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Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence

Melinda A. Marbes

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RESHAPING RECUSAL PROCEDURES: ELIMINATING DECISIONMAKER BIAS AND PROMOTING PUBLIC CONFIDENCE

Melinda A. Marbes*

I.	INTRODUCTION	809
II.	PARTIALITY PROBLEMS	811
A.	<i>Financial or Other Personal Interests in the Case</i>	812
B.	<i>Relational Interests in the Case</i>	814
C.	<i>Political Interests in the Case</i>	816
D.	<i>Personal Bias for or Against a Party or Participant</i>	817
E.	<i>A Common Thread in Partiality Problems</i>	819
III.	CURRENT SUBSTANTIVE STANDARDS AND PROCEDURAL PRACTICES LEAD TO DEFECTIVE “SELF-DISQUALIFICATION” DECISIONS	820
A.	<i>Current Federal and State Substantive Standards for Disqualification</i>	821
1.	Federal Due Process Clause Demands an Objective Evaluation of Bias	822
2.	Non-Constitutional Disqualification Law Requires an Objective Assessment of Bias.....	824
3.	Federal Statutory Substantive Disqualification Standards Apply the Reasonable Person Test	825
4.	State Substantive Disqualification Statutes are Based Upon Objective Standards.....	827
5.	Federal and State Codes of Judicial Conduct Rely on the “Reasonable Other” Standard to Evaluate Bias.....	828
a.	<i>State Codes of Judicial Conduct Apply an Objective Appearance-Based Standard</i>	829
b.	<i>Federal Code of Judicial Conduct Applies a Similar Objective Standard</i>	832
B.	<i>Federal and State Substantive Standards Rely on an Objective Assessment of Bias to Promote Purposes of Impartiality</i>	834
C.	<i>Federal and Most State Courts Use Self-Disqualification</i>	835
1.	Disqualification Procedures Under the Federal Constitution, Statutes, and Ethical Rules.....	835

* Visiting Associate Professor, Barry University Dwayne O. Andreas School of Law; Emory University School of Law, J.D. 1988; Emory College, B.A. 1985. I am grateful for the guidance regarding my scholarly efforts offered by Ronald Raider and Michelle Slack. In addition, I genuinely appreciate the able assistance provided by reference librarians Ning Han of Concordia University School of Law and Louis Rosen of Barry Dwayne O. Andreas University School of Law, as well as the work of the members and staff of the Valparaiso University Law Review. Of course, none of these individuals are responsible for the opinions expressed or mistakes made in this Article—I am solely to blame for those errors.

808 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49

2. Disqualification Procedures Under the State Constitution, Statutes, and Ethical Rules.....	837
IV. THE CHANCY COMBINATION OF OBJECTIVE STANDARDS, SELF-DISQUALIFYING PROCEDURES, AND THE BIAS BLIND SPOT	838
A. <i>The Bias Blind Spot Distorts Disqualification Decisions</i>	839
1. Self-Enhancement and Self-Interest Blind Us to Our Own Biases ..	840
a. <i>Self-Enhancement Concerns Help Create the Bias Blind Spot</i>	840
b. <i>Self-Interest Colors Our View of Our Own Biases</i>	841
2. Naïve Realism Distorts Our View of Our Own Biases and Our View of Others’ Biases	841
a. <i>The Illusion of Objectivity</i>	843
b. <i>The Confirmation Bias and Unwarranted Perseverance of Beliefs</i>	844
3. The Introspection Illusion Confirms Our False Belief that We are Unbiased	845
4. The Bias Blind Spot Creates Differing Perceptions of Bias in Self and Bias in Others.....	845
B. <i>Bias Blind Spot Leads to Defective Disqualification Decisions and Corrodes Confidence in the Judiciary</i>	846
1. The Bias Blind Spot Leads to Defective Disqualification Decisions	846
2. The Bias Blind Spot Causes Reasonable Others to Doubt the Self-Disqualifying Jurist’s Decision.....	847
V. RESHAPING RECUSAL PROCEDURES TO AVOID THE BIAS BLIND SPOT ..	848
A. <i>Self-Disqualification Must Be Eliminated and Other Procedural Reforms Must Be Made</i>	849
1. The Challenged Jurist Must Not Be the Sole or Final Arbiter of His Own Partiality	849
a. <i>“Self-Disqualification” Must Be Eliminated</i>	852
b. <i>Denial of Self-Disqualification Decisions Must Be Reviewed Promptly and De Novo</i>	853
2. Meaningful and Timely Disclosure of Interests and Relationships Must Be Made.....	855
3. Decisions Denying Disqualification Must Include Reasons and Be in Writing and Published	857
B. <i>Criticisms and Misplaced Confidence in Jurists’ Impartiality Should Not Stand in the Way of Recusal Reforms</i>	859
1. Judge Shopping Likely Will Decrease When Challenged Jurists No Longer Decide Disqualification.....	860
2. Administrative Burdens Are Outweighed by the Benefits of Recusal Reform	861
3. The Public Will Not Lose Confidence in the Judiciary as a Result of Recusal Reform.....	862

2015]	<i>Reshaping Recusal Procedures</i>	809
4.	Even Intelligent, Informed, and Well-Intentioned Jurists Have a Bias Blind Spot	863
5.	Appellate Review Procedures Do Not Erase Errors in Disqualification Disputes	864
VI.	THE PURPOSES OF IMPARTIALITY	866
A.	<i>The Three Dimensions of Impartiality</i>	866
B.	<i>A Framework for Assessing Recusal Reforms</i>	867
1.	Promoting Fairness in Litigation	868
2.	Promoting Public Confidence in the Courts	869
3.	Promoting the Role of Jurists as Ethical Actors	869
VII.	CONCLUSION	870

I. INTRODUCTION

“Most men . . . think themselves in possession of all truth, and that wherever others differ from them it is so far error.”¹

At the founding of our nation, the grounds for disqualification of judges and justices were very few and fairly narrow. In fact, the only ground for disqualifying a jurist was that he possessed a direct pecuniary interest in the pending case.² Since that time, the grounds for judicial disqualification have slowly, but steadily, been broadened—by both the legislatures and the courts.³ Now jurists may be disqualified in all federal courts and most state courts on account of: (1) a financial or other personal interest; (2) a relational interest; (3) a political interest; or (4) other reasons reflecting actual, probable, or apparent partiality.⁴

This expansion of the grounds for disqualification reflects a shift in social science from the 18th to the 21st Centuries that changed the public’s view of the psychology of judges.⁵ The 18th Century jurist was revered as a rational economic man vulnerable only to the sway of financial interests.⁶ But, we are all legal realists now and are more likely to view jurists as ordinary people influenced by both conscious and non-conscious motives. This shift in perspective over time has resulted in

¹ Benjamin Franklin, *Literary Trials: Constitutional Convention Speech*, in 36 LITIGATION 1, 64 (2010).

² See *infra* Part II.B (discussing a judge’s relational interest in a case).

³ See *infra* Part III (noting the broadening of judicial disqualification in both the legislature and courts).

⁴ See *infra* Part II.A–C (providing examples of interests that a jurist may be disqualified for).

⁵ See *infra* Part IV.A (showing a shift in the grounds for disqualification and its effect on the public’s view of judges).

⁶ See *infra* Part II.C (describing how 18th Century jurists could be swayed by money bribes).

810 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

reforms of the substantive standards to include an increasing number of specific interest-based grounds for disqualification.⁷ However, there has been little, if any, reshaping of the procedural practices used in disqualification disputes.⁸ In fact, in all federal and most state courts the challenged jurist remains the initial, and often final, arbiter of his own actual, probable, or apparent partiality—a practice adopted long ago from English common law.⁹

As a result, we are left with an out-of-date and out-of-sync system in which the practice of “self-disqualification” prevails and other procedural protections are eschewed. At the same time, the substantive standards have shifted to require the challenged jurist to make an objective assessment of his own actual, probable, or apparent biases in an increasing number of instances.¹⁰ This chancy combination of the substantive standards and the procedural practices introduces the risk of systemic error in disqualification decisions because it requires the challenged jurist to be unbiased about his own biases.¹¹ That objectivity, we now know, is virtually impossible due to the Bias Blind Spot.¹² As a result, the procedural practices used in disqualification disputes need to be reshaped to account for the Bias Blind Spot.¹³

Given how the Bias Blind Spot operates, those reforms must include: (1) either eliminating the challenged jurist from the decision making process or, at a minimum, providing for prompt *de novo* review of the challenged jurist’s determination; (2) requiring meaningful disclosure by both the jurist and the parties; and (3) mandating that any order denying disqualification be in writing, include reasons, and be published.¹⁴

In support of this thesis, Part II of this Article describes the most prevalent and persistent problems with partiality through a series of examples from the United States Supreme Court and the highest state courts, which illuminate the four basic types of conflicts or biases.¹⁵ In Part III the interplay of substantive standards and current procedural

⁷ See *infra* Part III.A (explaining specific federal and state interest-based grounds for disqualification).

⁸ See *infra* Part V (analyzing the ways in which recusal procedures need to be reshaped to avoid the Bias Blind Spot).

⁹ See *infra* Part III.C (noting that federal and most state courts use self-disqualification).

¹⁰ See *infra* Part III.A.5 (discussing the objective standard used by federal and state codes of judicial conduct).

¹¹ See *infra* Part IV.A (providing that the Bias Blind Spot distorts disqualification decisions).

¹² See *infra* Part IV (defining the Bias Blind Spot).

¹³ See *infra* Part V.A (recommending new procedural reforms for self-disqualification).

¹⁴ See *infra* Part V.A (listing the procedural reforms).

