1.html](http://www.courts.state.va.us/agencies/jirc/opinions/2008/08_1.html) (last visited Oct. 9, 2010).

228 Neb. Judicial Ethics Comm., Op. 06-4 (2006), available at <http://supremecourt.ne.gov/professional-ethics/judges/ethics-committee/pdf/06-4.pdf> (“[H]owever, even if the actual content of the judge’s comments would be largely impartial, a reasonable person viewing the seminar itinerary and publicity materials could perceive an impairment of the judge’s impartiality.”).

229 See Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1110 (2004) (stating that a recusal standard defined in terms of appearances is not surprising because “in modern-day society, it is perception, rather than reality, that has the greater importance”).

230 See, e.g., Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 653 (1994) (“In building and maintaining the image of the judiciary, it is the reasonable perception of the people that counts—and that is all that counts.”); Thomas R. Phillips & Karlene Dunn Poll, *Free Speech for Judges and Fair Appeals for Litigants: Judicial Recusal in a Post-White World*, 55 DRAKE L. REV. 691, 709 (2007) (“[R]ecusal as a mechanism for protecting the state’s interest in preserving both the impartiality and, possibly more important, the appearance of impartiality of the judiciary, has its limitations and thus critics.” (citation omitted)); Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1583 (2005) (“The appearance of impartiality is just as important, if not more important, as the reality of impartiality.” (citation omitted)); Bethany Krajelis, *An Age-Old Debate Exists About Effect of Politics in the Judiciary*, CHI. DAILY L. BULL., Apr. 21, 2010, at 1 (“You can’t have real justice until you have an appearance of justice.”) (quoting Malcolm C. Rich, Executive Director of the Chicago Applesseed Fund for Justice, the research arm of the Chicago Council of Lawyers).

231 See *Fla. Judges, Lawyers Warned on ‘Friending,’* BOS. GLOBE, Dec. 12, 2009, at 2; Editorial, *Our Take on . . . Judges as BFFs*, ORLANDO SENTINEL, Dec. 19, 2009, at A18; John Schwartz, *For Judges on Facebook, Friendship Has Limits*, N.Y. TIMES, Dec. 11, 2009, at A25; Debra Cassens Weiss, *Judges Shouldn’t ‘Friend’ Lawyers Who Appear Before Them, Opinion Says*, A.B.A. J. (Dec. 10, 2009, 8:22 AM), [http://www.abajournal.com/news/articles/judges\\_shouldn't\\_friend\\_lawyers\\_who\\_appear\\_before\\_them\\_opinion\\_says](http://www.abajournal.com/news/articles/judges_shouldn't_friend_lawyers_who_appear_before_them_opinion_says); Ashby Jones, *Why You Shouldn’t Take It Hard If a Judge Rejects Your Friend Request*, WALL ST. J. L. BLOG (Dec. 9, 2009, 6:14 PM),



Advisory Committee warned judges not to permit lawyers who appear in their courts to be identified as “friends” on the judge’s Facebook or other Internet social networking page.<sup>232</sup> According to the Florida Committee, a judge is disqualified from presiding over the cases of Internet “friends” because the “friends” listing “conveys or permits others to convey the impression that they are in a special position to influence the judge.”<sup>233</sup> In other words, the Internet posting creates an appearance of partiality automatically requiring the judge’s disqualification from matters in which the virtual “friend” appears as counsel. The opinion stands in stark contrast to the general rule that a judge is not automatically disqualified from a case in which a real friend appears.<sup>234</sup> As one court explained, “[f]riendship means many things, but it is rarely adequate grounds upon which to seek recusal of a federal judge.”<sup>235</sup> And this is true even where the judge and lawyer have a close relationship.<sup>236</sup> For example, disqualification was not required where an attorney frequently visited and vacationed with the judge and characterized the relationship as “close friends.”<sup>237</sup>

The Florida opinion ranks appearance over reality. Moreover, its application is not likely to be restricted to Internet relationships. For if the mere mention of a lawyer’s name on a social networking page (a very poor indicator of the true nature of a relationship<sup>238</sup>) creates an improper

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<http://blogs.wsj.com/law/2009/12/09/why-you-shouldnt-take-it-hard-if-a-judge-rejects-your-friend-request>.

232 Fla. Judicial Ethics Advisory Comm., Op. 2009–20 (2009), *available at* <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jecopinions/2009/2009-20.html>. *But see* Ethics Comm. of the Ky. Judiciary, Formal Op. JE-119 (2010), *available at* <http://courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999B-A326794CD62E/0/JE119.pdf> (granting “qualified” approval to list lawyers, social workers, law enforcement officials, and others as “friends” on a judge’s social networking page).

233 Fla. Judicial Ethics Advisory Comm., Op. 2009–20 (2009).

234 Jeffrey Cole, *Jilting the Judge: How to Make and Survive a Motion to Disqualify*, LITIGATION, Winter 2008, at 48, 52 (“[F]riendship with one party or its counsel, without more, will not require recusal.” (citation omitted)); John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 622 (1947) (observing that “the overwhelming American practice is against disqualification” on the basis of friendship); Timothy J. Goodson, Comment, *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, 201 (2005) (“[F]riendship between a judge and a litigating party has seldom been grounds for judicial disqualification.” (citation omitted)).

235 *Hadler v. Union Bank & Trust Co.*, 765 F. Supp. 976, 977 (S.D. Ind. 1991).

236 *United States v. Olis*, 571 F. Supp. 2d 777, 795 (S.D. Tex. 2008) (“Many courts therefore have held that a judge need not disqualify himself just because a friend—even a close friend—appears as a lawyer.” (citations omitted)).

237 *State v. Cannon*, 254 S.W.3d 287, 307–08 (Tenn. 2008); *see also* *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 924–25 (2004) (Scalia, J., memorandum denying motion for disqualification) (describing how Supreme Court Justice Byron White went on a skiing trip with Attorney General Robert Kennedy two weeks before the Attorney General argued a case before the Court and while he was a defendant in two cases before the Court).

238 *See* Jones, *supra* note 231 (“I’ve friended friends, friends of friends, acquaintances,

appearance, then more individualized and personal social contact such as a dinner at an attorney's home, an invitation to a lawyer's wedding, a private luncheon, or a poker night, as well as introducing a lawyer as "my friend," creates an even greater appearance of partiality.<sup>239</sup> Once appearances become the controlling concern, the actual nature of the personal relationship becomes irrelevant. At that point, the only way to avoid the disqualifying appearance is to end the relationship or keep it a secret.

The promotion of appearance over reality is not only alive and well in the virtual world but also in the world of Supreme Court appointments. Two issues that arose during the confirmation and installation of Justice Sonia Sotomayor illustrate how meaningless appearances can detract from more important issues in the judicial selection process.

#### b. Justice Sotomayor's Membership in the Belizean Grove

Detractors claimed that Justice Sotomayor's membership in a women's networking group, the Belizean Grove, violated the federal judicial code's prohibition against membership in an organization that practices invidious discrimination on the basis of sex.<sup>240</sup> Canon 2C of the Code of Conduct for United States Judges bars membership in discriminatory organizations because it "gives rise to perceptions that the judge's impartiality is impaired."<sup>241</sup> An objective reading of federal Canon 2C and the ethics advisory opinions interpreting similar state provisions clearly refutes the detractors' claim.<sup>242</sup> The Belizean Grove is obviously not the type of bigoted

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work colleagues, people who claim to know me, people from my past I barely remember, and people who probably requested my 'friendship' completely by mistake or through some sort of elaborate spam ruse that I'm not smart enough to figure out. I routinely 'confirm' them all.").

<sup>239</sup> See, e.g., Ilya Somin, *Florida Judicial Ethics Advisory Committee Forbids Facebook "Friendships" Between Judges and Lawyers*, THE VOLOKH CONSPIRACY (Dec. 15, 2009, 12:08 AM), <http://volokh.com/2009/12/15/florida-judicial-ethics-advisory-committee-forbids-facebook-friendships-between-judges-and-lawyers> ("[T]he Florida Committee's approach actually treats Facebook friendship between lawyers and judges as a *more* serious breach of judicial etiquette than a genuinely close friendship between the two. . . . I can't understand the justification for a rule that bans essentially innocuous Facebook 'friendships' but turns a blind eye to real friendships."). But see Samuel V. Jones, *Judge, Friends, and Facebook: An Essay on the Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 505 (forthcoming Dec. 2010) (arguing that the Florida Committee correctly interpreted the state's judicial code to prohibit judges from permitting lawyers to "friend" a judge on electronic networking websites).

<sup>240</sup> Tom LoBianco, *Sotomayor Scrutinized for Ties to Women's Club: GOP Calls It 'Discriminatory'*, WASH. TIMES, June 17, 2009, at A1.

<sup>241</sup> CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2C cmt. 2C (2009); see MODEL CODE OF JUDICIAL CONDUCT R. 3.6 cmt. 1 (2007).

<sup>242</sup> See Cynthia Gray, *Organizations that Practice Invidious Discrimination*, JUDICIAL ETHICS FORUM (June 30, 2009, 5:53 PM), <http://judicialethicsforum.com/2009/06/30/organizations-that-practice-invidious-discrimination> (discussing judicial ethics opinions interpreting rules which prohibit membership in groups practicing invidious discrimination).

group banned by Canon 2C. There is simply no basis upon which to conclude that membership in a women’s business networking group foreshadows partisan or biased court rulings. Is it reasonable to assume that a judge-member of the Belizean Grove will be partial to female litigants or that the group’s mission will somehow leverage the judge’s decisions? Of course not.<sup>243</sup> Justice Sotomayor’s membership did not tarnish her impartiality any more than Justices Ginsburg and O’Connor’s less-publicized association with the International Women’s Forum.<sup>244</sup> Any lingering doubt about the impact of club membership on Justice Sotomayor’s impartiality disappears after it is learned that the Belizean Grove was founded only because a men’s networking group, the Bohemian Club, would not allow women to join.<sup>245</sup> But there is no arguing with appearances. Justice Sotomayor resigned from the club to avoid distraction from the real issue—whether she possessed the necessary judicial trait of actual impartiality.<sup>246</sup>

### c. The Oaths of Office

Another appearances-driven distraction concerned the administration of the oaths of office to Justice Sotomayor. New members of the Supreme Court take two oaths.<sup>247</sup> The “judicial” oath is most often taken in a private ceremony at the Supreme Court.<sup>248</sup> The “constitutional” oath, required of all executive and judicial officers, is usually administered in a televised proceeding at the White House.<sup>249</sup> In Justice Sotomayor’s case, however,

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243 If the Belizean club did practice invidious discrimination or membership in the group created an appearance of impropriety, then Justice Sotomayor should have been disciplined for violating Canon 2C of the *CODE OF CONDUCT FOR UNITED STATES JUDGES* while serving as a judge of the court of appeals. *See* *CODE OF CONDUCT FOR UNITED STATES JUDGES* Canon 2C & cmt. 2C (2009) (prohibiting membership in any organization that practices invidious discrimination on the basis of sex and prohibiting conduct which creates an appearance of impropriety).

244 *See* LoBianco, *supra* note 240 (“The only two women to have sat on the court, Justice Ruth Bader Ginsburg and former Justice Sandra Day O’Connor, were members of a women’s networking group, the International Women’s Forum, but their memberships did not become a major issue in their confirmation hearings.”).

245 *Id.*

246 *Nominee Quits Women’s Group*, N.Y. TIMES, June 20, 2009, at A10 (stating that Justice Sotomayor resigned from the Belizean Grove to eliminate distractions from her “‘qualifications and record’”).

247 DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 31989, SUPREME COURT APPOINTMENT PROCESS: ROLES OF THE PRESIDENT, JUDICIARY COMMITTEE, AND SENATE 54 (2010).

248 *Id.*

249 *Id.*; *see also* *Supreme Court Oath Taking Procedures*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/oath/oathspceduresinfosheet2009.aspx> (last visited Sept. 7, 2010) (“[S]ince 1986, each President who has appointed a Justice has hosted an oath ceremony at the White House.”).

both oaths were administered at the Supreme Court, ostensibly to avoid the perception that she was “the President’s appointee”<sup>250</sup> and also as a “symbol of the Court’s independence” from the White House.<sup>251</sup> But moving the site of an installation ceremony can hardly be expected to undo the fact that a Supreme Court Justice is the President’s appointee. It is hardly a secret that Presidents select nominees whose political and ideological views mirror their own in the hope that the new Justice will decide cases in a manner consistent with the President’s views.<sup>252</sup> While most Americans have no idea how many oaths a Justice takes or the location of the administration of the oaths, the public is aware that the nominee is chosen and actively supported by the President in an often partisan confirmation process. And even assuming that the relocation of Justice Sotomayor’s oath-taking had some symbolic value, it was short lived. Four days after the installation ceremonies, the White House hosted a 200-person reception celebrating the appointment, where the President thanked the Senate leaders and White House staffers for “our success.”<sup>253</sup>

The attempt to achieve judicial legitimacy by manipulating appearances is superficial and, at best, ineffective. Does anyone hold Justice Sotomayor to be a more impartial jurist than Chief Justice Roberts because Sotomayor took both oaths at the Court while Roberts took both oaths at the White House?<sup>254</sup> If a President wishes to reinforce the concept of judicial autonomy, the direct approach is superior. For instance, at the installation ceremonies, wherever they are held, the President could directly broach the subject of judicial impartiality. The President could simply emphasize that nothing is expected from the new Justice, and the Constitution requires the Court to affirm an executive’s decisions when required by the facts and law and to reverse an executive when an impartial review of the matter so dictates.<sup>255</sup>

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250 See Ann M. Lousin, *What They Should Have Asked Sotomayor*, CHI. DAILY L. BULL., July 20, 2009, at 6 (stating that John Paul Stevens disliked White House oath taking because it “suggest[s] to the American people that ‘this is the President’s appointee.’”); see also Tony Mauro, *New Papers Give Insight into Rehnquist*, FULTON CNTY. DAILY REP., Aug. 24, 2009, at 1 (describing how the papers of the late Chief Justice William Rehnquist indicate that some members of the Court preferred installation ceremonies to be conducted at the judicial building).