¹⁵ See *infra* Part II (describing the problems with partiality).

practices in disqualification disputes is examined.¹⁶ In Part IV the fundamental features of the Bias Blind Spot that interfere with a jurist's clear vision of his own biases are described so that the procedural reforms suggested in Part V can be evaluated for effectiveness.¹⁷ Part V also addresses the most common criticisms or challenges to the proposed procedural reforms.¹⁸ In Part VI the primary purposes of partiality in our justice system—protection of litigants' rights to a fair trial, creation of public confidence in the courts, and support of jurists as ethical actors—are explored to give a clearer vision of the goals that recusal reform should realize.¹⁹ This Article concludes that the proposed procedural reforms will further the identified goals of disqualification by creating disqualification procedures that are, or at least appear to be, impartial.²⁰

II. PARTIALITY PROBLEMS

The problem of judicial partiality pre-dates the creation of our nation and has persisted throughout recorded time.²¹ In fact, some of the earliest references to judicial conflicts of interest in Western literary and legal texts date back to antiquity.²² Since that time, both literature and the law have chronicled persistent problems with the partiality of jurists.²³ While there are a variety of ways these partiality problems could be categorized, at least one well-respected scholar has identified four general grounds for disqualification based upon a jurist's partiality: (1) financial and other personal interests; (2) relational interests; (3) political interests; and (4) other bias.²⁴ These four general grounds are

¹⁶ See *infra* Part III (examining substantive and current procedural practices).

¹⁷ See *infra* Part IV (describing the Bias Blind Spot).

¹⁸ See *infra* Part V (addressing criticisms to the proposed procedural reforms).

¹⁹ See *infra* Part VI (exploring goals of recusal reform).

²⁰ See *infra* Part VII (concluding that the proposed procedural reforms will further the goals of disqualification).

²¹ See Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 498 (2013) [hereinafter *The Dimensions of Judicial Impartiality*] (noting that impartiality dates back to antiquity).

²² See *id.* (quoting FRANKLIN ADAM PIERCE, BOOK OF QUOTATIONS 466 (1952). "Plato recounts that in 399 BC Socrates described a judge's responsibilities in the following way: 'Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.'" *Id.*

²³ See *id.* at 499 (discussing partiality problems of the past with reference to literature).

²⁴ See *id.* at 499–505 (describing four categories of partiality problems). The terms "impartial" and "unbiased" are not identical. The Black's Law Dictionary defines "impartial" as "unbiased and disinterested." BLACK'S LAW DICTIONARY 568 (10th ed. 2014). The term "bias" is defined as an inclination, prejudice, or predilection and "disinterested" means "free from bias, prejudice, or partiality [or] not having a pecuniary interest." *Id.*

812 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

briefly described and illustrative recent examples are explained to set the stage for a discussion about how the combination of current substantive standards and procedural rules creates partiality problems that the reforms suggested in this Article are designed to address.²⁵

A. *Financial or Other Personal Interests in the Case*

There are several types of personal interests that may disqualify a jurist from hearing a case, but the most common and obvious are financial interests.²⁶ The “archetype of the partial judge is the corrupt jurist who solicits or accepts bribes.”²⁷ However, partial judges are not limited to those who take the bribes, but also include jurists who actually do or, at least appear to, misuse judicial power for personal gain in other forms: indirect financial benefit, sexual favors, and reputational interests.²⁸ These partiality problems exist for jurists presiding over cases in both the federal and state court systems, including the courts of last resort.²⁹

In recent years the financial and personal interests of judges and justices who are elected to the bench have received a lot of attention in the scholarly and public debates.³⁰ Perhaps the most notable recent example at the level of a state’s highest court is *Caperton v. A.T. Massey Coal Company, Inc.*, in which the acting Chief Justice Brett Benjamin refused to recuse himself even though the CEO of the party in whose favor Chief Justice Benjamin voted had provided nearly \$3.5 million to support the jurist’s election to the state supreme court because Chief Justice Benjamin believed he was not, in fact, biased.³¹ The matter was litigated all the way to the United States Supreme Court (“SCOTUS”), which held that the Due Process Clause of the U.S. Constitution mandated Chief Justice Benjamin’s disqualification because the election

While these terms are not exactly synonymous, they are sufficiently similar—at least when used in the judicial disqualification context—as to be used interchangeably in this Article.

²⁵ See *infra* Part II.A-D (discussing partiality problems).

²⁶ See *The Dimensions of Judicial Impartiality*, *supra* note 21, at 500 (finding examples of personal interests that suggest actual, probable, or apparent partiality in literature).

²⁷ *Id.* at 499.

²⁸ See *id.* at 499–501 (exploring literature and actual cases to provide examples of bribes, indirect financial benefits, and sexual favors gained through abuse of judicial power).

²⁹ See *infra* notes 31–35 and accompanying text (discussing the partiality of state and federal judges).

³⁰ See *infra* notes 31–38 and accompanying text (providing examples of judges with financial interests).

³¹ *Caperton v. A.T. Massey Coal Co., Inc.*, 679 S.E.2d 223, 285–86 (W. Va. 2008) (Benjamin, C.J., concurring) (stating that “the touchstone of a judicial system’s fairness is actual justice” which “derives from actual impartiality”).

support offered by an interested party created “a constitutionally intolerable probability of actual bias.”³²

However, even jurists appointed for life terms are not immune from partiality problems based upon personal interests—financial or otherwise.³³ For example, in 2011, the impartiality of both Justice Scalia and Justice Thomas was questioned because they participated in the *Citizens United v. FEC* case after both Justices apparently attended an invitation-only political retreat hosted by Koch Industries, Inc., whose political action committee supported the dismantling of the campaign finance laws at issue in the *Citizens United* case.³⁴ Of course, Justices Scalia and Thomas are not the only federal judges to attend such junkets.³⁵ In addition, there are other examples of questionable refusals to recuse involving the personal interests (involving the reputations and prior participation) of SCOTUS Justices, including the following cases.³⁶

In 1972, Justice Rehnquist declined to disqualify himself in *Laird v. Tatum*, which involved a challenge to the constitutionality of a domestic surveillance program that targeted Vietnam War dissidents.³⁷ Although he had testified before Congress in support of the program at issue, Justice Rehnquist participated in the case.³⁸ The backlash to Rehnquist’s refusal to recuse was so strong that it helped galvanize the need for

³² *Id.* at 868, 882.

³³ See, e.g., *Justice Rehnquist’s Decision to Participate in Laird v. Tatum*, 73 COLUM. L. REV. 106, 117 (1973) [hereinafter *Rehnquist’s Decision*] (discussing Justice Rehnquist’s participation in *Laird v. Tatum*); Jeanne Cummings, *Reform Group: Antonin Scalia, Clarence Thomas Had Citizens United Conflicts of Interest*, POLITICO (Jan. 19, 2011, 7:27 PM), <http://www.politico.com/news/stories/0111/47855.html>, archived at <http://perma.cc/XK7Q-DKRU> (reviewing a reform group’s call for an investigation of Justices Scalia and Thomas’ opinions in *Citizens United*).

³⁴ See Eric Lichtblau, *Advocacy Group Says Justices May Have Conflict in Campaign Finance Cases*, N.Y. TIMES (Jan. 19, 2011), available at http://www.nytimes.com/2011/01/20/us/politics/20koch.html?_r=0&pagewanted=print, archived at <http://perma.cc/V6RA-P35M> (discussing Common Cause’s request for an investigation of Justices Thomas and Scalia).

³⁵ See, e.g., Editorial, *Time to Ban Judicial Junkets*, N.Y. TIMES (Oct. 15, 2005), http://www.nytimes.com/2005/10/15/opinion/15sat3.html?_r=0, archived at <http://perma.cc/3STT-YEFH> (calling for bold action against private interests lobbying judges); Glen Elsasser, *Activists Shine Light on Junkets for Judges*, CHI. TRIB. (July 25, 2000), http://articles.chicagotribune.com/2000-07-25/news/0007250276_1_federal-judges-community-rights-counsel-seminars, archived at <http://perma.cc/U8YY-V86M> (providing examples of other federal judges who attend all expenses paid seminars).

³⁶ See *infra* notes 37–41 and accompanying text (citing examples of justices that have declined to recuse themselves).

³⁷ See *Rehnquist’s Decision*, *supra* note 33, at 117 (discussing Justice Rehnquist’s participation as a witness for the Justice Department’s issue on government surveillance); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 592 (1987) (reviewing Justice Rehnquist’s service as head of the Justice Department’s Office of Legal Counsel to the White House).

³⁸ Stempel, *supra* note 37, at 592.

814 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

reform that resulted in Congress passing legislation to amend the federal recusal statute.³⁹

In 2003, Justice Breyer participated when SCOTUS decided *Pharmaceutical Research and Manufacturers of America v. Walsh*, in which an association of drug manufacturers challenged the constitutionality of certain state prescription drug regulations.⁴⁰ Some legal ethicists questioned Justice Breyer's participation in the case because the Justice held stock in some of the pharmaceutical companies that were members of the association.⁴¹

B. Relational Interests in the Case

There may be concern in a given case that a jurist's impartiality could be compromised due to pre-existing personal relationships with litigants or other parties interested in the outcome of the case.⁴² The interested person may be family, a "friend," or a "foe" of the jurist.⁴³ Again, these problems arise at the highest levels in both the federal and court state systems.⁴⁴

In 2008, Justice Annette Ziegler of the Wisconsin Supreme Court was publicly reprimanded by her colleagues for presiding over cases when she was an appeals court judge in which her husband's business was a party to the litigation.⁴⁵ These same relational interests can affect SCOTUS Justices.⁴⁶ In fact, a personal relationship was at the heart of the dispute in the 1945 case of *Jewell Ridge Coal Corp. v. Local 6167*.⁴⁷ In that

³⁹ See *id.* at 594-95 & n.32 (noting the additional momentum Justice Rehnquist's participation gave to reformists).