251 Tony Mauro, *Sotomayor; On Home Turf*, NAT’L L.J., Aug. 10, 2009, at 17 (reporting that “[a] White House source said President Barack Obama wanted the ceremony on judicial ground as a ‘symbol of the Court’s independence’”).

252 See GEORGE L. WATSON & JOHN A. STOOKEY, *SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS* 58–59 (1995).

253 President Barack Obama, Remarks at a Reception Honoring Justice Sonia Sotomayor (Aug. 12, 2009) (available at 2009 WLNR 15601051) (transcribing the President’s remarks thanking Senators Patrick Leahy, Harry Reid, Charles E. Schumer, Kirston Gillibrand, and others who “organized and mobilized” support for the Sotomayor confirmation effort).

254 See David G. Savage, *Justice Sotomayor Sworn In*, J. GAZETTE (Ft. Wayne, Ind.), Aug. 9, 2009, at A3 (“Roberts took both oaths at the White House from senior Justice John Paul Stevens on Sept. 29, 2005.”).

255 President Obama expressed this sentiment on the day the Senate confirmed Justice

Moving rhetoric sometimes helps brand the American tradition of judicial impartiality. Moving camera locations does not.<sup>256</sup>

### III. PROMOTING ACTUAL IMPARTIALITY

The appearance of fairness is important, just not as important as actual fairness. In order to restore impartiality in fact to its proper place in the hierarchy of judicial values, it is necessary to proclaim impartiality as the primary value of judicial ethics. This can be accomplished by (1) acknowledging that partiality inflicts greater damage to litigants and the judicial system than does the appearance of partiality, (2) amending codes of judicial conduct to reflect the supremacy of actual impartiality, and (3) publicly “branding” the judiciary as impartial. After declaring and branding the supremacy of actual impartiality, that principle must be emphasized in judicial disciplinary proceedings, judicial education programs, and judicial selection, retention, and evaluation methods.

#### *A. Declaring Impartiality More Important than the Appearance of Impartiality*

Restoring impartiality to its proper place in the hierarchy of essential values should start with a simple declaration that actual impartiality is more important than the appearance of impartiality. This is not to depreciate or diminish the significance of rules protecting appearances. No one is suggesting that judicial conduct codes abandon provisions prohibiting ex parte communications or eliminate rules prohibiting the acceptance of gifts from attorneys even when not offered in return for a favor. Restricting a judge’s on-bench and off-bench conduct to avoid improper appearances is a proper goal of codes of conduct, but it should not be the primary goal. It is time to reestablish what was obvious in the nineteenth century: impartiality in fact, not in appearance, is the fundamental value of judicial ethics.<sup>257</sup>

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Sotomayor. *See* President Barack Obama, Remarks on Sotomayor Vote (Aug. 6, 2009) (available at 2009 WLNR 15208954).

<sup>256</sup> Apparently, many Presidents preferred to have at least one oath administered at the White House in order to facilitate television coverage. *See* Tony Mauro, *supra* note 251 (reporting that in 1991, associate White House counsel advised an assistant to the Chief Justice that the President wanted the oath ceremony conducted at the White House because the Court did not allow cameras). The Sotomayor installation was the first time that the Supreme Court permitted television cameras to record the administration of the oath. *Supreme Court Oath Firsts and Other Trivia*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/oath/supremecourtoathfirstsandtrivia2009.aspx> (last visited Sept. 7, 2010) (stating that the administration of the oath to Justice Sotomayor on August 8, 2009, was “the first time that an oath-taking ceremony at the Court was open to broadcast coverage”).

<sup>257</sup> Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1223 (2009) (“Moreover, impartiality is a prominent element in almost every widely accepted definition of the judicial role.” (citation omitted)); Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591,

This unequivocal declaration is necessary for the simple reason that actual unfairness in judicial decision-making results in more insidious damage to litigants and the judicial system than do the ill-advised acts of judges that give a perception of bias. An example will illustrate the point.

Judge Timothy Ellender attended a Halloween party wearing an Afro wig, a prison jump suit, handcuffs, and blackface.<sup>258</sup> The Judiciary Commission of Louisiana charged the judge with conduct “offensive, derogatory, degrading, insulting, and demeaning towards African-Americans,” stating that his conduct “called into question Judge Ellender’s integrity and his ability to be fair and impartial towards African-Americans who appear before his court as defendants in criminal proceedings.”<sup>259</sup> An investigation of the judge’s docket disclosed no sentencing disparity based on race.<sup>260</sup> Judge Ellender was suspended from office and ordered to enroll in a racial sensitivity course.<sup>261</sup> The demeaning and offensive exhibition of racial stereotyping by the judge certainly damaged public confidence in the judiciary and warranted the discipline imposed. However, an inappropriate Halloween costume does not threaten judicial legitimacy to the same extent as deciding a litigant’s fate on the basis of skin color rather than facts. This is true in part because actual bias results in real people suffering unconscionable, unjustifiable, and illegitimate consequences. But the elimination of actual partiality is also more important than improving appearances because the former can be hidden. Appearances of partiality are by definition in public view and therefore are identifiable and correctable, or at least punishable.

As a first step in restoring actual impartiality to its rightful status, the appearance of impartiality must be declared and treated as a “close second” to the maintenance and promotion of impartiality in fact.<sup>262</sup> Amending codes of judicial conduct to reflect the importance of impartiality and “branding” the judicial system with an impartiality theme will assist in that effort.

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637 (2009) (“The duty to be fair and impartial is critical to judicial ethics.” (citation omitted)); W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 305, 305 (2008) (“The fundamental value in judicial ethics is impartiality.”); Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 426 (2004) (“It is a truism that there is no concept more fundamental to the common law and United States legal systems than [n] judicial neutrality. Without such neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall.” (citation omitted)).

258 *In re* Ellender, 2004–2123, p. 2 (La. 12/13/04); 889 So. 2d 225, 227.

259 *Id.* at p. 3, 889 So. 2d at 228.

260 *Id.* at p. 11, 889 So. 2d at 232.

261 *Id.* at pp. 11–12, 889 So. 2d at 233.

262 Stephen Gillers, “*If Elected, I Promise [\_\_\_\_\_]*”—*What Should Judicial Candidates Be Allowed to Say?*, 35 IND. L. REV. 725, 729 (2002) (“We all know that the appearance of justice is either as important as justice or at least a close second.”).

1. *Acknowledging the Primacy of Actual Impartiality in Judicial Conduct Codes.*—The 1924 Canons treated impartiality as an essential value of the judicial office.<sup>263</sup> Maybe this was a remnant of the importance placed on the concept in the nineteenth century. But by 1972, the importance of actual impartiality had slipped to such an extent that the next two ABA Model Codes, while implying that deciding cases required impartiality, never expressly informed judges of that fact.<sup>264</sup> Correcting this “oversight,” Rule 2.2 of Canon 2 of the 2007 Code instructs judges to “perform all duties of judicial office fairly and impartially.”<sup>265</sup> This declaration certainly cures the omission of the two prior Model Codes but it does not go far enough. There is simply no reason for the Code not to make a stronger statement regarding the importance of impartiality. After all, impartiality is a fundamental principal of our jurisprudence and “should carry a higher priority than the value, important as it is, of projecting an appearance of impartiality.”<sup>266</sup> Indeed, the Reporter’s Explanation of Changes to the 2007 Code unequivocally states that Canon Two’s concern with actual impartiality and fairness is at the “heart” of the new Code.<sup>267</sup> That statement, emphasizing the importance of impartiality, belongs in the Code itself where judges will see it, not in an ancillary, unofficial explanation of the Code. A new comment should be added to Rule 2.2 of the 2007 Code advising judges that impartiality is the cornerstone of the judicial function and that appearance, while important, never replaces or supersedes the prime directive to decide disputes fairly.

2. *Branding the Judiciary as Impartial.*—Including a comment in judicial codes stressing the primary importance of actual impartiality will not suffice to enshrine the concept as the fundamental value of judicial ethics. To accomplish that objective there must be more, including a “branding” of our legal system as governed by the rule of law and judicial impartiality.

“Branding” is a concept usually applied in the context of promoting commercial products or services. Fundamentally, branding is a shorthand method of describing the quality or benefits of a particular product or service

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263 CANONS OF JUDICIAL ETHICS Canon 5 (1924) (“[A judge] should be temperate, attentive, patient, [and] impartial . . .”).

264 REPORTER’S EXPLANATION OF CHANGES: ABA MODEL CODE OF JUDICIAL CONDUCT, 2007, AM. BAR. ASS’N 14 (“Although the duty to decide cases with impartiality was implicit in numerous provisions in the former [1990] Code, it was not stated explicitly.”).

265 *Id.* (explaining that Rule 2.2 of the 2007 Code corrects the oversight of the 1990 Code, which failed to explicitly direct judges to decide cases impartially); MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

266 Dale A. Nance, *Reliability and the Admissibility of Experts*, 34 SETON HALL L. REV. 191, 206 n.56 (2003).

267 REPORTER’S EXPLANATION OF CHANGES, *supra* note 264, at 12 (“This Canon [2] is at the heart of the Rules, in that it governs core judicial functions.”).

to consumers or clients.<sup>268</sup> A brand, usually expressed through a name, logo, symbol, or slogan, must be “durable,” “consistent,” and “meaningful” to potential customers.<sup>269</sup> Hopefully, it also “reflects the values of the people who create the product.”<sup>270</sup>

Successful commercial brandings are familiar to most Americans. “Coke” (“it’s the real thing”) has become synonymous with a cola drink. “You’re in good hands with Allstate” tells the marketplace all it needs to know about the insurance company. Similarly, “the breakfast of champions” succinctly explains why one should choose Wheaties over a competitor’s product. But branding is not restricted to profit-producing enterprises. Law schools have been branded and re-branded.<sup>271</sup> Law reviews attempt to develop better name recognition and a stronger market share through branding.<sup>272</sup> Judges and courts also develop brands that influence individual and institutional reputations.<sup>273</sup>

Recognizing the importance of branding, the United States Courts retained an advertising company to develop and implement “a major Branding strategy that will strive to create a new identity for the Courts.”<sup>274</sup> The one-page press release announcing the award of the web-development contract to DeepBlue stresses the prime directive of the courts: to administer fair and impartial justice. The first paragraph of the release describes the “federal judicial system’s critical mission, which is to ensure fairness and equal justice to all citizens.”<sup>275</sup> Five lines later, the announcement reemphasizes that “[t]hrough fair and impartial judgments, the federal courts interpret and apply the law to resolve disputes.”<sup>276</sup> In

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268 Kristin L. Rakowski, *Branding as an Antidote to Indecency Regulation*, 16 UCLA ENT. L. REV. 1, 16 (2009) (“Branding, at its core, is a means of providing notice to consumers about the quality and characteristics of a product.”).

269 *Id.* at 18.

270 Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1583 (2006).

271 See, e.g., *Case Study: U of M Law School Brand Strategy*, EATON & ASSOCIATES DESIGN COMPANY, [http://www.eanda.com/pages/case\\_studies/umlaw\\_brand.htm](http://www.eanda.com/pages/case_studies/umlaw_brand.htm) (last visited Oct. 9, 2010) (“The University of Minnesota Law School is known internationally for superior academic standards and its contribution to the law community. However, the Law School’s promotions did not effectively represent their prestige. Over the past two years, Eaton & Associates has ‘re-branded’ the school through an evolving system of materials design.”).

272 Joshua D. Baker, Note, *Relics or Relevant?: The Value of the Modern Law Review*, 111 W. VA. L. REV. 919, 936 (2009) (discussing the advantages of branding for law journals).

273 Michael E. Solimine, *Judicial Stratification and the Reputations of the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 1331, 1356 (2005) (“In the past two decades, the Seventh Circuit has developed its own brand.”).

274 Press Release, DeepBlue, U.S. Courts Selects DeepBlue for Branding and Website Re-Development Project (Sept. 29, 2008), available at [http://www.deepblue.com/news\\_uscourts.aspx](http://www.deepblue.com/news_uscourts.aspx) (last visited Sept. 7, 2010).

275 *Id.*

276 *Id.*



effect, the news release brands impartiality as the distinguishing trait of the American judicial system. This is the type of public declaration necessary to reinvigorate the concept of actual impartiality. Fortunately, the theme expressed in the press release has carried over as a prominent feature of the United States Courts website designed by DeepBlue. The opening page of the website advises visitors that federal courts “are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress.”<sup>277</sup> By contrast, no mention of judicial impartiality appears on the opening screens of the websites for the various circuits of the United States Courts of Appeals.<sup>278</sup>

Branding judicial impartiality through web page design and other means serves an essential purpose beyond mere image building. Because no express right to an impartial judge appears in the Constitution, the traditional value placed on the neutral magistrate rests solely upon long-standing and respected societal norms and traditions.<sup>279</sup> But cultural norms change over time, especially when ignored or taken for granted.<sup>280</sup> As a result, a “vigilant defense” of the bedrock principle of impartiality is essential to its continued survival.<sup>281</sup> Without constant reinforcement, the treasured principle could be morphed into a new norm: the appearance of impartiality.

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277 UNITED STATES COURTS, <http://www.uscourts.gov> (last visited Sept. 13, 2010).

278 UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, <http://www.ca3.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, <http://www.ca5.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, <http://www.ca6.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, <http://www.ca7.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, <http://www.ca8.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, <http://www.ca10.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, <http://www.ca11.uscourts.gov> (last visited Sept. 13, 2010); UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, <http://cadc.uscourts.gov> (last visited Sept. 13, 2010).

279 See David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 25 (2009) (suggesting that “societal norms, customs, and expectations are among the most compelling determinants of the American ‘tradition of judicial independence’” (quoting Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 913 (2007))).

280 See *id.* at 26.

281 CHARLES GARDNER GEYH, *WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* 260 (2006) (“It would be a mistake to assume that independence norms have been so deeply entrenched as to render either these episodic challenges inconsequential or the vigilant defense of those norms unnecessary to their preservation.”).

Even worse, the new cultural measure of a judge's worth could be defined by how closely a judge is aligned with partisan interests or groups. In that world, judges would be asked "not, 'What does the law require?' but rather, 'What have you done for me lately?'"<sup>282</sup> And unfortunately judges would likely adjust to meet the new public expectation. Judges strive to achieve what society values. Because impartiality is valued, judges work hard to attain it.<sup>283</sup> If impartiality is not properly incentivized, but instead replaced by appearances or partisan allegiances, then judges will strive to live up to the new norm. To prevent a new, undesirable brand from attaching itself to the judiciary, the old time-tested brand of impartiality must be reaffirmed.

In addition to defining and publicizing the court's mission in terms of an unbiased and fair judiciary, a greater effort must be made to incorporate the importance of impartiality in judicial disciplinary proceedings; judicial selection, retention, and evaluation procedures; and judicial education. Reemphasizing impartiality in these areas will result in a stronger brand and, most importantly, will produce more impartiality among our judges.

### *B. Judicial Discipline and Partiality*

Each state maintains a disciplinary system tasked with investigating and adjudicating allegations of judicial misconduct.<sup>284</sup> While these organizations cannot graft a sense of impartiality onto the psyche of a judge, they can remove a judge who lacks the trait. Even where a particular transgression suggesting partiality is insufficient to warrant removal, a lesser disciplinary sanction may cause a judge to purge a conscious bias, if not from a sense of innate fairness, then from a fear of future prosecution.<sup>285</sup>

As a practical matter, most sanctions imposed by disciplinary commissions do not include removal or suspension of the judge.<sup>286</sup> In 2008, approximately eighty percent of judges found to be in violation of state

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<sup>282</sup> Burbank, *supra* note 279, at 916.

<sup>283</sup> Shirley S. Abrahamson, Chief Justice, Wis. Supreme Court, Remarks Before the American Bar Association Commission on Separation of Powers and Judicial Independence (Dec. 13, 1996), in 12 ST. JOHN'S J. LEGAL COMMENT 69, 79 (1996) ("Because judicial independence is valued in our society, judges strive to live up to this norm."); Pimentel, *supra* note 279, at 25 ("[J]udges aspire to high integrity because they live and work in a culture that prizes it."); Stratos Pahis, Note, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1903 (2009) ("We expect judges to be honest because we establish institutions that incentivize honesty.").

<sup>284</sup> ALFINI ET AL., *supra* note 188, § 1.04.

<sup>285</sup> Pimentel, *supra* note 279, at 26 ("[T]he existence of a system of judicial discipline does not generate integrity. Rather it is an environmental factor that may influence a judge in her exercise of integrity, i.e. it may mitigate the harm when integrity is lacking . . .").

<sup>286</sup> John O. Haley, *The Civil, Criminal and Disciplinary Liability of Judges*, 54 AM. J. COMP. L. 281, 290 (2006) ("The most frequently imposed sanctions are relatively minor, such as public censure or admonishment.").

judicial conduct rules received sentences which allowed them to remain on the bench.<sup>287</sup> Imposing a reprimand, censure, or admonishment is an appropriate response to a minor transgression. Courtroom demonstrations of partiality or favoritism, however, should not be accorded such lenient treatment and warrant the permanent or temporary removal of the offending judge.

Ticket fixing,<sup>288</sup> providing a party favored treatment at the request of a state senator,<sup>289</sup> convicting a defendant before the defense rests,<sup>290</sup> sentencing a pregnant defendant based on the judge's personal view of abortion,<sup>291</sup> and other similar displays of unfairness deserve a punishment commensurate with the harm caused to the heart of the judicial system. The New York Commission on Judicial Discipline properly considers ticket fixing as sufficiently inconsistent with the role of a judge to warrant removal even for a single transgression.<sup>292</sup> Also, in New York, "as a general rule, intervention [by a judge] in a proceeding in another court should result in removal."<sup>293</sup> On the other (more lenient) hand, in Mississippi, "[o]ften the sanction for 'fixing' tickets is a public reprimand, fine and assessment of the costs."<sup>294</sup> Under this counterproductive approach, a Mississippi judge received a reprimand and five hundred dollar fine after committing an "expansive degree of misconduct"<sup>295</sup> including finding thirteen defendants not guilty without a trial at the request of others, including judges.<sup>296</sup> Not surprisingly, undervaluing impartiality has resulted in ticket-fixing becoming what one commentator has described as a "chronic problem in Mississippi's . . . court system."<sup>297</sup>

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287 In 2008, twenty-six state judges lost their job as a result of actual or threatened disciplinary proceedings. Of those twenty-six, nine judges were removed, one disbarred, one permanently barred from judicial office, one found disabled, one permanently retired, two suspended until the end of their terms, and eleven retired or resigned to avoid disciplinary proceedings. One hundred and fifteen judges received other public sanctions. *State Judicial Discipline in 2008*, JUD. CONDUCT REP., Winter 2009, at 1.

288 *E.g.*, *In re Hearn*, 542 So. 2d 901, 902 (Miss. 1989); Kim Smith, *JP Sought to Fix Son's Ticket*, ARIZ. DAILY STAR, June 30, 2010, at A2; Charles Toutant, *Jail Sought for Ex-Jersey City Judge Who Admitted Fixing Traffic Tickets*, 200 N.J. L.J. 701. *See generally* Cynthia Gray, *Ticket-Fixing*, JUD. CONDUCT REP., Summer 2006, at 1.

289 *E.g.*, *In re Eplin*, 416 S.E.2d 248, 250 (W. Va. 1992).

290 *E.g.*, *In re Sulski*, 1 Ill. Cts. Comm'n 22, 22 (Feb. 19, 1974).

291 *E.g.*, *Cleveland Bar Ass'n v. Cleary*, 754 N.E.2d 235, 240 (Ohio 2001).

292 *In re Reedy*, 475 N.E.2d 1262, 1263 (N.Y. 1985) ("Ticket-fixing is misconduct of such gravity as to warrant removal, even if this matter were petitioner's only transgression." (citations omitted)).

293 *In re Edwards*, 492 N.E.2d 124, 125 (N.Y. 1986).

294 Miss. Comm'n on Judicial Performance v. Bradford, 08–JP–01989–SCT (¶ 12) (Miss. 2009), 18 So. 3d 251, 255.

295 *In re Seal*, 585 So. 2d 741, 746 (Miss. 1991).

296 *Id.* at 744.

297 Gray, *supra* note 288.

To help ensure that an appropriately severe punishment accompanies a demonstration of judicial bias, prejudice, or other form of partiality, each jurisdiction should formally and specifically establish the lack of impartiality as an aggravating factor in a disciplinary proceeding. Most states have not.

For the purpose of matching the severity of punishment with the degree of the offense, states have enumerated aggravating and mitigating factors to be applied in judicial disciplinary proceedings.<sup>298</sup> Many jurisdictions<sup>299</sup> employ the following ten factors set forth by the Washington State Supreme Court in *In re Deming*:<sup>300</sup>

- (a) whether the judge's act was isolated or part of a pattern;
- (b) the "nature, extent, and frequency" of the misconduct;
- (c) whether the misconduct occurred in court;
- (d) whether the acts occurred in the judge's official or private capacity;
- (e) whether the judge acknowledged the wrongdoing;
- (f) the judge's attempt to change the improper conduct;
- (g) the length of the judge's service;
- (h) prior complaints about the judge;
- (i) the misconduct's impact on judicial integrity and public respect; and
- (j) whether judicial status was exploited to satisfy "personal desires."<sup>301</sup>

After an exhaustive study, the American Judicature Society condensed the frequently employed disciplinary factors into the following short list: (1) the nature of the judge's misconduct, (2) the extent of the misconduct, (3) the judge's culpability, (4) the judge's response to the investigation and disciplinary proceeding, and (5) the judge's reputation and record.<sup>302</sup>

No doubt the sentencing considerations set forth by the *Deming* court and the American Judicature Society assist disciplinary bodies in making difficult decisions. However, they suffer from a lack of specificity. For example, the American Judicature Society's compilation of aggravating and mitigating factors could be applied to the medical, accounting, or teaching

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298 *In re Coffey's Case*, 949 A.2d 102, 114 (N.H. 2008) (citing *In re Inquiry Concerning a Judge*, 788 P.2d 716, 724 (Alaska 1990)).

299 Multiple states have adopted the standards of *In re Deming*, 736 P.2d 639 (Wash. 1987). *In re Inquiry Concerning McCormick*, 639 N.W.2d 12, 16 (Iowa 2002) (citation omitted); *In re Morvant*, 2009-O-0747, p. 6 n.8 (La. 6/26/09); 15 So. 3d 74, 78 n.8 (citation omitted); *In re Moore*, 626 N.W.2d 374, 386 & n.20 (Mich. 2001) (citation omitted); *Judicial Conduct Comm'n v. McGuire*, 2004 ND 171, ¶ 33, 685 N.W.2d 748, 765 (citation omitted); *In re Singletary*, 967 A.2d 1094, 1102 (Pa. Ct. Jud. Discipline 2009); *In re Disciplinary Proceedings Against Ziegler*, 2008 WI 47, ¶ 43, 309 Wis. 2d, 253, 279-80, 750 N.W.2d 710 (citation omitted); see *Disciplinary Counsel v. O'Neill*, 103 Ohio St. 3d 204, 2004-Ohio-4704, 815 N.E.2d 286 (citations omitted); see also ARIZ. CT. R. 19 (2010) (listing aggravating and mitigating factors based on *Deming*).

300 *In re Deming*, 736 P.2d 639 (Wash. 1987).

301 *Id.* at 659 (describing the factors as "non-exclusive").

302 CYNTHIA GRAY, AMERICAN JUDICATURE SOCIETY, A STUDY OF STATE JUDICIAL DISCIPLINE SANCTIONS 81-82 (2002). At least one state has adopted the American Judicature Society's five-factor test. *In re Coffey*, 949 A.2d at 115.

professions by substituting “doctor,” or “accountant,” or “teacher” each time the word “judge” appears. Both sets of guidelines fail to hone in on the fundamental purpose of the judicial system and the specific attributes of judicial authority that justify society’s special interest in judicial performance and discipline.

Some states, while employing the general framework established by *Deming*, add specific sentencing considerations related to the unique and powerful position of the judge.<sup>303</sup> In New Jersey, one factor defining the gravity of an offense is “whether the misconduct constitutes the impugn exercise of judicial power that evidences lack of independence or impartiality.”<sup>304</sup> This specific declaration, that transgressions impacting the cornerstone of the judicial function will likely enhance a judge’s punishment, serves to alert the disciplinary body, the offending judge, all other judges, and the public at large of the high value placed on protecting judicial impartiality. Like New Jersey, every jurisdiction should broadcast in precise terms that impartiality matters and that a violation of that signature characteristic of American jurisprudence will result in an appropriately augmented disciplinary response. Lesser infractions involving only an appearance of partiality can continue to be treated more leniently.

Identifying a lack of impartiality as an aggravating sentencing factor and applying that factor to enhance the punishment of offending judges will directly foster impartiality in fact. It will also indirectly assist the cause of impartiality by helping to brand the judicial system as valuing fairness.

### C. Judicial Education

Notwithstanding the claim that “judges are notoriously difficult to educate,”<sup>305</sup> judicial education is underutilized in promoting the goal of actual impartiality. Continuing education classes are needed, first, simply to remind judges of their core function as neutral magistrates. Featuring judges who have demonstrated the ability to set aside personal predilections and ignore public pressure in order to render impartial decisions is an ideal format for this type of impartiality refresher course. But more importantly, judges must be taught about the cognitive illusions that infect their decisions and study methods to combat these subconscious biases.