⁴⁰ See Monroe H. Freedman, *Judicial Impartiality in the Supreme Court – The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513, 527 (2005) (discussing Justice Breyer's stock held in one of the three pharmaceutical companies that was suing Pharmaceutical Research and Manufactures of America).

⁴¹ *Id.* at 527.

⁴² *The Dimensions of Judicial Impartiality*, *supra* note 21, at 502.

⁴³ *Id.*

⁴⁴ See *infra* notes 45-54 and accompanying text (providing examples of justices with relational interests in a case).

⁴⁵ See Steven Elbow, *State Supreme Court Reprimands Ziegler in Unprecedented Ruling*, CAP. TIMES (May 28, 2008), <http://www.highbeam.com/doc/1G1-179495976.html>, archived at <http://perma.cc/8SBV-NPRN> (discussing Justice Ziegler's public reprimand); Dee J. Hall, *Ziegler is Given a Public Reprimand*, MADISON.COM (May 29, 2008, 12:00 AM), http://host.madison.com/news/ziegler-is-given-a-public-reprimand/article_07a048a5-6e12-533a-b78c-6059e7d6c120.html, archived at <http://perma.cc/Z7PP-VRDQ> (describing Justice Ziegler's conflict of interest in cases).

⁴⁶ See *infra* notes 47-54 and accompanying text (providing examples of Supreme Court Justices with relational interests in cases).

⁴⁷ See ALLIANCE FOR JUSTICE, A SUPREME COURT JUSTICE'S RECUSAL DECISIONS SHOULD BE TRANSPARENT AND REVIEWABLE 4 (2011), available at <http://www.afj.org/wp->

case, Justice Black declined to disqualify himself even though his former law partner represented one of the victorious litigants.⁴⁸ Justice Black's decision to participate in the rehearing engendered strong criticisms from his colleague, Justice Robert Jackson.⁴⁹

While there was no reprimand or even reproach by his colleagues, Justice Scalia was called to task by some scholars and the media when he refused to recuse himself from a case brought by the Sierra Club against then Vice-President Dick Cheney.⁵⁰ Apparently, while the case was impending, Justice Scalia (and some of his family members) went duck hunting with Cheney and accepted a free ride on the Vice-President's jet.⁵¹ Despite loud calls questioning whether he appeared to be impartial, Justice Scalia denied the Sierra Club's request that he step aside and then cast his vote in support of the Vice President's position in the litigation.⁵²

More recently, Justice Thomas' participation in the challenge to the Patient Protection and Affordable Care Act was criticized by liberal members of Congress and some commentators.⁵³ They raised questions about Justice Thomas' partiality because Ginni Thomas, the Justice's wife, was a founder and active supporter of Liberty Central, and a well-paid lobbyist for the Heritage Foundation and other conservative political organizations that supported overturning the law.⁵⁴

content/uploads/2013/11/recusal-afj-memo.pdf, archived at <http://perma.cc/475W-GP4Q> (discussing Justice Black's participation in the case).

⁴⁸ See *id.* (discussing Justice Black's refusal to recuse himself).

⁴⁹ See *Jewell Ridge Coal Corp. v. Local 6167*, 325 U.S. 897, 897 (1945) (Jackson, J., concurring) (listing the limited grounds on which Justice Jackson concurred).

⁵⁰ See Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 229 (2004) (evaluating Justice Scalia's decision to not recuse himself in *Cheney v. United States Dist. Court for the Dist. of Columbia*).

⁵¹ See Michael C. Dorf, *Justice Scalia's Persuasive But Elitist Response to the Duck Hunting Controversy*, FINDLAW (Mar. 24, 2004), <http://writ.news.findlaw.com/dorf/20040324.html>, archived at <http://perma.cc/9ULG-KMXA> (explaining why Justice Scalia's trip with Vice-President Dick Cheney creates the appearance of impropriety).

⁵² See *Cheney v. United States Dist. Court for the Dist. of Columbia*, 541 U.S. 913, 929 (2004) (providing the order by Justice Scalia denying Sierra Club's motion to disqualify him).

⁵³ See Felicia Sonmez, *House Democrats Say Thomas Should Recuse Himself in Health-Care Case*, WASH. POST (Feb. 9, 2011, 12:21 PM), <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html>, archived at <http://perma.cc/M3VS-XSEP> (reviewing a letter asking Justice Thomas to recuse himself).

⁵⁴ See *id.* (reviewing the conflict of interest between Justice Thomas and his wife, Ginni Thomas' role as a lobbyist).

C. *Political Interests in the Case*

The possible influence of political interests or ideologies is another concern when a jurist's impartiality—whether actual, probable, or apparent—is at stake.⁵⁵ The political interests that might influence a case can be divided into interests emanating from external and internal sources.⁵⁶ External political interests are those that threaten a jurist's impartiality because his "political future is subject to manipulation or control by others who have an interest in the outcomes of cases the [jurist] decides."⁵⁷ Internal political interests "relate to ideological zeal, which can bias the [jurist] for or against litigants and lead [the jurist] to prejudge cases."⁵⁸ There have been a number of recent high profile cases in both state and federal courts where the impartiality of a jurist was questioned based upon either external or internal political interests.⁵⁹

The political interests of jurists are most often questioned in instances where judges are elected or when the jurist presides over politically sensitive or other controversial cases. The *Caperton* case and other recent examples of high-stakes judicial elections exemplify external political interests because the elected jurist is, probably is, or at least appears to be, beholden to the special interest groups that help elect them.⁶⁰ However, even jurists who are appointed for life terms may be improperly influenced by internal politics.⁶¹ The most common modern concerns involve so called "activist judges"—jurists whose interpretations and applications of applicable law are, or appear to be, influenced by the jurist's personal ideology.⁶² The claims of judicial activism come from both the right and left ends of the political spectrum and even involve jurists at the highest level of the federal and state court systems.⁶³ In fact, some recent cases pending before SCOTUS have given

⁵⁵ *The Dimensions of Judicial Impartiality*, *supra* note 21, at 503.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *infra* notes 60–62 and accompanying text (providing examples of judges with a political interest in a case).

⁶⁰ See *supra* notes 37–41 and accompanying text (giving examples of cases where Supreme Court Justices had a personal interest).

⁶¹ See *The Dimensions of Judicial Impartiality*, *supra* note 21, at 505 (noting that even Supreme Court Justices are accused of judicial activism).

⁶² *Id.* (describing earlier efforts by conservative court critics against liberal leaning jurists "who allegedly disregarded the law and substituted their political preferences" when making decisions and the more recent efforts of liberals to label jurists whose decisions are seen as more conservative as "judicial activists" as well).

⁶³ See *id.* (discussing claims of judicial activism that emanate from conservatives and liberals).

rise to controversies regarding the political ideologies of some of the Justices.⁶⁴

The problem of political interests is well illustrated by calls from conservatives in recent years for Justice Ginsberg to recuse herself from cases involving abortion and other reproductive rights issues, which are based upon the fact that she was a member of the NOW Legal Defense and Education Fund team before serving as a jurist.⁶⁵ In fact, in 2004, when NOW's advocacy group filed an *amicus curie* brief in a case testing a state's obligations to provide medical screenings to low-income children, some on the political right criticized Justice Ginsberg for taking part in the case because of her NOW affiliation.⁶⁶ Justice Ginsberg was criticized again when only two weeks later she gave the opening remarks at the Justice Ruth Bader Ginsburg Distinguished Lecture Series on Women and the Law, which was co-sponsored by NOW.⁶⁷ Thus, even jurists who are not subject to election can be seen as influenced by political forces.

D. Personal Bias for or Against a Party or Participant

The type of personal bias in this category is a catch-all for forms of partiality that do not neatly fit within the descriptions of the jurist's personal (especially financial), relational, or political interests.⁶⁸ While some interests and biases will overlap, this last category includes bias for or against persons because they are members of a particular race, nationality, ethnicity, gender, socio-economic class, sexual orientation or other identifiable group.⁶⁹ Again, in recent years challenges of personal bias for or against a party or participant have been raised against jurists at all levels on both the federal and state bench.⁷⁰

The sponsors of California's Proposition 8, which would have banned gay marriage, sought to disqualify the presiding jurist, Chief Judge Walker, who is a gay man in a long-term relationship.⁷¹ After

⁶⁴ See *infra* notes 64–66 and accompanying text (providing an example of cases before the Supreme Court involving bias controversies).

⁶⁵ Richard A. Serrano & David G. Savage, *Ginsburg Has Ties to Activist Group*, L.A. TIMES (Mar. 11, 2004), <http://articles.latimes.com/2004/mar/11/nation/na-ginsbug11>, archived at <http://perma.cc/G9NX-3376>.

⁶⁶ *Id.*

⁶⁷ See *id.* (citing to several legal experts' opinions on the matter).

⁶⁸ *The Dimensions of Judicial Impartiality*, *supra* note 21, at 505.

⁶⁹ See *id.* at 505–507 (providing examples from literature to describe status or group based bias).

⁷⁰ See *infra* notes 70–73 and accompanying text (noting that accusations of bias affect jurists at all levels).