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303 See, e.g., *In re Seaman*, 627 A.2d 106, 122 (N.J. 1993) (defining relevant factors to include whether the judge’s conduct involved dishonesty, corrupted the judicial process, evidenced a lack of independence or impartiality, or misused judicial authority (citations omitted)); see also *In re Mathesius*, 910 A.2d 594, 611–12 (N.J. 2006) (applying the factors set out in *In re Seaman*).

304 *In re Seaman*, 627 A.2d at 122 (citing *In re Yaccarino*, 502 A.2d 3 (N.J. 1988)).

305 Elisabeth McDonald, *And Still We Must Talk About “Real Rape.”* 29 PACE L. REV. 349, 373 (2009) (reviewing JENNIFER TEMKIN & BARBARA KRAHE, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* (2008) (internal quotation marks omitted)).

1. *Reinforcing the Neutral Magistrate Principle through Judicial Education.*—Judicial training can reinforce the idea that impartiality is the mainstay of an adversary system of justice. Virtually every rule governing the trial process is born from a desire to ensure a fair hearing by a neutral tribunal. “It is [the trial judge’s] responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality . . . .”<sup>306</sup> Judges understand this duty, but the press of court business and the time and energy devoted to processing overwhelming case loads necessitates a periodic reminder of the very reason for a judicial officer’s existence.

One logical format for an impartiality “refresher” course is the study of judges who have exhibited the ability to set aside friendships, political pressure, personal philosophies, and “public clamor” to decide matters solely on the facts and law. Such judicial role models are not hard to find.

Some jurists demonstrate real courage. Frank Johnson, a federal judge in Alabama from 1955 to 1979, suffered a cross burning in his yard, hundreds of death threats, and the detonation of a bomb at his mother’s home in retaliation for his desegregation rulings.<sup>307</sup> Judge W. Arthur Garrity’s home was under twenty-four-hour protection while he presided over the Boston school desegregation case.<sup>308</sup> Less well-known is David Brearley, former Chief Justice of the New Jersey Supreme Court. During the American War for Independence, Chief Justice Brearley struck down a state statute prohibiting commercial intercourse with the British.<sup>309</sup> As a result, the enemy recovered property worth 29,428 pounds and thirteen shillings.<sup>310</sup> The Chief Justice decided the case impartially even though, prior to his court appointment, he had been arrested by the British and charged with high treason while serving as a colonel in the Continental Army.<sup>311</sup> More recently, Probate Judge George Greer received the Sandra Day O’Connor Jurist Award for courage in permitting the withdrawal of the feeding tube

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306 *State v. Iban C.*, 881 A.2d 1005, 1023 (Conn. 2005) (alteration in original) (quoting *State v. Gonzalez*, 864 A.2d 847, 860–61 (Conn. 2005)).

307 Dan T. Carter, “Let Justice be Done”: Public Passion and Judicial Courage in Modern Alabama, Remarks at the Ray Rushton Distinguished Lecturer Series, in 28 CUMB. L. REV. 553, 566–67 (1998); see also Christopher A. Bracey, *Adjudication, Antisubordination, and the Jazz Connection*, 54 ALA. L. REV. 853, 871 (2003) (“The Civil Rights era was, in many ways, an era defined by judicial courage.”).

308 Michael S. Greco, Immediate-Past President, Am. Bar Ass’n, *Judicial Courage in the 21st Century* 5 (June 13, 2007), available at [http://www.klgates.com/files/Publication/f696f601-8d62-4501-85ac-16a62601bb04/Presentation/PublicationAttachment/b259f9f7-8b6f-4e50-96cf-217f77a5f349/Greco\\_MA\\_District\\_Court\\_Conf\\_061307.pdf](http://www.klgates.com/files/Publication/f696f601-8d62-4501-85ac-16a62601bb04/Presentation/PublicationAttachment/b259f9f7-8b6f-4e50-96cf-217f77a5f349/Greco_MA_District_Court_Conf_061307.pdf).

309 *United States v. Jepson*, 90 F. Supp. 983, 985–87 (D.N.J. 1950) (discussing *Holmes v. Walton*, 9 N.J.L. 444 (N.J. 1780)).

310 *Id.* at 985–86.

311 JOSEPH C. MORTON, *SHAPERS OF THE GREAT DEBATE AT THE CONSTITUTIONAL CONVENTION OF 1787: A BIOGRAPHICAL DICTIONARY* 39–40 (2006).

from a woman in a permanent vegetative state.<sup>312</sup>

Other judges in equally precarious, but less physically threatening, situations have disregarded personal loyalties and debts of gratitude. Two of President Truman's Supreme Court appointees, Justices Burton and Clark, were his personal friends and were expected to vote to uphold his seizure of the steel mills during the Korean War.<sup>313</sup> Instead, both men concurred with the majority in *Youngstown Sheet & Tube Co. v. Sawyer*, finding the takeover unconstitutional.<sup>314</sup> In a similar vein of independence, a unanimous Court rejected President Nixon's privilege claim regarding White House tape recordings in *United States v. Nixon*.<sup>315</sup> Chief Justice Burger and two of the other Nixon appointees joined in the majority opinion, which eventually resulted in the President's resignation.<sup>316</sup>

*Texas v. Johnson*<sup>317</sup> illustrates the indispensable and widespread ability of judges to disregard personal convictions in favor of following the law. In that case, Justice Scalia provided the decisive fifth vote to invalidate a state statute criminalizing flag-burning, notwithstanding his personal dislike of flag-burners.<sup>318</sup> Justice Scalia left no doubt about his personal view of flag desecration when he told a reporter, "I don't like people who burn the American flag, and if I were king, I would put them in jail."<sup>319</sup>

It is not only high-profile judges who exemplify the gold standard of impartiality. Virtually every judge has ruled against a friend, suppressed essential evidence, acquitted an alleged sex offender, granted probation to a defendant considered by most to be unworthy of the privilege, or ruled against public officials who would be helpful in the judge's next retention

<sup>312</sup> Press Release, American College of Trial Lawyers, American College of Trial Lawyers Honors Judge George W. Greer with Prestigious Sandra Day O'Connor Jurist Award (Mar. 24, 2008), available at <http://www.actl.com/AM/Template.cfm?Section=Home&CONTENTID=3549&TEMPLATE=/CM/ContentDisplay.cfm>. Judge Greer, the trial judge in *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004), received death threats and was also compelled to resign from his church. Barbara A. Noah, *The Role of Religion in the Schiavo Controversy*, 6 Hous. J. HEALTH L. & POL'Y 319, 344 (2006) (citation omitted).

<sup>313</sup> William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUFFOLK U. L. REV. 751, 753 n.3 (1987). Democratic Presidents appointed all nine judges. *Id.* at 753.

<sup>314</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>315</sup> *United States v. Nixon*, 418 U.S. 683, 714 (1974). Justice Rehnquist did not participate in the decision. *Id.* at 683.

<sup>316</sup> The Nixon appointees were Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist. Ruth Bader Ginsburg, *Remarks on Judicial Independence*, 20 U. HAW. L. REV. 603, 604 (1998).

<sup>317</sup> *Texas v. Johnson*, 491 U.S. 397 (1989).

<sup>318</sup> Karen Lee Torre, *Norm Pattis's New Dopey Word*, CONN. L. TRIB., Dec. 22, 2008, at 35 (stating that Justice Scalia provided the "tipping vote" producing an outcome that he "personally detested").

<sup>319</sup> Robert Barnes, *With a Book Coming Out, Scalia Is All Talk—Even with the Media*, WASH. POST, Apr. 10, 2008, at A4.

campaign.<sup>320</sup> Everyday acts by ordinary judges provide an equally effective teaching tool in reinforcing the goal of judicial neutrality.

But merely mandating education classes that highlight examples of judicial courage will not alone maintain and improve courtroom impartiality. What is needed is judicial education on a deeper level: the subconscious aspects of judging.

2. *Cognitive Illusions*.—Few judges understand the complicated mental processes involved in receiving and evaluating information during the decision-making process. Judges are simply unaware of how heuristics and other subconscious biases and stereotypes influence outcomes. It is education in these matters, foreign to most judges, that holds the greatest hope for improving judicial impartiality.

#### a. Decision-Making Heuristics

Heuristics are rules of thumb that we all use and misuse in making judgments. Understanding the subconscious operation of heuristic thought is especially vital for those entrusted by the government to make impartial decisions for others.

One such shortcut method of reasoning, known as the representativeness heuristic, can especially taint judicial decision-making because it relies on a process honored by all lawyers: reasoning by analogy.<sup>321</sup> In its pure form, the representativeness heuristic estimates the frequency of an event by comparing it to a prototype or a superficially similar known event.<sup>322</sup> For example, if you were asked whether a short, slim person who reads poetry was more likely an Ivy League classics professor or a truck driver,

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320 Cf. *Republican Party of Minn. v. White*, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting) (“[C]ountless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least [fifty] percent of the litigants who appear before them. It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections.”); Greco, *supra* note 308, at 4 (“Day in and day out, judges in our country—over 25,000 in the state court system alone—hear thousands of cases. And each day courageous judges . . . uphold the Rule of Law and administer justice, even when the law itself may be unpopular, the facts and players shock the public, the case is notorious, or personal harm is a possibility.”).

321 See Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 51 (2003) (“This [representativeness] heuristic should sound familiar to lawyers and legal academics, because we have been brain-washed since law school on the fine art of reasoning (and misleading) by analogies, a device rooted in similarities and differences.” (citation omitted)).

322 JOHN B. BEST, *COGNITIVE PSYCHOLOGY* 374 (5th ed. 1999); Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231, 249 (1991). Crespi defines the representativeness heuristic as “reliance upon stereotypical characterizations to the point of insensitivity to relevant prior probabilities and sample sizes.” *Id.* (citation omitted).



you might conclude that the individual was more likely a professor.<sup>323</sup> This is because the description of the individual is more *representative* of the stereotypical image of a scholar than the prototype truck driver.<sup>324</sup> But this conclusion is almost certainly wrong, considering the small number of classics professors at Ivy League schools and the large number of truck drivers.<sup>325</sup> Other decision-making heuristics directly related to the judging process,<sup>326</sup> yet little understood by judges, include anchoring (relying on the first available information to the exclusion of more relevant data obtained later);<sup>327</sup> framing (allowing the way in which a question is asked to influence our reasoning);<sup>328</sup> hindsight bias (overstating the predictability of past events);<sup>329</sup> and confirmation bias (seeking information that may confirm what is expected to be true).<sup>330</sup>

Lawyers might suggest that the egocentric bias (overestimating one's abilities)<sup>331</sup> is the heuristic most likely to undermine a judge's reasoning process. Judge David Davis probably suffered from this cognitive defect since it was no secret that his "self-appreciation was great."<sup>332</sup> Judicial susceptibility to the egocentric bias was measured recently during a conference of administrative law judges. Judges attending the conference were asked to compare themselves to other attendees on their ability to (1) judge a witness's credibility, (2) "avoid bias," and (3) "facilitate settlements."<sup>333</sup> With regard to assessing witness credibility, 83.3% of the administrative judges placed themselves in the top half of attendees.

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323 This illustration is presented in DAVID G. MYERS, *PSYCHOLOGY* 278–79 (1986).

324 *Id.* at 278.

325 *Id.* at 278–79.

326 See United States *ex rel.* Bagley v. TRW, Inc., 204 F.R.D. 170, 180 (C.D. Cal. 2001) (recognizing the misleading results caused by the hindsight bias); Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) (finding that framing, anchoring, hindsight, representativeness, and egocentric biases significantly influence judicial decision making); Jeffery J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 572 (1998) (describing how the hindsight bias can affect the application of judicial standards such as foreseeability).

327 See Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 667 (1999) (describing the concept of anchoring).

328 BEST, *supra* note 322, at 376; see also Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 42 (2004) ("[T]he way in which an issue is presented to us significantly influences how we perceive it.").

329 Jeffery J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1171–72 (2003).

330 BEST, *supra* note 322, at 377.

331 See Jeffery J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1228 (2009) ("[J]udges are inclined to make the same sorts of favorable assumptions about their own abilities that non-judges do." (citation omitted)).

332 See WHITNEY, *supra* note 23, at 75.

333 Chris Guthrie, Jeffery J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

Similarly, 86.2% of the judges placed themselves in the upper half in their ability to promote settlements. And to no one's surprise, 97.2% rated themselves in the top half in the ability to avoid bias.<sup>334</sup>

Because heuristics influence how judges process information, misuse of these reasoning shortcuts can adversely affect every aspect of a judge's job, including sentencing decisions;<sup>335</sup> settlement negotiations;<sup>336</sup> the ability to accurately recall facts,<sup>337</sup> disregard suppressed evidence,<sup>338</sup> or interpret statutes,<sup>339</sup> and rulings on motions,<sup>340</sup> discovery disputes,<sup>341</sup> and evidentiary objections.<sup>342</sup>

Incorporating the subject of heuristics into judicial education programs will assist judges in recognizing and combating these common barriers to well-reasoned, objective judgments, thereby enhancing the actual impartiality of the courts.

#### b. Gender, Racial, Ethnic, and Other Stereotypes

Cognitive illusions most threaten judicial impartiality when they result in unconscious biases and stereotypes involving attorneys, witnesses, or litigants. Because courts acknowledge that “[a] growing body of social science recognizes the persuasiveness of unconscious racial and ethnic stereotyping and group bias,”<sup>343</sup> training strategies have been developed to deal with racial, ethnic, gender, and sexual orientation forms of implicit bias.

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334 *Id.*

335 See Guthrie et al., *supra* note 326, at 794 (discussing the application of the anchoring heuristic in sentencing decisions).

336 Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1988–89 (2007) (demonstrating that biases impact settlement negotiations).

337 See Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 353 n.23 (2007).

338 See Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1262–63 (2005).

339 See Mullins, *supra* note 321, at 53 (“This bias or risk of error can be found in the implementation of law generally and is associated with statutory interpretation heuristics as well as in statutes themselves.” (citation omitted)).

340 See Bone, *supra* note 336, at 1988–89 (referring to the effect of cognitive bias on motions for summary judgment); Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1472–75 (2007) (arguing that “status quo” bias and “egocentric bias” limit a judge's ability to correctly assess a post-trial claim of “newly discovered evidence” (citations omitted)).

341 See Bone, *supra* note 336, at 1988 (suggesting that heuristics influence discovery rulings).

342 See William Wesley Patton, *To Err Is Human, To Forgive, Often Unjust: Harmless Error Analysis in Child Abuse Dependency Proceedings*, 13 U.C. DAVIS J. JUV. L. & POL'Y 99, 103 n.10 (2009) (“Judges' egocentric biases affect almost every aspect of trials . . .” (citation omitted)).

343 *Chin v. Runnels*, 343 F. Supp. 2d 891, 906 (N.D. Cal. 2004) (citations omitted).

To be most effective, these strategies must address subconscious biases and not merely the overt manifestation of those biases. Too often sensitivity training consists simply of a “do’s and don’ts” checklist instructing judges to avoid demeaning or stereotypical comments.<sup>344</sup>

For example, a handbook on *Gender Equality in the Courts: A Guide for All New Mexico State and Federal Courts* warns judges not to (1) use terms of endearment like “honey” or “dear” when addressing female lawyers, (2) make sexual jokes, or (3) comment on physical appearances.<sup>345</sup> On the “do’s” side of the checklist, the New Mexico Handbook suggests that judges treat everyone with courtesy and respect and address women and men with “gender neutral terms” and use titles such as Mr. or Ms.<sup>346</sup> Similarly, California’s *Guidelines for Judicial Officers: Avoiding the Appearance of Bias*, does just that: the handbook counsels judges to steer clear of bad appearances by refraining from addressing female lawyers by their first names or commenting on an attorney’s physical appearance.<sup>347</sup> Pennsylvania judges are directed not to use “sweetie,” “honey,” “dear,” “son,” “boy,” or “young lady,” or comment on a person’s appearance, dress, hairstyle, body parts, pregnancy, skin color, ethnicity, or disability.<sup>348</sup> Jurists in the Keystone State are further cautioned against making derogatory comments, stereotypical remarks, or assumptions concerning a “person’s profession or agenda.”<sup>349</sup> Although essential, each of these protocols deals with the appearance or manifestation of bias, not the actual underlying bias.

Fortunately, judicial training regimes have been created to address unconscious biases. The University of North Carolina School of Government sponsors one of the best. “Fairness in the Courts”<sup>350</sup> explains the impact of implicit associations, stereotypical thinking, and heuristics on the decision-making process and skillfully suggests methods to combat racial, ethnic, and other forms of implicit bias that inhibit impartial courtroom judgments.

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344 Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 18–22 (2006); *id.* at 18 (criticizing “[t]he checklist method to judicial debiasing”).

345 COMM. ON WOMEN AND THE LEGAL PROFESSION, STATE BAR OF N.M., GENDER EQUALITY IN THE COURTS: A GUIDE FOR ALL NEW MEXICO STATE AND FEDERAL COURTS 7–8 (2000), *available at* <http://www.nmbar.org/attorneys/lawpubs/genderequality.pdf>.

346 *Id.* at 7.

347 JUDICIAL COUNCIL ADVISORY COMM. ON ACCESS AND FAIRNESS, GUIDELINES FOR JUDICIAL OFFICERS: AVOIDING THE APPEARANCE OF BIAS 11, 15 (1996), *available at* <http://www.courtinfo.ca.gov/programs/access/documents/genderb.pdf>.

348 PENNSYLVANIA INTERBRANCH COMM’N FOR GENDER, RACIAL & ETHNIC FAIRNESS, ACHIEVING FAIRNESS THROUGH BIAS-FREE BEHAVIOR: A POCKET GUIDE FOR THE PENNSYLVANIA COURTS 10 (2009), *available at* [http://www.co.lancaster.pa.us/courts/lib/courts/UJS\\_Non-Discrimination\\_and\\_EEO\\_Policy\\_Achieving\\_Fairness\\_Pamphlet.pdf](http://www.co.lancaster.pa.us/courts/lib/courts/UJS_Non-Discrimination_and_EEO_Policy_Achieving_Fairness_Pamphlet.pdf).

349 *Id.* at 11.

350 James C. Drennan, Albert Coates Professor of Public Law and Government, Fairness in the Courts (Jan. 28, 2010), *available at* <http://www.sog.unc.edu/faculty/smithjess/201001NJSchool.htm>.

Similarly, a National Judicial College workshop explores implicit bias and its impact on the judging process.<sup>351</sup> Illinois also created a course devoted in part to the impact of implicit bias and heuristics in judicial decision-making.<sup>352</sup> Judge Mark W. Bennett has prepared presentations and written materials for judges explaining implicit bias.<sup>353</sup>

The ability to recognize and combat actual bias is more important than a judge's ability to avoid the appearance of bias. Even accepting for a moment the popular notion that the two concepts are of equal importance, logic dictates that both should receive equal time in education programs. But they do not. Most judicial ethics instruction is based on judicial codes, which, in the main, focus on preventing bad appearances.<sup>354</sup> The more important instruction on cognitive illusions<sup>355</sup> should be "mainstreamed" instead of being given "short-shrift" in judicial education.<sup>356</sup> This is easily accomplished because many states, as part of their mandatory continuing judicial education program,<sup>357</sup> require that judges complete courses covering specific subject matter such as judicial ethics,<sup>358</sup> capital litigation,<sup>359</sup> and

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351 Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 *DRAKE L. REV.* 591, 630–32 (2009) (describing the workshop's implicit bias curriculum); see also Kathleen Sikora, *Social Cognition: Solutions for Unintended Bias*, *NASJE NEWS*, Fall 2006, at 32, 33, available at <http://nasje.org/news/newsletter0604/conf18.htm> (summarizing the National Judicial College's course content).

352 See Course Materials, *Judicial Decision Making in a Democratic Society*, Illinois Judicial Conference (June 15–19, 2009) (on file with author).

353 Mark W. Bennett, Essay, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 *HARV. L. & POL'Y REV.* 149, 169 (2010) (describing the literature on implicit bias and its application to jury selection); see also JERRY KANG, *IMPLICIT BIAS: A PRIMER FOR COURTS* (2009), available at <http://new.abanet.org/sections/criminaljustice/PublicDocuments/unit%203%20kang.pdf>.

354 See *supra* Part II.B.2–5.

355 By "more important" I mean primacy not only in the sense that reality should trump perception, but also in the sense that it is difficult to understand the complexities of cognitive science without expert assistance. By contrast, the rules protecting appearances (e.g., rules advising judges not to solicit money for charities, donate money to political candidates, or accept gifts from lawyers) can largely be self-taught.

356 Ramirez, *supra* note 351, at 621, 636.

357 See, e.g., CAL. R. CT. 10.462(d) (2010) (setting minimum education requirements for trial judges at thirty hours every three years); FLA. R. JUD. ADMIN. 2.320(b)(2) (2010) (requiring thirty hours of instruction every three years); N.Y. CT. R. § 17.3 (2010) (requiring judges to attend at least twenty-four hours of instruction every two years); see also Rachlinski et al., *supra* note 257, at 1228 ("Judicial education is common these days . . .").

358 See, e.g., FLA. R. JUD. ADMIN. 2.320(b)(2) (2010) (requiring two hours of judicial ethics training every three years); OHIO GOV. JUD. R. IV § 2(C) (2010) (requiring at least two hours of instruction relating to judicial ethics and professionalism every two years).

359 See, e.g., CAL. R. CT. 10.469(d) (2010) (recommending that judges assigned to hear capital cases attend a comprehensive education program); ILL. SUP. CT. R. 43 (2010) (requiring judges who preside over death penalty cases to attend capital litigation seminars).

domestic violence.<sup>360</sup> Cognitive bias, which influences every aspect of a judge's work, must be added to the mandated areas of judicial training.

#### *D. The Selection, Retention, and Evaluation of Judges*

The processes by which judges are chosen, retained in office, and evaluated provide a ready-made, but often overlooked, avenue for insuring and promoting judicial impartiality.

1. *Judicial Selection*.—No shortage of opinion exists on which method of judicial selection produces the most impartial judges.<sup>361</sup> As a delegate to the 1847 Illinois Constitutional Convention, David Davis vehemently argued for the popular election of state judges in order to prevent the corrupting influence caused by legislative appointment of the judiciary.<sup>362</sup> Delegate Davis also believed that elections would improve the federal bench because, unlike the president, the people “would have chosen judges, instead of broken down politicians.”<sup>363</sup> Today, Wisconsin Supreme Court Chief Justice Shirley Abramson agrees that the election of judges is the preferred selection method, at least in her state.<sup>364</sup> On the other side of the ballot box, Justice John Paul Stevens considers that “the very practice of electing judges is unwise,”<sup>365</sup> and Justice Sandra Day O'Connor remarked that if Minnesota “has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly

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360 See, e.g., N.Y. Ct. R. § 17.4(a) (2010) (requiring judges dealing with criminal or family matters to attend a program addressing domestic violence); N.J. STAT. ANN. § 2C:25–20b(1)–(3) (West 2010) (requiring the New Jersey Administrative Office of the Courts to develop and implement judicial training concerning the impact and dynamics of domestic violence).

361 See Seth Anderson, Opening Statement of Moderator, Anatomy of a Merit Selection Victory (Feb. 13, 2009), in 93 JUDICATURE 6, 6 (2009) (“The debate over the best methods of selecting judges really is as old as the republic.”).

362 THE CONSTITUTIONAL DEBATES OF 1847, at 461–62 (Arthur Charles Cole ed., 1919). Davis may have held a different opinion had his own Whig Party, rather than the Democrats, controlled the Illinois legislature. See also Bruce I. Petrie, Sr., *Political Patronage in Ohio: Governor Taft's Judicial Appointees*, 77 U. CIN. L. REV. 645, 645 (2008) (criticizing the fact that every judicial officer appointed by the governor belonged to the same political party (citation omitted)).

363 THE CONSTITUTIONAL DEBATES OF 1847, *supra* note 362, at 462.

364 Abrahamson, *supra* note 283, at 76; see also CHRIS W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 139 (2009); Tony Mauro, *On Judicial Elections and Judicial Recusal*, THE BLT: THE BLOG OF LEGAL TIMES (Oct. 12, 2009, 11:30 AM), <http://legal-times.typepad.com/blt/2009/10/on-judicial-elections-and-judicial-recusal.html> (reporting that Pennsylvania Supreme Court Justices Seamus McCaffery and Debra Todd presented the case for judicial elections before a meeting of the American Academy of Appellate Lawyers).

365 N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring).

electing judges.”<sup>366</sup>

Each side of the debate offers its own set of empirical data. Support for the argument that elected judges bring a greater sense of impartiality to the bench can be found in a recent study purportedly showing that merit-selected judges are more likely to suffer discipline for misconduct evidencing a “lack of impartiality” than judges selected by other means.<sup>367</sup> In further support of their position, election proponents cite a poll commissioned by the ABA finding that seventy-five percent of the respondents considered elected judges “more fair and impartial” than appointed judges.<sup>368</sup>

Adherents to the theory that appointed judges are less partisan cite their own polling data demonstrating the public’s dislike of campaign contributions in judicial races. According to one study, sixty-nine percent of Americans are convinced that raising campaign funds influences a judge’s courtroom decisions to a “great” or “moderate” extent.<sup>369</sup> The percentage believing that contributions influence decisions is even higher among leaders in the business community.<sup>370</sup> Advocates of an appointed judiciary also flaunt a set of empirical studies arguably demonstrating that elected judges tailor their rulings to secure votes and campaign contributions.<sup>371</sup>

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<sup>366</sup> Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring).

<sup>367</sup> Jona Goldschmidt et al., *The Relationship Between Method of Judicial Selection and Judicial Misconduct*, 18 WIDENER L.J. 455, 475 (2009). *But see* Malia Reddick, *Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline* 6 (Am. Judicature Soc’y, White Paper June 15, 2010), available at <http://www.ajs.org/selection/docs/JudgingQualityJudSelectMethods.pdf> (concluding that a review of disciplinary actions in nine states “support[s] the hypothesis that merit-selected judges are disciplined less often than elected judges.”).