⁷¹ See *Perry v. Schwarzenegger*, 790 F. Supp. 1119, 1122–23 (N.D. Cal. 2011) (describing the motion of the defendant-intervenors seeking to vacate the judgment on the grounds the

818 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

Chief Judge Walker retired (and when his order holding the law unconstitutional was on appeal to the United States Court of Appeals for the Ninth Circuit), a newspaper article reported that Chief Judge Walker “shared that he was gay and that he was in a [long-term] same-sex relationship at the time when he was presiding over this case.”⁷² Thereafter, the sponsors of Proposition 8 sought an order from the United States District Court for the Northern District of California challenging former Chief Judge Walker’s participation in the trial citing his sexual orientation.⁷³ The new Chief Judge of the court ruled that Judge Walker was not biased and did not have to recuse himself simply because he was gay and might be affected by the ruling as a private citizen.⁷⁴

Similarly, activists on the political left have taken issue with Justice Scalia’s participation in the cases regarding recognition of gay marriages under federal and state law.⁷⁵ The challengers do more than simply criticize Justice Scalia’s participation based upon his dissenting opinions in earlier gay rights cases, which would not be grounds for disqualification.⁷⁶ Instead, the challengers point to Justice Scalia’s remarks at a book tour event at Princeton University when he responded to a gay student’s question about Justice Scalia’s opinions in those prior gay rights cases.⁷⁷

presiding judge was or could reasonably appear to be biased based upon his sexual orientation).

⁷² *Id.* at 1121.

⁷³ *See id.* (stating that the Motion to Vacate was based on the premise that Judge Walker’s same-sex relationship disqualified him from presiding over the case).

⁷⁴ *See id.* at 1128, 1130, 1133 (denying motion of defendant-intervenors seeking to vacate the judgment on the grounds the presiding judge was or could reasonably appear to be biased based upon his membership in class of persons who might benefit from the ruling); *see also* Maura Dolan, *Gay Judge Not Required to Remove Himself from Same-Sex Marriage Case, U.S. Judge Rules*, L.A. TIMES (June 15, 2011), <http://articles.latimes.com/2011/jun/15/local/la-me-0615-gay-judge-20110616>, *archived at* <http://perma.cc/3XX6-SU8T> (quoting Judge Ware on the unreasonableness of the assumption that Judge Walker could not render an impartial judgment).

⁷⁵ *See* Jim Morrison, *Op-Ed: Scalia Too Biased to Judge Marriage Cases*, ADVOCATE (Dec. 27, 2012, 1:48 PM), <http://www.advocate.com/commentary/2012/12/27/scalia-too-biased-judge-upcoming-marriage-cases>, *archived at* <http://perma.cc/Z6GY-8N5N> (discussing reasons for LGBT activists calling for Justice Scalia to recuse himself).

⁷⁶ *See* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 318–22 (2d ed. 2007) (stating that a jurist’s participation in a prior case involving a party or similar facts or participation in a prior proceeding in the same case, without more, does not disqualify the jurist).

⁷⁷ *See* Morrison, *supra* note 75 (noting Scalia equated the moral opposition to homosexuality akin to the moral opposition to murder). *But see* Erin Fuchs, *Here’s Why Scalia Should NOT Recuse Himself from the Gay Marriage Cases*, BUSINESS INSIDER (Dec. 13, 2012, 1:30 PM), <http://www.businessinsider.com/why-scalia-should-hear-gay-marriage>

E. A Common Thread in Partiality Problems

In each of these situations, the grounds for the appearance of partiality (if not an actual or probable partiality problem) are different, but they all resulted in an initial decision denying disqualification.⁷⁸ Some scenarios involve the jurist's financial or other personal interests.⁷⁹ In other instances, doubts about impartiality are created by the jurist's relationships with interested parties.⁸⁰ In some matters the political interests or ideology of the jurist may influence the decision.⁸¹ In a few cases, there are even questions of bias for or against a party or participant based upon their membership of a specific interest group.⁸² But, in spite of the variety of circumstances, in each case the initial decision was to deny the jurist was disqualified.⁸³

This is not to suggest that the jurists were, in fact, partial or even that if all the facts about the described situations were known that would raise reasonable doubts in the mind of others to create an appearance of partiality. Instead, the point is that there is reason to pause and consider more carefully the questions raised by these disqualification challenges and the resulting decisions. Such serious reflection reveals one striking feature of all these disputes—the challenged jurist was the sole (and in courts of last resort the final) arbiter of his own impartiality.⁸⁴ Given what we know about the Bias Blind Spot, this feature of disqualification decisions requires more attention and should be the focus of recusal reform efforts. In other words, to properly reform recusal practice, we must reshape the procedures (and perhaps the substantive standards) used to decide when disqualification is warranted.

2012-12#Hmsjc, archived at <http://perma.cc/FGU6-R99C> (explaining why several SCOTUS litigators do not believe Justice Scalia is disqualified from hearing the gay marriage cases).

⁷⁸ See *supra* notes 26-51 and accompanying text (citing the initial decision not to disqualify).

⁷⁹ See *supra* notes 26-33 and accompanying text (discussing financial and personal interests in cases).

⁸⁰ See *supra* notes 33-37 and accompanying text (explaining that jurist's impartiality may be compromised by pre-existing personal relationships with parties vested in the outcome of the case).

⁸¹ See *supra* notes 37-51 and accompanying text (noting the influence of political interests or ideologies that could affect a jurist's impartiality).

⁸² See *supra* notes 42-49 and accompanying text (looking at miscellaneous types of personal bias that fall outside the other categories).

⁸³ See *supra* notes 26-51 and accompanying text (discussing the tendency to not disqualify the jurist for bias).

⁸⁴ See *supra* notes 26-51 and accompanying text (noting that discretion in the disqualification decision rested with the jurist in each case).

820 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

III. CURRENT SUBSTANTIVE STANDARDS AND PROCEDURAL PRACTICES LEAD TO DEFECTIVE “SELF-DISQUALIFICATION” DECISIONS

The current substantive standards and procedural rules, when mixed with the cognitive illusions of the challenged jurist as decision maker, create a chancy combination that introduces the risk of systemic error in disqualification decisions. The substantive standards for disqualification include actual bias, probable bias, and apparent bias.⁸⁵ However, the actual bias standard is seldom applied and instead federal and state court decisions focus on the lesser standards of probable or apparent bias.⁸⁶ Both of these standards require the challenged jurist to use an objective—not subjective—test to determine if sufficient concerns regarding impartiality exist so as to warrant disqualification.⁸⁷ In most instances, the procedural rules permit the challenged jurist to act as the initial and, in some cases final, arbiter of his own alleged biases.⁸⁸ This combination sets up a situation in which the challenged jurist evaluates his own biases from the perspective of “self” rather than from the perspective of the reasonable, informed “other” who is the benchmark for the substantive disqualification standard.⁸⁹ This practice—which can

⁸⁵ See FLAMM, *supra* note 76, § 5.2, 103–05. Although the early common law did not permit disqualification for bias (other than in two limited circumstances of pecuniary interest and certain prior participation in the proceedings), the current substantive standards applicable to the federal and state courts certainly dictate disqualification of a jurist who actually is biased.

⁸⁶ See FLAMM, *supra* note 76, §§ 5.1–5.2, 103–08. Thus, this Article focuses on how the Bias Blind Spot affects disqualification decisions using the lesser substantive standards of probable or apparent bias. See *infra* Part IV (discussing the chancy combination of objective standards, self-disqualifying procedures, and the Bias Blind Spot).

⁸⁷ See FLAMM, *supra* note 76, at 104 (stating that the current federal disqualification standard is objective). The term “objective” describes something “existing independent of thought or an observer” and “belonging to the *object* of the thought rather than to the thinking subject[.]” *Objective Definition*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/objective?s=t> (last visited Nov. 7, 2014), archived at <http://perma.cc/6XMA-UZTA> (emphasis added). In contrast, “subjective” describes something “existing in the mind [and] belonging to the thinking *subject* rather than to the *object* of thought.” *Subjective Definition*, DICTIONARY.COM, available at <http://dictionary.reference.com/browse/subjective> (last visited Nov. 7, 2014), archived at <http://perma.cc/6XMA-UZTA> (emphasis added). Thus, as used in this Article, “subjective” assessments are made based upon internal evidence of the mental state of the challenged jurist—his feelings, opinions, and thoughts—and “objective” assessments are made based upon external evidence such as actions and words of the challenged jurist. See *infra* Part III.A.3–4 (discussing current federal and state substantive standards for disqualification).

⁸⁸ See *infra* Part III.A.5 and accompanying text (discussing procedural practices in federal and state courts).

⁸⁹ See *infra* Part IV.A and accompanying text (describing how the Bias Blind Spot distorts disqualification decisions).

be labelled as “self-disqualification” – when combined with the cognitive illusion known as the Bias Blind Spot, collapses the objective reasonable person test into a subjective self-assessment without the jurist even realizing the problem.⁹⁰ This chancy combination of substantive standards, procedural practices, and human fallibility introduces systematic error that results in actually, probably, or apparently biased jurists deciding cases rather than stepping aside.

A. *Current Federal and State Substantive Standards for Disqualification*

The substantive standards used by the federal and state courts require the challenged jurist to use an objective – not subjective – test to determine if sufficient concerns regarding impartiality exist to warrant disqualification.⁹¹ These substantive standards are drawn from three types of legal sources: (1) the Due Process Clause of the United States Constitution and some state constitutions; (2) applicable federal and state statutes on disqualification; and (3) the relevant federal and state judicial ethics codes.⁹² Each of these sources provides for one of three general disqualification standards: the challenged jurist is disqualified when he is actually, probably, or apparently biased.⁹³ All three of these tests require consideration of the circumstances from the perspective of the reasonable, informed person – an “other” rather than from the “self” oriented perspective of the challenged jurist.⁹⁴ Thus, current federal and state substantive law applicable to disqualification decisions requires the decision maker to evaluate the evidence of actual, probable, or apparent bias as an objective “other” would.