<sup>368</sup> James Bopp, Jr. & Josiah Neeley, *How Not to Reform Judicial Elections*: Davis, White, and the Future of Judicial Campaign Financing, 86 DENV. U. L. REV. 195, 199 (2008).

<sup>369</sup> KATHLEEN HALL JAMIESON, THE ANNENBERG PUBLIC POLICY CENTER, PUBLIC UNDERSTANDING OF AND SUPPORT FOR THE COURTS: 2007 ANNENBERG PUBLIC POLICY CENTER JUDICIAL SURVEY RESULTS (2007), [http://www.annenbergpublicpolicycenter.org/Downloads/20071017\\_JudicialSurvey/Judicial\\_Findings\\_10-17-2007.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Judicial_Findings_10-17-2007.pdf); accord Deborah Goldberg, *Public Funding of Judicial Elections: The Roles of Judges and the Rules of Campaign Finance*, 64 OHIO ST. L.J. 95, 97 n.11 (2003) (“Poll after poll demonstrates the public’s belief that money contributed to candidates for the bench affects judicial decision-making.”).

<sup>370</sup> CHRISTIAN W. PECK, ZOGBY INT’L, ATTITUDES AND VIEWS OF AMERICAN BUSINESS LEADERS ON STATE JUDICIAL ELECTIONS AND POLITICAL CONTRIBUTIONS TO JUDGES 4 (2007), available at [http://www.faircourts.org/media/cms/CED\\_FINAL\\_repor\\_ons\\_14MAY07\\_BED4DF4955B01.pdf](http://www.faircourts.org/media/cms/CED_FINAL_repor_ons_14MAY07_BED4DF4955B01.pdf) (finding that 79% of business leaders believe that campaign contributions impact judicial decisions).

<sup>371</sup> Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 625 (2009) (purporting to provide “empirical evidence that elected state supreme court judges routinely adjust their rulings to attract votes and campaign money”); see also Aman McLeod, *Bidding for Justice: A Case Study About the Effect of Campaign Contributions on Judicial Decision-Making*, 85 U. DET. MERCY L. REV. 385, 400 (2008) (suggesting that a Michigan Supreme Court Justice is more likely to vote for a party if the party’s lawyers have made a substantially larger campaign contribution to the justice than the opposing party’s lawyers).

Due to conflicting polls and studies, the debate over judicial selection remains driven by intuition and ideology rather than empiricism.<sup>372</sup> Without clear-cut evidence as to which selection method produces the most impartial judges, there is no compelling argument for choosing one system over the other. And even if there were, the ideological component of the debate might prevent wholesale adoption of the empirically proven “best” method of selection.<sup>373</sup> As a result, strategies must be developed to ensure that impartial judges are chosen regardless of the selection method.

#### a. Emphasizing Impartiality in the Judicial Appointment Process

Judicial nominating commissions exist in thirty-three states and the District of Columbia.<sup>374</sup> The commissions vary in duties, composition, and procedures, but each has the responsibility to review and evaluate applicants for state judicial posts and recommend a group of the applicants to the appointing authority.<sup>375</sup> Commission members are usually provided with a set of criteria upon which to assess the candidates. Obviously, the criteria should identify the traits of a good judge and emphasize the nonnegotiable quality of impartiality. Inexplicably, some jurisdictions totally omit the concept of fairness from their stated selection standards. For example, Indiana directs that each member of the state’s judicial nominating commission evaluate judicial candidates on the following considerations: (1) “legal education,” (2) “legal writings,” (3) reputation and experience as a lawyer or judge, (4) health, (5) “financial interests,” (6) public service and efforts to improve the administration of justice, and (7) “other pertinent information.”<sup>376</sup>

The American Bar Association suggests five selection criteria: (1) “experience,” (2) “integrity,” (3) “professional competence,” (4) “judicial temperament,” and (5) “service to the law” and administration of justice.<sup>377</sup>

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372 See Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. Tol. L. Rev. 551, 554 (2008) (“[T]he debate over judicial selection is inherently ideological in nature, such that no empirical transformation of the debate has yet taken place.”).

373 *Id.* at 589.

374 AM. JUDICATURE SOC’Y, JUDICIAL MERIT SELECTION: CURRENT STATUS tbl.2 (2010), available at [http://www.judicialselection.us/uploads/Documents/Judicial\\_Merit\\_Charts\\_ofFC20225EC6C2.pdf](http://www.judicialselection.us/uploads/Documents/Judicial_Merit_Charts_ofFC20225EC6C2.pdf).

375 See *Methods of Judicial Selection: Judicial Nominating Commissions*, AM. JUDICATURE SOC’Y, [http://www.judicialselection.us/judicial\\_selection/methods/judicial\\_nominating\\_commissions.cfm?state=](http://www.judicialselection.us/judicial_selection/methods/judicial_nominating_commissions.cfm?state=) (last visited Oct. 9, 2010) (summarizing the rules governing the operation of each state judicial nominating commission).

376 IND. CODE ANN. § 33-27-3-2 (LexisNexis 2004).

377 COMM’N ON STATE JUDICIAL SELECTION STANDARDS, AM. BAR ASS’N, STANDARDS ON STATE JUDICIAL SELECTION 7 (2000), available at <http://www.abanet.org/judind/downloads/reformat.pdf>.

While impartiality is not listed, judicial temperament is defined to include “a commitment to equal justice under law, freedom from bias, ability to decide issues according to law, courtesy and civility, open-mindedness and compassion.”<sup>378</sup> But if impartiality lies at the heart of our judicial system, then it deserves specific recognition as an ABA selection criterion. This is especially true because some states that pattern their selection standards after the ABA recommendations do not include the ABA’s definition of judicial temperament.<sup>379</sup> Emphasizing impartiality in selection criteria is vital because it reminds the public and nominating commission members of this essential trait<sup>380</sup> and focuses the selection process on candidates who exhibit it.<sup>381</sup>

The concept of impartiality is likewise short-changed in the application forms used for judicial candidates. Illustrative is the very thorough Application for Nomination to Judicial Office used in Arizona.<sup>382</sup> It contains seventy-one questions, but not a single inquiry mentions impartiality.<sup>383</sup> Adding a question requiring each candidate to explain why he or she could be relied upon to exercise judicial power without bias or favoritism, and independent of political or other irrelevant considerations, would help fortify public trust in the selection process.<sup>384</sup> This type of question also

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378 *Id.*

379 For example, the Utah *Manual of Procedures for Justice Court Nominating Commissions* defines judicial temperament to include “common sense, compassion, decisiveness, firmness, humility, open-mindedness, patience, tact and understanding.” UTAH STATE COURTS, MANUAL OF PROCEDURES FOR JUSTICE COURT NOMINATING COMMISSIONS 19 (2010), available at [http://www.utcourts.gov/resources/rules/ucja/append/a\\_nomcom/appa.pdf](http://www.utcourts.gov/resources/rules/ucja/append/a_nomcom/appa.pdf). The Manual also suggests that in addition to the ABA selection guidelines the commission members “may wish to consider” a candidate’s impartiality. *Id.* at 21.

380 This is especially important for judicial screening committees that include non-attorney members. See, e.g., ARIZ. CONST. art. 6, §§ 36, 41 (requiring five attorneys and ten non-attorneys on judicial nominating commissions).

381 See Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 117 (2007).

382 ARIZ. JUDICIAL NOMINATING COMM’NS, APPLICATION FOR NOMINATION TO JUDICIAL OFFICE, available at [http://www.supreme.state.az.us/jnc/view\\_applications.htm](http://www.supreme.state.az.us/jnc/view_applications.htm).

383 *Id.*; see also JUDICIAL QUALIFICATIONS COMM’N OF S.D., PERSONAL DATA QUESTIONNAIRE—JUDGE (revised June 2008), available at <http://www.sdjudicial.com/uploads/downloads/JQC/JQCjudge%20app1.pdf#search=> (personal data questionnaire consisting of eight pages with no questions concerning impartiality); OKLA. JUDICIAL NOMINATING COMM’N, APPLICATION FOR OKLAHOMA JUDICIAL VACANCY 11, available at <http://www.oscn.net/Sites/JudicialNominatingCommission/documents/application%20form.pdf> (including no questions regarding impartiality other than inquiring if the applicant belongs to any organization that restricts membership on the basis of sex, race, color, religion, or national origin); IDAHO JUDICIAL COUNCIL, APPLICATION FOR APPOINTMENT TO JUDICIAL OFFICE (revised Mar. 2007), available at <http://www.judicialcouncil.idaho.gov/Application.pdf> (same); DC FED. LAW ENFORCEMENT NOMINATING COMM’N, JUDICIAL CANDIDATE QUESTIONNAIRE 23, available at <http://www.norton.house.gov/images/stories/us-district-court-judge-questionnaire.pdf> (same).

384 The Montgomery County, Tennessee, Human Resources Department’s applica-



reminds candidates of the importance of impartiality and encourages those possessing the trait to apply.<sup>385</sup> At a minimum, applications for judicial vacancies should include a yes-or-no question asking whether the candidate will comply with the judicial code's mandate that judges perform all duties fairly and impartially.<sup>386</sup> The Hawaii Judicial Selection Commission takes this approach and includes the following question in its application:

Canon 2 of the Hawai'i Revised Code of Judicial Conduct states that a judge should perform the duties of judicial office impartially, competently, and diligently. Is there any reason why you could not meet the requirements of Canon 2 and its rules and commentary if you are appointed to judicial office?<sup>387</sup>

As stated by Professor Pimentel, “if we want to preserve judicial independence—or, more precisely, *a system that affords due process to all parties, impartially and according to law*—our judicial screening and selection criteria should weight these characteristics heavily.”<sup>388</sup> And the public should know that these selection factors are heavily weighed.

#### b. Emphasizing Impartiality in Judicial Elections

Infusing the primacy of impartiality into the judicial nomination commission process can be readily accomplished by highlighting the concept in the selection criteria, judicial application form, and interview process. While these uncomplicated, cost-free steps will not insure the selection of persons possessing the impartiality gene, they will alert commission members, judicial applicants, and the public of the importance the government places on fairness and impartiality.

Advancing the cause of judicial impartiality in the election process is much more difficult. Thousands of voters, rather than a small number of commission members, must be convinced of the overriding importance of impartiality. Moreover, the electorate must withstand a constant

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tion for judicial office includes questions focusing on the applicant's ability to administer justice impartially. MONTGOMERY CNTY. TENN. HUMAN RESOURCES DEP'T, APPLICATION FOR NOMINATION TO JUDICIAL OFFICE 8, *available at* <http://www.montgomerycountyttn.org/county/employment/JudicialApplication.pdf> (requesting 150 word essays on the applicant's approach to addressing issues of bias in the judicial system and the applicant's activities demonstrating a commitment to equal justice under the law).

<sup>385</sup> See COMM'N ON STATE JUDICIAL SELECTION STANDARDS, AM. BAR ASS'N, *supra* note 377, at 8 (“[D]isclosure of selection criteria encourages qualified candidates to seek judicial office by informing them of the qualities sought in a qualified judge.”).

<sup>386</sup> MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007) (“A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”).

<sup>387</sup> HAW. JUDICIAL SELECTION COMM'N, APPLICATION FOR JUDICIAL OFFICE 19, *available at* <http://www.courts.state.hi.us/docs/form/jsc/JSP084.pdf>.

<sup>388</sup> Pimentel, *supra* note 279, at 24 (citation omitted).

bombardment of the counter-impartiality message broadcast by single-issue, highly partisan, interest groups. These groups define the best candidate not in terms of dedication to the rule of law, but in terms of the judicial candidate's personal opinion concerning abortion, guns, gay marriage, tort reform, or other controversial political or social issue. Nevertheless, simple strategies are available to increase the emphasis on judicial impartiality during the election process.

### (1) Candidate Questionnaires and Interviews

The importance of impartiality can be emphasized in the candidate questionnaires and interviews utilized by bar associations, civic organizations, and the media. The League of Women Voters, for example, suggests that its local chapters ask individuals seeking a seat on the bench to define judicial independence and discuss its importance to the legal system.<sup>389</sup> The League also requests that candidates explain their approach to handling a conflict between personal beliefs and the law.<sup>390</sup> Placing a similar emphasis on impartiality, the *Philadelphia Inquirer* based its recent endorsement of incumbent judges, in part, on their ability to document instances in which they acted to preserve judicial independence.<sup>391</sup> The *Inquirer* asked non-incumbent office-seekers, "how do you plan to remain independent if elected to the bench?"<sup>392</sup> All judicial candidates in Pennsylvania were invited to describe means by which they planned to keep their current or future courtrooms bias-free.<sup>393</sup> More common, however, is the unhelpful, boiler-plate inquiry offered by civic groups and newspapers that merely requests a summary of the judicial candidate's experience and education and an essay explaining why the candidate should be elected.<sup>394</sup>

Promoting the fundamental value of fairness requires that civic groups, bar associations, and the press beseech candidates to define impartiality and describe specific measures that they will employ to maintain and enhance that judicial quality.