⁹⁰ See Jeffrey M. Hayes, *To Recuse or to Refuse: Self-Judging and the Reasonable Person Problem*, 33 J. L. PROF. 85, 96–97 (2008) (labeling this phenomenon as “self-judging”). But, that is a misnomer because, as the author concedes, the jurist who is the target of the disqualification motion is not on trial. *Id.* at 97. Moreover, the jurist has no financial or other personal interest at stake in the case. *Id.*

⁹¹ See *infra* notes 123–28 and accompanying text (explaining the objective standard).

⁹² See Debra L. Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 189–90 (2011) [hereinafter *The Elusive Goal of Impartiality*] (discussing sources of disqualification standards). Of course, these sources do not include State Constitutions, several of which include their own Due Process Clause. See generally Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1151–73 (2011) (explaining the recusal laws of the fifty states and the District of Columbia in the Appendix).

⁹³ See *supra* Part III.A.1–3 (discussing the various substantive standards for disqualification under federal and state constitutions, statutes, and judicial codes of conduct).

⁹⁴ See *supra* Part III (considering the objective nature of the federal and state substantive standards for disqualification).

822 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

1. Federal Due Process Clause Demands an Objective Evaluation of Bias

The first of these substantive standards, the Due Process Clause of the United States Constitution requires an objective assessment of whether the jurist is actually or probably biased.⁹⁵ Historically, SCOTUS has interpreted the Due Process Clause to require disqualification in two distinct circumstances: (1) when the jurist has a direct or indirect pecuniary interest in the case; and (2) when the jurist has a conflict due to his participation in an earlier proceeding (such as when the judge is presiding over the trial of a criminal defendant after holding the defendant in contempt of court).⁹⁶ More recently SCOTUS held that there is a third instance in which the Due Process Clause requires that the challenged jurist step aside.⁹⁷ In *Caperton*, a sharply divided SCOTUS held that disqualification is warranted “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”⁹⁸ Thus, the Due Process Clause requires a challenged jurist to recuse in at least three different situations, which the *Caperton* majority described as circumstances when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable[.]”⁹⁹

⁹⁵ See generally Serbulea, *supra* note 92, at 1151–72 (listing the state constitutions of twelve states that include provisions that have been interpreted to require disqualification of judicial officers who are not impartial). Most of those state constitutional provisions are due process clauses. *Id.* at 1110–11, 1162–69. However, a handful of state constitutions—those adopted in Arkansas, California, Maryland, and Texas—include explicit standards for judicial disqualification. *Id.* at 1152–53, 1160, 1169–70. The disqualifying situations enumerated in these state constitutions are similar, if not identical, to the disqualifying circumstances set forth in the applicable state statutes or judicial ethics rules. *Id.*

⁹⁶ See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (declaring a judge had a direct pecuniary interest in the outcome of the case and should have been disqualified); *Ward v. Monroeville*, 409 U.S. 57, 60–62 (1972) (holding that the village mayor could not act as a neutral judge over cases that involved village income); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971) (stating that a judge who becomes embroiled in a heated argument with the petitioner’s lawyer should not preside over the contempt proceedings); *In re Murchison*, 349 U.S. 133, 137–39 (1955) (stating it was a violation of due process for the grand jury judge to preside over the subsequent petition); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (stating the defendant had the right to an impartial judge, unmotivated by pecuniary interests).

⁹⁷ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884–87 (2009) (noting the risk of bias when a significant campaign contributor influences the election to unseat a judge at the time they have a case pending before the court).

⁹⁸ *Id.* at 884.

⁹⁹ *Id.* at 868 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

It is clear from both the language and holding in *Caperton* that the “probability of actual bias” standard requires an objective evaluation of the external evidence of bias in order to comply with Due Process.¹⁰⁰ First, Justice Kennedy explains the prior SCOTUS precedents make clear that “[t]he inquiry is an objective one.”¹⁰¹ Second, the majority opinion states that actual subjective bias is not required to merit disqualification—a serious risk of bias is sufficient: “[t]he Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional ‘potential for bias.’”¹⁰² Third, the *Caperton* Court spells out that the disqualification determination does not depend on the challenged jurist’s assessment of his own thoughts, opinions, or feelings but relies on external evidence of how the average jurist would respond in the circumstances: “the question is whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”¹⁰³ Thus, the Due Process standard is not concerned with the internal evidence of actual bias known only to the challenged jurist, but requires assessment of whether there is a probability of judicial bias as viewed from an objective perspective held by somebody else—a reasonable “other.”¹⁰⁴

While this guarantee of judicial impartiality means that the Due Process Clause is exceedingly important in some respects—it is, in

¹⁰⁰ *Id.* at 872.

¹⁰¹ *Id.* at 881.

¹⁰² *Id.* at 881.

¹⁰³ *Caperton*, 556 U.S. at 870 (quoting *Withrow v. Larkin*, 421 U.S. 35, 46 (1975)). In the facts before the *Caperton* Court, “[t]he inquiry center[ed] on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.” *Id.* at 884.

¹⁰⁴ *See id.* at 896 (noting the dissent’s concern regarding the ambiguity of the reasonableness standard used by the majority). One thing that the *Caperton* majority did not answer is whether that “other” is “a reasonable [lay]person, a reasonable lawyer, or a reasonable judge[.]” *Id.* (Roberts, J., dissenting). Some commentators have posited that the Due Process Clause, unlike the federal and state statutes and judicial rules, requires the assessment of probable bias be made by a “reasonable judge” rather than a reasonable layperson. *See, e.g.*, Raymond J. McKoski, *Judicial Disqualification After Caperton v. A.T. Massey Coal Company: What’s Due Process Got To Do With It?*, 63 BAYLOR L. REV. 368, 388–91 (2011) (stating that the average judge who is skilled in the art of judging is best suited to determine whether a jurist is likely to be tempted to ignore his oath, training, and professional obligations when deciding a case); Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 75 (2010) (concluding that the ABA appearance-based disqualification test is administered by a “member of the public,” while the due process test focuses on the reasonable judge).

824 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

practice, the least important standard for judicial disqualification. It is the most important source of judicial disqualification law because the Due Process Clause embodies an ideal and guarantees “[a] fair trial in a fair tribunal” to all litigants who appear before any court in the United States—whether a federal or state tribunal.¹⁰⁵ The Fifth Amendment insures that Due Process is provided in the federal courts and the Due Process guarantee is made applicable to the state courts through the Fourteenth Amendment.¹⁰⁶ Nevertheless, “[t]he Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states, of course, [already have been and] remain free to impose more rigorous standards for judicial disqualification than those we find mandated [by the Due Process Clause].”¹⁰⁷ Thus, even though the Due Process Clause applies to every federal and state court it seldom will be the basis for disqualification—instead most disqualification disputes will be resolved by applying other applicable non-constitutional federal or state laws.

2. Non-Constitutional Disqualification Law Requires an Objective Assessment of Bias

The non-constitutional sources of disqualification law vary somewhat in specific aspects of the substantive test employed, but nearly all apply an objective standard when assessing judicial bias. While there may be other mechanisms to remove a jurist, the primary non-constitutional sources of disqualification law include applicable federal and state statutes and the rules governing judicial conduct in both federal and state courts.¹⁰⁸ In the federal courts, Title 28 of the United States Code provides the statutory authority for parties to seek disqualification of a jurist who actually is biased or appears to be less than impartial.¹⁰⁹ In the state courts, disqualification is also governed, in part, by statutory law as nearly every state—with only two exceptions—has adopted a disqualification statute.¹¹⁰ While a substantial minority of states permits parties to use some form of peremptory challenge to

¹⁰⁵ *Caperton*, 556 U.S. at 876 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

¹⁰⁶ *See id.* at 872 (stating the analysis is based on the Fourteenth Amendment in this case).

¹⁰⁷ *Id.* at 889–90 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

¹⁰⁸ *See generally* FLAMM, *supra* note 76, at 30–50 (discussing the basis for disqualification provisions).

¹⁰⁹ *See generally id.* at 669–81 (describing all the amendments that have been made to Title 28 of the United States Code in regard to disqualification provisions).

¹¹⁰ *See* Serbulea, *supra* note 92, at 1122 & n.104 (noting that Delaware and New Hampshire are the two exceptions); *see also*, FLAMM, *supra* note 76, at 753 (explaining that there are statutes, constitutional provisions, or court rules in nearly every state dealing with judicial disqualification).

disqualify a jurist, most state statutes generally require that a jurist step aside when he is actually biased or his impartiality might reasonably be questioned.¹¹¹ Given that both federal and state statutes embody an appearance of impartiality standard, it is not surprising that a challenged jurist's actual or potential for bias must be assessed using an objective standard.

3. Federal Statutory Substantive Disqualification Standards Apply the Reasonable Person Test

In the federal courts, that objective assessment can be made under 28 U.S.C. §§ 47, 144, or 455, but section 455 is the statute that, in practice, governs most federal disqualification disputes.¹¹² Unlike 28 U.S.C. § 455, sections 47 & 144 of Title 28 are rarely used as the basis for a motion to disqualify.¹¹³ Section 47 has a very narrow focus and disqualifies a judge only from "hear[ing] or determin[ing] an appeal from the decision of a case or issue tried by him [previously]."¹¹⁴ Section 144 also is limited in scope because it applies only to "proceeding[s] in a district court" and not to any federal appellate court.¹¹⁵ However, section 144 should be widely used at least in district court because the intent and language of the statute suggests that Congress intended to provide parties with the right to use a peremptory challenge to disqualify a trial judge whom the party believed to be biased or prejudiced.¹¹⁶ Notwithstanding this language, federal courts have interpreted and applied section 144 in such a way as to render its provisions virtually meaningless.¹¹⁷ Thus, most federal court challenges to a jurist's impartiality that rely upon statutory law generally are brought under 28 U.S.C. § 455.

In contrast to both section 47 and section 144, section 455 is designed to apply broadly and, by its terms, governs disqualification in all federal

¹¹¹ See Serbulea, *supra* note 92, at 1123 & n.108 (noting that Arizona, Iowa, Louisiana, Michigan, and South Carolina are the minority of states); see also, FLAMM, *supra* note 76, at 753 (stating that the most significant difference among state disqualification laws is that while in a majority of jurisdictions judges may be removed only for cause, a substantial minority of states permit parties to use peremptory challenges to remove a jurist).

¹¹² See Serbulea, *supra* note 92, at 1121 (citing to the relevant federal disqualification statutes).

¹¹³ See *id.* at 1125-26 (providing reasoning as to why sections 47 and 144 of Title 28 are rarely used).

¹¹⁴ 28 U.S.C. § 47 (2006).

¹¹⁵ *Id.* § 144.

¹¹⁶ See Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1223-26 (analyzing Congress's intended use of the statute).

¹¹⁷ See *id.* at 1224-25 & n.58 (citing to examples of federal cases).

826 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

courts at both the trial and appellate level.¹¹⁸ Under subpart (a) of section 455, a federal court jurist “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”¹¹⁹ This standard has been interpreted to require disqualification “when a reasonable person, knowing the relevant facts” would believe the jurist may be biased and it does not require a showing of subjective bias.¹²⁰ This general disqualification standard is augmented in subpart (b) of section 455 by a list of specific circumstances, which *per se* constitutes disqualifying conditions.¹²¹ The current language of both parts of section

¹¹⁸ See CHIEF JUSTICE ROBERTS, SUPREME COURT OF THE U.S., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (Dec. 31, 2011), available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf>, archived at <http://perma.cc/2PGR-UKQV> [hereinafter 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY] (stating that “the limits of Congress’s power to require recusal [of SCOTUS Justices] ha[s] never been tested”). In spite of the clear language used by Congress, SCOTUS has never acknowledged, much less held, that section 255 applies to disqualification of the Justices of SCOTUS. *Id.* In fact, Chief Justice Roberts recently released a Year End Report that suggested Congress may not have the power to regulate disqualification disputes and other ethical matters involving SCOTUS. *Id.* However, section 455 is widely used in the district courts and circuit courts of appeal. *Id.*

¹¹⁹ 28 U.S.C. § 455(a) (2006).

¹²⁰ See *Liljeberg v. Health Serv. Acquisition Corp.*, 486 U.S. 847, 848 (1988) (holding that if a reasonable person, knowing the relevant facts as they actually existed, would believe that the judge should have known of the conflict, then the judge may be retroactively disqualified under section 455).

¹²¹ 28 U.S.C. § 455(b) (2006). In fact, section 455(b) mandates that a federal jurist:

[S]hall also disqualify himself in the following circumstances:

- (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
- (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
- (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
- (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
 - (ii) Is acting as a lawyer in the proceeding;

455 includes the term “shall” to make clear the jurist has no discretion and must recuse if the conditions set forth in either subpart are met—regardless of the jurist’s thoughts, feelings, or opinions.¹²² Thus, both sections of section 455 provide legal standards that employ an objective test—not one based upon the jurist’s subjective view—for determining whether disqualification is required.

4. State Substantive Disqualification Statutes are Based Upon Objective Standards

Like the federal statutory scheme, most state disqualification statutes require application of an objective test to determine if sufficient bias does or at least appears to exist to warrant the jurist stepping down. Although a minority of states permit some form of peremptory challenge, most limit that right to one challenge per party per case, so any party that desires to disqualify any substituted jurist must meet the applicable “for cause” standard.¹²³ The disqualification standards provided in twenty-nine of the statutes adopted in the fifty states can be broken down into two categories: (1) five states require a showing of

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

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

Id.

¹²² 28 U.S.C. § 455 (1970). Before its amendment in 1974, Section 455 provided for a subjective test for determining whether disqualification was warranted:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.

Id. (emphasis added); see also Barry Sullivan, *Law and Discretion in Supreme Court Recusals: A Response to Professor Lubet*, 47 VAL. U. L. REV. 907, 919–20 (suggesting the possibility that § 455 may be unconstitutional as applied, but “it seems unlikely that a majority of the Justices would want to provoke a constitutional stand-off over the question whether Congress has the right to insist that the Justices act with the same degree of probity as other federal judges.”).

¹²³ See Serbulea, *supra* note 92, at 1122–23 & n.105 (discussing state disqualification statutes and noting that only seventeen states allow for peremptory disqualification without cause); see also JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 18 (2008), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/Recusal%20Paper_FINAL.pdf, archived at <http://www.perma.cc/M2AD-8CSZ> (explaining that about one third of the states, a total of nineteen, permit parties to use peremptory challenges to remove one judge per proceeding); FLAMM, *supra* note 76, at 790 (stating that “a substantial minority of mostly western or mid-western jurisdictions have provisions on the books that permit parties to seek disqualification on a peremptory basis, without any showing of cause”).

828 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

actual bias; and (2) twenty-four states require disqualification upon a showing of at least an appearance of partiality.¹²⁴ However, the statutory law in the remaining twenty-one states is not easily grouped into a single classification—though all appear to require evidence of something less than actual bias.¹²⁵ The “appearance of impropriety” or “appearance of partiality” test asks the decision maker to evaluate the evidence of possible bias in the same manner a reasonable [and informed] “other” would—which requires that he view the external evidence of possible bias.¹²⁶ In other words, the majority of state disqualification statutes that have a clear standard employ an objective test and do not rely upon the jurist’s subjective thoughts, feelings, or opinion about his own actual, probable, or apparent bias.

5. Federal and State Codes of Judicial Conduct Rely on the “Reasonable Other” Standard to Evaluate Bias

In addition to the statutory grounds for disqualification, federal and state court judges and justices (with the possible exception of SCOTUS) are subject to ethical rules that require assessment of judicial bias using an objective assessment of the external evidence.¹²⁷ The *Code of Conduct for United States Judges* (“*Code of Conduct for US Judges*”) adopted by the Judicial Conference of the United States is the touchstone for determining whether the circumstances create an “appearance of impropriety” that dictate whether the federal jurist should step aside and not hear a case.¹²⁸ The *ABA Model Code of Judicial Conduct* (“*ABA Judicial Code*”) provides the benchmark for disqualification in state court systems, having been adopted in substantial part in at least forty-nine states.¹²⁹ It is not clear that either of these ethical codes has the force of

¹²⁴ See Serbulea, *supra* note 92, at 1123 & n.108 (noting the five states are Arizona, Iowa, Louisiana, Michigan, and South Carolina). See generally FLAMM, *supra* note 76, at 790–822 (listing only eighteen states that permit some form of peremptory challenge that requires no showing of cause).

¹²⁵ See Serbulea, *supra* note 92, at 1123 (recognizing that the law is unclear in the rest of the states); see also FLAMM, *supra* note 76, at 104–07 (stating the “appearance of impropriety” or “appearance of bias” standards are both objective assessments).

¹²⁶ See FLAMM, *supra* note 76, at 107 (stating that all states—except Iowa, Louisiana, Michigan, and Wisconsin—have adopted the “appearance of bias” standard and held it requires the challenged jurist to step aside “whenever a reasonable person would think [the jurist] might not be absolutely detached and impartial”).

¹²⁷ See 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 118, at 7 (stating that “the limits of Congress’s power to require recusal [of SCOTUS Justices] have never been tested”).

¹²⁸ Bassett, *supra* note 116, at 1229.

¹²⁹ See *id.* (noting adoption of a version of the ABA Judicial Code in all forty-nine states); Marie McManus Degnan, Note, *No Actual Bias Needed: The Intersection of Due Process and*

law—the *ABA Judicial Code* being merely a model code and there being some question regarding the statutory authority of the Judicial Conference to enact binding ethics rules for jurists.¹³⁰ Nevertheless, the ethical standards expressed in both the *ABA Judicial Code* and the *Code of Conduct of US Judges* are given great deference by courts when deciding disqualification disputes.¹³¹ Thus, both of these judicial conduct codes have a significant impact on disqualification decisions throughout the federal and state court systems.

a. State Codes of Judicial Conduct Apply an Objective Appearance-Based Standard

There are two basic scenarios under the *ABA Judicial Code* that dictate a jurist must not sit on a case: (1) when he actually is not impartial; or (2) when it appears to a reasonable person that he might not be impartial.¹³² Both standards are set forth in Rule 2.11 of the *ABA Judicial Code*, which is the operative provision for judicial disqualification.¹³³ The first part of Rule 2.11(a) provides that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned[.]”¹³⁴ The second part of Rule 2.11(a) includes six enumerated disqualifying situations that require a jurist to step aside when:

- (1) the judge has a personal bias against a party or lawyer or the judge has personal knowledge of the facts of the proceeding;
- (2) the judge or his spouse, parent, or child has an economic interest in the outcome of the litigation;
- (3) the judge, his spouse, or his close family member is a party, trustee or officer to a party, lawyer, a

Statutory Recusal, 83 *TEMPLE L. REV.* 225, 227 & n.20 (2010) (noting adoption of Rule 2.11 in substantial part in all fifty states).