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389 LEAGUE OF WOMEN VOTERS, SAFEGUARDING US DEMOCRACY: PROMOTING AN INDEPENDENT JUDICIARY I (2007-2009), available at <http://www.lwv.org/AM/Template.cfm?Section=Home&section=Miscellaneous&template=/CM/ContentDisplay.cfm&ContentFileID=2290>.

390 *Id.*

391 *Inquirer Judicial Candidate Questionnaire*, PHILA. INQUIRER (Mar. 6, 2009, 9:11 PM), <http://phillynews.wordpress.com/category/pennsylvania-primary-2009>.

392 *Id.*

393 *Id.*

394 See, e.g., *Editorial Board Endorsements: James R. Epstein*, CHI. TRIB., <http://primaries2010.elections.chicagotribune.com/editorial/james-r-epstein/> (last updated Mar. 14, 2010).

## (2) Pre-Judicial Education

Although endorsed by the ABA,<sup>395</sup> the California Commission for Impartial Courts,<sup>396</sup> and several respected judges and commentators,<sup>397</sup> the idea of pre-judicial education has been slow to gain a foothold. A few states require candidates for elected judicial office to complete a short course in ethical campaign practices.<sup>398</sup> On a more comprehensive scale, the Ohio legislature is considering a “judicial candidate qualification program.”<sup>399</sup> If enacted, the proposal would mandate that judicial candidates attend a forty-hour course covering civil and criminal procedure, rules of evidence, constitutional law, judicial demeanor, and other subjects deemed appropriate by the Supreme Court of Ohio.<sup>400</sup>

Pre-judicial education has the potential to serve as an important tool in enhancing judicial impartiality.<sup>401</sup> To do so, however, the curriculum cannot be limited to the “nuts and bolts” of substantive and procedural law or restricted to hints on how to avoid bad appearances. A significant portion of any pre-bench program must provide a forum for exploring the theoretical underpinnings of the impartial magistrate, the cognitive illusions discussed previously,<sup>402</sup> and the everyday situations successful candidates will face that test their ability to maintain courtroom neutrality. Training of this type may cause some of the more impartiality-challenged aspirants to see the light and self-select out of the process.<sup>403</sup> The remaining candidates will have a new, or at least enhanced, notion of the meaning of judicial impartiality, in theory and in practice. While beneficial regardless of the method of judicial selection, pre-judicial education is especially valuable

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395 AM. BAR ASS'N HOUSE OF DELEGATES, RESOLUTION NO. 113, at 1, 9-10 (2009), *available at* [http://www.abanet.org/judind/pdf/HOD%20Resolution%20%20Report %20IJE%20Adopted113.pdf](http://www.abanet.org/judind/pdf/HOD%20Resolution%20%20Report%20IJE%20Adopted113.pdf) (urging states to adopt pre-selection judicial education programs).

396 JUDICIAL COUNCIL OF CAL., COMMISSION FOR IMPARTIAL COURTS: FINAL REPORT 73–74 (2009), *available at* <http://www.courtinfo.ca.gov/jc/tflists/documents/cicfinalreport.pdf>.

397 *See, e.g.*, Marc T. Amy, *Judiciary School: A Proposal for a Pre-Judicial LL.M. Degree*, 52 J. LEGAL EDUC. 130, 130 (2002); Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 201 (2010); Ellen F. Rosenblum, *Judicial Ethics for All: An Expansive Approach to Judicial Ethics Education*, 28 JUST. SYS. J. 394, 396 (2007).

398 *See, e.g.*, OHIO CODE OF JUDICIAL CONDUCT R. 4.2(A)(4) (2009) (requiring two hours of instruction on campaign practices, finance, and ethics); N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(f) (2010) (permitting candidates to complete an education program in person, by videotape, or over the Internet).

399 H.B. 173, 127th Gen. Assemb., Reg. Sess. (Ohio 2007–08).

400 *Id.*

401 Fisher, *supra* note 397, at 201. Fisher argues that one purpose of pre-judicial education is to populate the bench with men and women “more consciously committed to fulfilling the ideals of the fair and impartial administration of justice for all.” *Id.*

402 *See id.* at 196 (suggesting that pre-judicial education include sensitivity training regarding stereotyping and subconscious bias).

403 *See Rosenblum, supra* note 397, at 395.

in states with an elected judiciary. In those jurisdictions, there may be no judicial screening process, candidates may be non-lawyers,<sup>404</sup> and some candidates will have absolutely no idea what it means to be a judge.<sup>405</sup>

### (3) The Responsibility of Judicial Candidates to Promote Impartiality

The job of instilling an appreciation and respect for judicial impartiality during a campaign lies in large part with the judicial candidates themselves. And most candidates do stress their commitment to fairness and dedication to the rule of law. Too often, however, judicial aspirants stray from the impartiality message in order to satisfy, or at least avoid displeasing, interest groups with a large membership, a large pocketbook, or both.

The 2007 Code encourages judicial candidates to reinforce the importance of the neutral magistrate during campaign appearances. Comment fifteen to Rule 4.1 of the Code advises that judicial candidates, when discussing disputed or controversial legal or political issues like abortion or the death penalty, “*should* also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected.”<sup>406</sup> Comment thirteen to Rule 4.1 suggests that a candidate “*should* acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.”<sup>407</sup>

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404 Approximately thirty-three states allow non-attorney judges to preside in some cases. SPECIAL COMM’N ON THE FUTURE OF THE N.Y. STATE COURTS, JUSTICE MOST LOCAL: THE FUTURE OF TOWN AND VILLAGE COURTS IN NEW YORK STATE 30 (2008), *available at* [http://www.nyslocalgov.org/pdf/Justice\\_Most\\_Local.pdf](http://www.nyslocalgov.org/pdf/Justice_Most_Local.pdf).

405 The Special Commission on the Future of New York State Courts noted some of the outrageous behavior of the Justices of the Town and Village Courts, seventy-percent of whom are non-lawyers:

[J]ustices jailed defendants absent a guilty plea or trial; evicted litigants without first holding a proper proceeding; refused to appoint lawyers for criminal defendants who were entitled to representation; jailed litigants for failing to pay a fine; adjudicated cases where their own family members were involved; presided over proceedings while intoxicated; freed crime suspects as favors to friends; fixed the outcome of cases; communicated with witnesses *ex parte*, . . . and admitted unfamiliarity with the most basic of legal principles. . . . [J]ustices were found to have made blatantly racist or other disparaging statements. Moreover, there were several alarming accounts of justices who—in the context of presiding over domestic violence matters—made statements to the effect that the victim probably deserved the abusive treatment or had exaggerated its severity.

*Id.* at 39; *see also* Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 477 (2004) (suggesting that judicial education programs are “particularly useful” for lower-level judges who sometimes are not lawyers).

406 MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 15 (2007) (emphasis added).

407 *Id.* R. 4.1 cmt. 13 (emphasis added).

Regrettably, the term “should” renders these provisions aspirational guides, not enforceable rules.<sup>408</sup> As such, they can be ignored without fear of discipline. Making both comments mandatory by replacing the word “should” with the word “must” would add teeth to the admonishments and insure impartiality a place in campaign rhetoric.<sup>409</sup>

Judicial candidates who fail to temper statements of personal belief on hot-button issues with assurances that they will follow the law should be called out by bar associations, judicial watchdog groups, other candidates, and the press. Failing to mention the duty of impartiality when discussing controversial social or political issues violates comments thirteen and fifteen, regardless of whether the provisions are mandatory or hortatory. A judge’s duty is not limited to compliance with the disciplinary rules found in a judicial code. Judges also have an explicit duty of “seeking to achieve” even the purely “aspirational goals” of the Code.<sup>410</sup> Thus, failure to comply with the comments reflects adversely on the willingness of an individual to abide by ethical standards—a fact that the voting public has a right to know.

### c. Testing Judicial Candidates for Impartiality

Is there a test available to weed out biased individuals from the merit and elective selection processes? The most likely candidate is the extremely popular<sup>411</sup> but controversial<sup>412</sup> series of Implicit Association Tests created by Brian Nosek, Mahzarin Banaji, and Tony Greenwald.<sup>413</sup> These computerized tests, designed to identify gender, racial, ethnic, age, religious, and other subconscious biases, have been taken by 4.5 million individuals

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408 Use of the term “should” in a Rule or comment of the 2007 Code renders the provision permissive, not mandatory. *Id.* scope 2 & 3. The term “must” renders a Rule binding and enforceable. *Id.* scope 3.

409 It is beyond the scope of this Article to examine the extent to which a code of judicial conduct may constitutionally require candidates for judicial office to make particular statements or refrain from making certain statements during a political campaign. *See* Republican Party of Minn. v. White, 536 U.S. 765, 765–68 (2002). It is worth noting, however, that the 2007 Code provides that a judicial candidate “must” instruct his or her campaign committee to accept only lawful, reasonable, and appropriate contributions. MODEL CODE OF JUDICIAL CONDUCT R. 4.4 cmt. 3 (2007). This provision places an affirmative and enforceable duty on a judge to give the instruction to committee members. *See id.* scope 3.

410 MODEL CODE OF JUDICIAL CONDUCT scope 4 (2007).

411 Hart Blanton et al., *Strong Claims and Weak Evidence: Reassessing the Predictive Validity of the IAT*, 94 J. APPLIED PSYCHOL. 567, 567 (2009) (noting the popularity of the Implicit Association Tests).

412 Ingrid E. Castro, *Implicit Racism*, in 2 ENCYCLOPEDIA OF RACE AND RACISM 156, 157 (John Hartwell Moore ed., 2008) (“Project Implicit is a large and somewhat controversial psychological study . . .”).

413 *Project Implicit Team*, PROJECT IMPLICIT, <http://projectimplicit.net/people.php> (last visited Sept. 12, 2010).

worldwide.<sup>414</sup> The object of each test is to assess the “strength of temporal associations” between a category of people and “positively or negatively evaluative terms.”<sup>415</sup> For example, the “Race” Implicit Association Test asks subjects to strike a certain computer key with their left hand when a black face or a “negative” word (e.g., evil, war) appears on the computer screen and to strike a different key with their right hand when a white face or positive word (e.g., love, hope) is shown.<sup>416</sup> In the second part of the test, the right hand key is struck for positive words and black faces and the left hand key is struck for negative words and white faces.<sup>417</sup> The time it takes for a subject to match positive and negative words with white and black faces is measured.<sup>418</sup> Seventy-five to eighty percent of the Asian and white test-takers require less time to match positive words with white faces than with black faces.<sup>419</sup> As a result, some researchers conclude that most Asians and whites have an implicit preference for Caucasians and an implicit bias against African-Americans.<sup>420</sup>

Should Implicit Association Tests be given to judicial candidates as a screening device? The consensus is that the tests are inappropriate for use in determining the fitness of an individual to serve as a judge.<sup>421</sup> Three primary considerations support this conclusion. First, and most telling, the test creators argue against the use of their assessment device as a selection tool and state that they will testify against anyone who tries to use an Implicit Association Test for that purpose.<sup>422</sup> Second, factors other than implicit bias could account for the variation in reaction times on the tests. Sympathy for

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<sup>414</sup> See *General Information*, PROJECT IMPLICIT, <http://projectimplicit.net/generalinfo.php> (last visited Sept. 12, 2010).

<sup>415</sup> John Duckitt, *Prejudice*, in 5 *NEW DICTIONARY OF THE HISTORY OF IDEAS 1890, 1893* (Maryanne Cline Horowitz ed., 2005).

<sup>416</sup> See *Implicit Association Test (Race)*, ONLINE PSYCHOLOGY LABORATORY, <http://opl.apa.org/Experiments/About/AboutIATRace.aspx> (last visited Sept. 10, 2010).

<sup>417</sup> *Id.*

<sup>418</sup> *Id.*

<sup>419</sup> See *General Information*, *supra* note 414.

<sup>420</sup> *Id.* Additionally, an age-related Implicit Association Test demonstrates that over eighty percent of respondents display “implicit negativity toward the elderly compared to the young.” *Id.*

<sup>421</sup> Rachlinski et al., *supra* note 331, at 1227–28 (“We do not suggest that people who display strong white preferences on the IAT should be barred from serving as judges, nor do we even support using the IAT as a measure of qualification to serve on the bench. The direct link between IAT score and decisionmaking is far too tenuous for such a radical recommendation.” (citation omitted)).

<sup>422</sup> Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12 (“The problem, Banaji says, is that all those uses, [employment screening and proving discrimination], assume that someone who shows bias on the test will always act in a biased manner. Because this isn’t true, Banaji and her colleagues argue against the use of the IAT as a selection tool or a means to prove discrimination. Banaji says she and her colleagues will testify in court against any attempt to use the test to identify biased individuals.”).