¹³⁰ Bassett, *supra* note 116, at 1229–30 & n.79. Of course, the *ABA Judicial Code*, being a model code does not have the force of law unless and until it is properly adopted in a jurisdiction. *Id.* at 1229. The 1972 version of *ABA Model Code* has been adopted in at least forty-nine of the fifty states. *Id.* While some states treat their judicial codes of conduct as enforceable rules of law other states that have adopted the *ABA Judicial Code* treat the standards as guidelines for ethical judicial behavior. *Id.* at n.79.

¹³¹ *See id.* at 1229 (noting that the states differ with respect to the power of these ethical rules).

¹³² *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2004) (discussing the two scenarios referenced in the Code).

¹³³ *See id.* (providing an overview of Rule 2.11).

¹³⁴ MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2004) (reflecting the concept formally found in Canon 3E).

- material witness, or has an interest substantially affected by the proceeding;
- (4) the judge knows or learns from a timely filed motion that one of the parties has made campaign contributions of a certain size and within a specific time frame;
 - (5) the judge has made public statements that appear to commit the judge to an issue in the case; or
 - (6) the judge previously was involved in the case as a lawyer, public official, material witness, or presided over the matter in another court.¹³⁵

While these six specific situations listed in Rule 2.11(a)(1)–(6) are intended to “cover most of the situations in which disqualification is likely to arise,” the enumerated circumstances are not an exhaustive list.¹³⁶ In addition, the specific enumerated scenarios are not a substitute for the general disqualification standard set forth in Rule 2.11, which is an independent basis for disqualification.¹³⁷ Thus, there are two standards under Rule 2.11 – the list of *per se* disqualifying conditions and the general disqualification standard that is invoked when the facts do not fit within one of the six *per se* rules, but the judge’s impartiality nevertheless might reasonably be questioned.¹³⁸

While there are two standards embodied within Rule 2.11, the language of the rule makes clear that if either test is met, the jurist

¹³⁵ *Id.* at 19. Not all states have adopted all of the enumerated disqualifying circumstances. See Degnan, *supra* note 129, at 227 (noting that all fifty states have adopted the rule in substantial part). In fact, the rule requiring disqualification based upon campaign contributions by interested parties has been adopted in only one state. *Id.* at 228 & n. 27.

¹³⁶ E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 60 (1973). The notes provide that:

Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked. Any conduct that would lead a reasonable [person] knowing all the circumstances to the conclusion that the judge’s “impartiality might reasonably be questioned” is a basis for the judge’s disqualification.

Id.

¹³⁷ See MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2007) (“Under this Rule, a judge is disqualified whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.”).

¹³⁸ See MODEL CODE OF JUDICIAL CONDUCT R. 2.11 cmt. 1 (2004) (stating that a jurist is disqualified “whenever the judge’s impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.”).

“shall” step aside.¹³⁹ The original version of this rule did not include the term “shall” but rather indicated that the challenged jurist “should” step aside in the disqualifying situations.¹⁴⁰ This change in language (which actually was made throughout the *ABA Judicial Code*) signaled a change to a mandatory rule—rather than a discretionary standard.¹⁴¹ This change in the language from “should” to “shall” has been adopted in a majority of states and, therefore, these provisions are deemed mandatory in those jurisdictions as well.¹⁴² In addition, the majority of states that had adopted the precursor to Rule 2.11 had already interpreted and applied the “should disqualify” language to require recusal.¹⁴³ Thus, in every state that adopted a standard based upon the *ABA Judicial Code*, if either the general standard is met or one of the specific situations exists, the disqualification decision is not discretionary.

In addition to being mandatory, both the general and specific standards for disqualification under the *ABA Judicial Code* require an objective rather than subjective assessment of the jurist’s impartiality. The first disqualification standard—when the “judge’s impartiality might reasonably be questioned”—is evaluated not from the perspective of the challenged jurist but from the point of view of a reasonable person—that hypothetical “other” in the law.¹⁴⁴ Likewise, the assessment of judicial impartiality under the second disqualification standard—the *per se* rules—requires evaluation of external facts measured from an objective perspective not the subjective state of mind of the challenged jurist.¹⁴⁵ Moreover, the comments to the *ABA Judicial*

¹³⁹ See Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 57-58 (2000) (noting that “shall” was substituted for “should” when the ABA Judicial Code was amended in 1990). In 1990, the term “should” was replaced with the currently used “shall” in all the canons and rules making the provisions of the ABA Judicial Code mandatory. *Id.* at 58.

¹⁴⁰ See *id.* at 57 (referring to the original version of Rule 2.11).

¹⁴¹ See *id.* at 58 (discussing the change in the language of Rule 2.11 to include the word “shall”).

¹⁴² See *id.* at n.13 (noting that of the forty-nine states that have adopted the *ABA Judicial Code* only sixteen still use the term “should” in their version of the rules).

¹⁴³ See *id.* at 57 n.12 (providing an example of a South Dakota case where “should” was not mandatory).

¹⁴⁴ See Abramson, *supra* note 139, at 58-59 (explaining that the challenged jurist’s subjective evaluation of the potentially disqualifying circumstances will differ from the assessment a reasonable other would make of the same situation).

¹⁴⁵ See *id.* at 59-60 (evaluating individual facts). For example, the decision maker must evaluate whether the jurist previously played a particular role in the case, if the jurist or a related person has a known direct or indirect economic interest in the case, or whether the jurist or related party may be a material witness. See also MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)-(C) (2007) (providing rules for when a judge must disqualify himself from a proceeding).

832 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

Code make clear the reference point is the reasonable minds of others – not the challenged jurist: “[t]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”¹⁴⁶ Thus, regardless of whether disqualification is based upon the six enumerated *per se* circumstances or the “might reasonably be questioned” catch-all provision, the evaluation of partiality under the *ABA Judicial Code*, which has been adopted in nearly all the states, embodies an objective standard that relies on external evidence of bias.

b. Federal Code of Judicial Conduct Applies a Similar Objective Standard

The standard for judicial disqualification contained in the *Code of Conduct for US Judges* is virtually indistinguishable from the standard in the *ABA Judicial Code*.¹⁴⁷ In fact, the two Codes employ nearly identical language for both the enumerated situations in which bias is presumed and the general based disqualification standards.¹⁴⁸ There are only two differences in these two substantive standards for judicial disqualification.¹⁴⁹ First, the *Code of Conduct for US Judges* does not include in its listing of enumerated *per se* disqualifying circumstances any reference to the jurist’s personal bias or prejudice concerning a party’s lawyer as is included in Rule 2.11 of the *ABA Judicial Code*.¹⁵⁰ Second, although the *Code of Conduct for US Judges* requires disqualification when the jurist and certain related persons have any “interest[s] that could be substantially affected by the outcome of the proceeding,” this standard omits the “de minimis” qualifier that is included in the *ABA Judicial Code*.¹⁵¹ Otherwise, the language of the two judicial codes of conduct defining disqualification standards is identical and these provisions closely correspond to the substantive standards of

¹⁴⁶ MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5 (2007).

¹⁴⁷ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(a) (2009); MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007).

¹⁴⁸ See Bassett, *supra* note 116, at 1230–32 (describing the similarities between the *Code of Conduct for United States Judges* and the *ABA Model Code of Judicial Conduct*).

¹⁴⁹ See *id.* at 1231 (stating the two differences in the Codes).

¹⁵⁰ Compare CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(a) (2009) (neglecting to include a detailed reference to personal bias toward a lawyer presenting the case), with MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2011) (including bias toward a lawyer presenting the case as a disqualifying factor).

¹⁵¹ Compare CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(d)(iii) (2009) (indicating that an interest must be “substantially affected” by the proceeding’s outcome to determine bias), with MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(c) (2011) (stating that the person’s bias must have more than a “de minimis” effect on the outcome).

section 455.¹⁵² Given these similarities in language, the *Code of Conduct for US Judges* – like the *ABA Judicial Code* – mandates disqualification of a jurist when there is objective evidence that the challenged jurist’s impartiality might reasonably be questioned by an informed “other” or the *per se* disqualifying circumstances are present.

The use of an objective test for disqualification is in keeping with the underlying purposes of the *ABA Judicial Code* and the *Code of Conduct for US Judges*. The *ABA Judicial Code* emphasizes the importance of ensuring fairness in the courts by ensuring both actual impartiality and perceived impartiality.¹⁵³ The appearance of an impartiality standard also promotes public confidence in the courts, which is seen as integral to the proper workings of the judicial system and society as a whole.¹⁵⁴ Similarly, the *Code of Conduct for US Judges* requires judges to avoid the appearance of impropriety and “to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”¹⁵⁵ The need to act appropriately is not limited to when a judge discharges his judicial duties, rather he must “avoid all impropriety and appearance of impropriety” throughout his professional and personal life to promote public confidence in the judiciary.¹⁵⁶ Thus, both the *ABA Judicial Code*

¹⁵² See 28 U.S.C. § 455 (2012) (governing the conduct of judges and when they should recuse themselves). Compare CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(d)(iii) (2009) (containing the same language for disqualification as the *Model Code of Judicial Conduct* except it omits the reference to “de minimis” interests), with MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2)(c) (2011) (using the same language for disqualification as the *Code of Conduct for US Judges* with the addition of a “de minimis” standard).

¹⁵³ See MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

¹⁵⁴ See MODEL CODE OF JUDICIAL CONDUCT, Preamble (2011) (introducing the role of the judiciary and the need for impartiality). The Preamble provides:

An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

Id.

¹⁵⁵ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2009).