(or less familiarity with) the minority group, compassion or guilt regarding the plight of the disadvantaged, knowledge of cultural stereotypes, test anxiety, and the test-taker's cognitive and physical agility might explain differing reaction times.<sup>423</sup> Third, evidence that Implicit Association Tests accurately predict discriminatory behavior is “surprisingly weak.”<sup>424</sup>

The inappropriateness of the Implicit Association Tests as a screening device does not diminish the fact that the tests are a powerful and personalized starting point in educating judges about implicit bias. Once judges accept that cognitive impairments interfere with decision-making, steps can be taken to “both facilitate the reduction of unconscious biases and encourage judges to use their abilities to compensate for those biases.”<sup>425</sup>

2. *Judicial Performance Evaluations.*—Lawyers and bar associations assessed judicial performance long before states began their own evaluation programs.<sup>426</sup> Whether privately or governmentally sponsored, the primary purpose of performance evaluations is to allow judges to correct their faults and improve overall performance.<sup>427</sup> This is accomplished by providing

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423 Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023, 1081–84 (2006).

424 Blanton, *supra* note 411, at 568 (“[W]e closely scrutinize claims that the race IAT predicts discriminatory behavior—and discover that the evidence is surprisingly weak.”); *see also* Ralph Richard Banks & Richard Thompson Ford, (*How*) *Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1111 n.180 (2009) (“Many researchers have attempted, during the past decade, to establish a link between IAT scores and discriminatory behavior, but thus far have not achieved the success for which they hoped.”); Gregory Mitchell & Philip E. Tetlock, *Facts Do Matter: A Reply to Bagenstos*, 37 HOFSTRA L. REV. 737, 747–48 (2009); Mitchell & Tetlock, *supra* note 423, at 1094. *But see* Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. (forthcoming Dec. 2010) (suggesting the predictive validity of Implicit Association Tests).

425 Rachlinski et al., *supra* note 331, at 1226.

426 In 1855, David Davis was endorsed by the lawyers of the Eighth Judicial Circuit for retention as a circuit judge. *See* KING, *supra* note 3, at 91 (“In 1855, in response to the almost unanimous demand of the bar, the people re-elected Davis as circuit judge for a six-year term.”). This endorsement took the form of a letter from twenty-four lawyers asking Davis for his “assent to an announcement of [Davis] as a candidate for re-election to the office of Judge of the Circuit Court.” Letter from Thomas M. Moffett, *supra* note 51. Such letters provided a common device for “drafting” judicial candidates in Illinois in the mid-nineteenth century. *See* EDWARD M. MARTIN, *THE ROLE OF THE BAR IN ELECTING THE BENCH IN CHICAGO* 33–34 (1936). The Chicago Bar Association began using bar polls to evaluate judicial candidates in 1887. *Id.* at 100–01; *see also* Penny J. White, *Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1064 (2002) (“[J]udicial evaluation has been a subject of debate since the late 1800s.”).

427 ILL. SUP. CT. R. 58(c) (2010) (establishing performance evaluations for the purpose of “achieving excellence in the performance of individual judges and the improvement of the judiciary as a whole”); UTAH CODE ANN. § 78A–2–104(5)(b) (LexisNexis 2008 & Supp. 2009) (defining the goal of the performance evaluation program to be improvement in the performance of individual judges); David C. Brody, *Judicial Performance Evaluations by State Governments: Informing the Public While Avoiding the Pitfalls*, 21 JUST. SYS. J. 333, 334 (2000)

individual judges with feedback and by identifying problem areas in need of judicial training.<sup>428</sup> Additionally, performance evaluations provide information for voters in jurisdictions with retention elections.<sup>429</sup>

Reinforcing impartiality during every step of the judicial evaluation process helps advance the cause of actual impartiality in several related ways. First, it brands and solidifies the concept as an accepted social norm among lawyers, judges, and the public. Second, it increases the likelihood that judges exhibiting the quality will be retained in office while those lacking the quality will not. Third, highlighting impartiality in states with retention elections refocuses the campaign debate on the rule of law rather than the judge's personal beliefs or the popularity of any single decision by the judge.<sup>430</sup> But as in the case of judicial nomination commissions,<sup>431</sup> some states have done a better job than others in declaring that impartiality counts in evaluating judicial performance.

The Judicial Performance Standards established by the Missouri Bar Association effectively reinforce the importance of impartiality in the evaluation process. The first performance measure asks whether the judge “[a]dministers justice impartially and uniformly.”<sup>432</sup> In making this determination, the Missouri Bar Evaluation Committee considers four factors, namely, whether the judge (1) “[t]reats people equally, regardless of race, gender, ethnicity, economic status, or any other factor”; (2) “[d]isplays fairness and impartiality toward each side of the case”; (3) “[i]s not affected by partisan considerations”; and (4) “[w]eighs all

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(“[M]ore than twenty states have developed [judicial performance evaluation] programs of their own in an effort to improve the performance of judges (rather than inform the public.”).

428 ARIZ. R. PROC. JUD. PERF. REV. R. 2(g)(2) (directing the state Judicial Performance Review Commission to identify educational needs and to work with the Committee on Judicial Education and Training to design courses to meet those needs).

429 INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT 3 (2006). The authors assert that judicial performance evaluation “provides a valuable source of information to voters in states where judges must face an election to remain in office.” *Id.* See COLO. REV. STAT. § 13-5-5-101(1) (2010) (declaring judicial self-improvement and voter information as the dual purpose of the Colorado Commission on Judicial Performance).

430 Rebecca Love Kourlis & Jordan M. Singer, *Using Judicial Performance Evaluations to Promote Judicial Accountability*, 90 JUDICATURE 200, 202-03 (2007) (suggesting that judicial performance evaluations influence the electorate to base its decision on a candidate's impartiality, independence, knowledge, fairness, and efficiency rather than personal opinions on “hot-button” issues); INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 429, at 4 (stating that judicial performance evaluations can refocus the debate on the fairness and knowledge of the judge rather than the judge's decision in a particular case).

431 See *supra* notes 374-381 and accompanying text (discussing the failure of many judicial nominating commissions to identify impartiality as a selection criterion).

432 *Judicial Performance Standards*, MO. BAR ASS'N, <http://www.mobar.org/data/judges10/standards.htm> (last visited Oct. 11, 2010).



evidence fairly and impartially.”<sup>433</sup> These criteria make it impossible for members of the evaluation committee to overlook the importance of impartiality. The questionnaire sent to lawyers practicing before the judge incorporates these same factors.<sup>434</sup> Thus, each lawyer completing the survey is reminded of the core value of impartiality. Equally important, the questionnaire alerts judges that fairness weighs heavily in whether they will receive a recommended rating.<sup>435</sup> Further branding impartiality as a cultural norm, the criteria appear prominently on the Missouri Bar’s website, thereby apprising the public that Missouri lawyers consider fairness and impartiality to be the trademark of a judge.<sup>436</sup>

The questionnaire sent to jurors as part of Alaska’s evaluation process gets to the heart of the matter by simply and directly asking, “[w]as the judge fair and impartial to all sides in the case?”<sup>437</sup> Kansas surveys non-attorneys, including jurors, police, court and probation staff, social service caseworkers, and others regarding a judge’s performance.<sup>438</sup> The section of the Kansas non-attorney survey entitled “Impartiality” asks four direct questions regarding the judge’s fairness: whether the judge gives litigants “a fair opportunity to be heard,” “prejudge[s] . . . cases,” “[p]resents a neutral presence on the bench,” and “[t]reats all people fairly regardless of who they are.”<sup>439</sup>

Other states fail to stress impartiality as a judicial performance standard. For example, the Utah legislature directs that the following factors be considered during the evaluation of sitting judges: “integrity,” “knowledge,” “understanding of the law,” “ability to communicate,” “punctuality,” “preparation,” “attentiveness,” “dignity,” “control over proceedings,” and “skills as a manager.”<sup>440</sup> Certainly these are important judicial traits, and it may be that the legislature intended that integrity include impartiality, but that is no reason to omit “impartiality” from the top ten list of evaluation criteria. Exhibiting the same deficiency, Hawaii Supreme Court Rule 19.4

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433 *Id.*

434 *Judging the Judges—2010*, Mo. BAR ASS’N, <http://www.mobar.org/data/judges10/index.htm> (last visited Oct. 11, 2010).

435 The Missouri Bar Association also sends a questionnaire to jurors as part of the evaluation process. The first question on the juror survey asks, “[d]id the judge treat people equally regardless of race, gender, ethnicity, economic status, or any other factor?” *Id.* The second question asks, “[d]id the judge appear to be free from bias?” *Id.*

436 See *Judicial Performance Standards*, *supra* note 430.

437 Memorandum from Alaska Jud. Council Staff to Jud. Council 15 (Feb. 7, 2008), *available at* <http://www.ajc.state.ak.us/retention/retent08/jrsrv08.pdf>.

438 *General Information*, KAN. COMM’N ON JUDICIAL PERFORMANCE, <http://kansasjudicialperformance.org/index.cfm?Page=GeneralInformation> (last visited Oct. 11, 2010).

439 *Survey of Non-Attorneys About Trial Judges*, KAN. COMM’N ON JUDICIAL PERFORMANCE, <http://www.kansasjudicialperformance.org/documents/Survey-Non-Attorneys-About-Trial-Judges.pdf> (last updated May 1, 2009).

440 UTAH CODE ANN. § 78A-2-104(5)(d) (LexisNexis Supp. 2009).

sets out judicial performance considerations to include: “(a) [l]egal ability; (b) [j]udicial management skills; (c) [c]omportment; and (d) [a]ny other criteria established by the [evaluation] committee and approved by the supreme court.”<sup>441</sup>

As demonstrated in Missouri, Alaska, and Kansas, judicial performance evaluations offer a ready-made method for promoting actual impartiality.

#### CONCLUSION

In 1789, Congress mandated that every federal judge take the following oath:

I, \_\_\_\_ \_\_\_\_, do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_\_, according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States. So help me God.<sup>442</sup>

It is no mistake that the one-sentence oath contains three references to judicial impartiality. The repetitive statements about administering justice impartially and without respect to persons or wealth were included because the drafters knew that the legitimacy of any state-imposed dispute resolution system rests upon the promise of a neutral magistrate. David Davis and his contemporaries recited this oath and were held to its standard of actual impartiality.

Today, federal judges declaim the same oath.<sup>443</sup> But the emphasis of judicial codes on appearances has altered the oath’s meaning. Judicial officers now, in effect, pledge to (1) administer justice without respect to persons, (2) appear to administer justice without respect to persons, (3) do justice to the rich and poor alike, (4) appear to do justice to the rich and poor, (5) discharge the duties of office faithfully and impartially, and (6) appear to discharge the duties of office faithfully and impartially. Placing reality and perception on the same plane devalues impartiality and overvalues appearances. Judicial conduct rules, judicial discipline, judicial education,

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441 HAW. SUP. CT. R. 19.4. The questionnaire used to evaluate Hawaii family court judges in 2008 included inquiries regarding the judge’s bias and inquiries regarding the evenhanded treatment of attorneys and litigants under the heading, “comportment.” HAW. STATE JUDICIARY, JUDICIAL PERFORMANCE PROGRAM: 2008 REPORT 49 (2008), *available at* [http://www.courts.state.hi.us/docs/jud/Jud\\_perform\\_08.PDF](http://www.courts.state.hi.us/docs/jud/Jud_perform_08.PDF). Similar survey questions relating to the impartiality of Hawaii Appellate Judges were presented under a “Fairness and Impartiality” heading. *Id.* at 5 tbl.1.

442 Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76.

443 The oath has undergone two minor, non-substantive changes since Davis’s time. The phrase, “or affirm,” has been placed within parentheses and the word “under” has been substituted for the phrase, “agreeable to.” 28 U.S.C. § 453 (2006).

and judicial advisory opinions are currently configured around perception, not fact. Virtual friends mandate judicial disqualification when real friends do not.<sup>444</sup> But as the founders recognized, it is the cultural norm of actual impartiality that legitimizes and supports a judicial system.<sup>445</sup> Appearances cannot perform the same function.<sup>446</sup> Once impartiality in fact is devalued sufficiently to become a secondary consideration, it will be replaced by a new cultural norm. The most likely candidate for the successor measure of a judge's worth is the judge's willingness to commit to partisan political or social positions, and then to deliver decisions accordingly. In that event, the ability and willingness of a tribunal to impartially discharge the judicial function, or administer justice without respect to persons or wealth, is of absolutely no value.

David Davis's performance as a judge is just one example of what takes place in courtrooms throughout the country everyday: judges setting aside personal and partisan allegiances to render fair decisions dictated by facts and law. Actual impartiality, not appearances, is the goal of the American judicial system. It is time to confirm that fact and take affirmative steps to reestablish actual impartiality as the fundamental value of judicial ethics.

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444 See *supra* notes 231–239 and accompanying text.

445 See Rachlinski et al., *supra* note 331, at 1223 (“[I]mpartiality is a prominent element in almost every widely accepted definition of the judicial role.” (citation omitted)). Not only do judicial systems depend on an absence of partiality, but “[a]lmost every important theory of morality includes the idea of impartiality.” JAMES RACHELS, *THE ELEMENTS OF MORAL PHILOSOPHY* 9 (1986).

446 See Ryan L. Souders, Note, *A Gorilla at the Dinner Table: Partisan Judicial Elections in the United States*, 25 *REV. LITIG.* 529, 539 (2006) (“The appearance of impartiality, therefore, is a necessary but insufficient element to achieving legitimacy and a neutral triadic dispute resolution system. The second and preferred path to legitimacy, however, yields the appearance of impartiality through the actual existence of impartiality.”).