¹⁵⁶ CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2009). The Commentary explains:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both

834 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

and the *Code of Conduct for US Judges* properly apply an objective test to determine whether a jurist is not only actually impartial, but has maintained the appearance of impartiality at all times.

B. Federal and State Substantive Standards Rely on an Objective Assessment of Bias to Promote Purposes of Impartiality

The substantive standards for judicial disqualification used in the federal and state courts—whether based upon the Constitution, a statute, or code of ethics—employ an objective test for determining judicial bias. Using an objective substantive standard to determine judicial bias makes sense once we properly understand the primary purposes of disqualification—actual impartiality to safeguard the litigant’s right to a fair trial and the appearance of impartiality to promote public confidence in the courts.¹⁵⁷ The use of an objective standard focused on external evidence of the challenged jurist’s words and deeds in assessing actual, probable, or apparent bias is necessary. This objective and externally focused standard is critical to measuring how a reasonable “other” would view the situation, which is required for the appearance of bias standard.¹⁵⁸ Also, the use of a subjective standard in assessing probable bias would be improper because we cannot detect non-conscious bias by examining the internal evidence—the challenged jurist’s thoughts, feelings and opinions.¹⁵⁹ While a subjective standard for determining actual bias may suffice when the bias is conscious, only an objective standard can adequately address non-conscious actual bias.¹⁶⁰ Thus, the

professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.

Id.

¹⁵⁷ See *The Dimensions of Judicial Impartiality*, *supra* note 21, at 513–14 (discussing the primary purposes underlying the rule of impartiality in the context of disqualification as protecting individual rights to a fair trial in specific cases and creating confidence in the legal system generally). However, at least one commentator has suggested that Due Process Clause based disqualification standards need only avoid actual bias and that concerns regarding the public’s confidence in the courts are overblown and could be properly addressed by simply requiring jurists to provide adequate explanations of their reasons for disqualification decisions. See also Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 42–43 (2007) (analyzing other proposals).

¹⁵⁸ See *supra* Part III.B (discussing the use of extrospective evidence to assess bias in others).

¹⁵⁹ See *infra* Part IV.A.3 (discussing the use of introspective evidence to assess bias in self).

¹⁶⁰ See *Pub. Util. Comm. of D.C. v. Pollak*, 343 U.S. 451, 466–67 (1952) (Frankfurter, J., concurring) (finding that the subconscious may lead to biased decision making). The most notable instance of a jurist stepping down due to actual bias happened when Justice Frankfurter recused himself from hearing a case challenging the practice of playing the

applicable substantive standard must use an objective standard to protect litigants' rights by preventing actually biased jurists from hearing litigants' cases and maintain public confidence in the judiciary by avoiding either the probability of partiality or the appearance of impartiality.

C. *Federal and Most State Courts Use Self-Disqualification*

While the federal and state courts use different procedures when determining disqualification disputes, most of those procedures have one flaw in common: they allow "self-disqualification."¹⁶¹ The current procedures in all federal courts permit the challenged jurist to make the initial determination of whether he is, probably is, or appears to be sufficiently biased to warrant disqualification.¹⁶² Although most of those decisions (other than at SCOTUS) are subject to some form of appellate review, the costs to litigants of pursuing an appeal and the lenient standard of review makes it unlikely that an incorrect initial decision will be corrected. The same problems plague the state courts, despite the availability of limited rights to peremptory challenges in a minority of states, most state courts use procedures that empower the challenged jurist to decide disqualification disputes.¹⁶³ Thus, in both the federal and state courts most often the challenged jurist is tasked with being unbiased about his own biases and there is no meaningful appellate review.

1. Disqualification Procedures Under the Federal Constitution, Statutes, and Ethical Rules

The three sources of the disqualification substantive standards most often used in federal court—the U.S. Constitution, the applicable federal

radio on public buses because his feelings were "so strongly engaged as a victim of the practice in controversy" it was better for him "not [to] participate in judicial judgment upon it." *Id.* at 467. Justice Frankfurter further stated his belief that most judges can, given their judicial "training, professional habits, [and] self-discipline[.]" set aside their feelings and judge impartially; however, Justice Frankfurter also stated that he worried that his "unconscious feelings" on the subject were so strong they might operate on a sub-conscious level and affect the outcome or—at the very least—"unfairly lead others to believe they are [so] operating." *Id.* at 466-67. Thus, he took no part in consideration of the case. *Id.* at 467.

¹⁶¹ See Hayes, *supra* note 90, at 96-97 (discussing fact that most federal and state court procedures permit a challenged jurist to be the judge in his own disqualification cause and labeling the phenomenon as "self-disqualification").

¹⁶² See 28 U.S.C. § 455 (2012) (providing guidance on how jurists should determine whether their bias will influence a case).

¹⁶³ See FLAMM, *supra* note 76, at 753-56 (distinguishing the state court procedures for disqualification from federal practices).

836 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

disqualification statutes, and the code of conduct that applies to federal jurists—either require or permit a challenged jurist to make the initial disqualification decision.¹⁶⁴ The Due Process Clause itself does not specify any procedures for how a disqualification dispute is to be determined, but SCOTUS has consistently held that it is proper for the challenged jurist to make the initial disqualification decision.¹⁶⁵ Although the language of 28 U.S.C. § 144 appears to provide for a peremptory disqualification, the statute added procedural hurdles.¹⁶⁶ Additionally, the manner in which the statute has been consistently applied by federal jurists has transformed section 144 into a discretionary disqualification mechanism and rendered it ineffectual.¹⁶⁷ The language of the most frequently used federal statute, 28 U.S.C. § 455 expressly provides that the challenged jurist shall decide whether the grounds for disqualification are satisfied.¹⁶⁸ Similarly, the *Code of Conduct for U.S. Judges* provides a self-enforcing disqualification standard that leaves the challenged jurist in charge of the disqualification decision.¹⁶⁹ Thus, regardless of the substantive standard used in a federal court disqualification dispute, the judge or justice who is

¹⁶⁴ See *The Elusive Goal of Impartiality*, *supra* note 92, at 196 (discussing sources of federal disqualification standards).

¹⁶⁵ See U.S. CONST. art. V (quoting “[n]o person shall . . . be deprived of life, liberty, or property without due process”); see, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009) (noting that the challenged state supreme court justice decided all four disqualification motions filed against him and suggesting that procedure was proper). “Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case.” *Id.* Indeed, the *Caperton* Court missed the perfect opportunity to correct this flawed disqualification procedure—but instead chose to focus on the substance of the decision made by Justice Benjamin who repeatedly failed to appreciate how the facts applied to the proper objective standard dictated by state law. See also *Marbes*, *supra* note 164, at 269–70 (explaining the reasons *Caperton* argued to dismiss Justice Benjamin); Bassett & Perschbacher, *supra* note 92, at 193 (illustrating the impact of *Caperton* on the study of judicial impartiality).

¹⁶⁶ See 28 U.S.C. § 144 (2012) (adding procedural requirements including a deadline for filing an affidavit of facts and a certificate of good faith from counsel).

¹⁶⁷ See *id.* (regulating the bias and prejudice of judges); see also FLAMM, *supra* note 76, at 695–96 (describing the application of the strict construction of 28 U.S.C. § 144).

¹⁶⁸ See 28 U.S.C. § 445(a)–(b) (stating that “(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in [any of the six enumerated] circumstances . . . [.]” (emphasis added)).

¹⁶⁹ See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C)(1) (2009) (giving the judge the power to decide his or her own personal bias). “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which [one of the six *per se* circumstances exist].” *Id.*

believed to be actually, probably, or apparently biased is empowered to make that critical decision.

2. Disqualification Procedures Under the State Constitution, Statutes, and Ethical Rules

Similarly, in most state court proceedings—whether decided under a state constitutional provision, statute, or the state analog of the *ABA Model Judicial Code*—the challenged jurist is the initial, and in some cases sole or final, arbiter of whether he is sufficiently impartial to continue presiding over the case.¹⁷⁰ Although the procedures governing who makes the initial disqualification decision differ from state to state, the procedural rules applicable to a party’s request that a jurist step aside falls into one of two basic categories: pre-emptory disqualification or disqualification for cause.¹⁷¹ In a majority of states, a jurist cannot be disqualified without cause, either actual bias or an appearance of bias must be demonstrated.¹⁷² A significant minority of states (a total of eighteen states mostly in the mid-west and west) currently permit the use of preemptory challenges in some of their courts some of the time.¹⁷³ However, all eighteen of those states restrict the use of preemptory challenges in some way—requiring that the motion be “timely” filed, the movant allege sufficient grounds for removal, and other measures—that result in the application of a discretionary standard by the challenged jurist in many cases.¹⁷⁴ Even in the handful of states where the preemptory disqualification is essentially automatic, each side of the litigation (even when there are multiple parties on a side) is limited to one unconditional preemptory challenge in each case, and all subsequent

¹⁷⁰ See Serbulea, *supra* note 92, at 1122–23, 1151–73 (detailing the procedures for each state that allow a judge to make a self-determination regarding bias).

¹⁷¹ See FLAMM, *supra* note 76, at 25 (noting there are three procedures for removal of a jurist: (1) voluntary disqualification or recusal; (2) preemptory disqualification; and (3) for cause disqualification); see also Serbulea, *supra* note 92, at 1122–23 n.105, (reflecting that seventeen states use some form of preemptory challenge procedure and the remaining thirty-three states require a decision on the merits of any disqualification motion).

¹⁷² See FLAMM, *supra* note 76, at 29–30 (highlighting the practices of disqualification in various states).

¹⁷³ See *id.* (demonstrating that some states that permit some form of “without cause” preemptory disqualification including Alaska, Arizona, California, Idaho, Illinois, Indiana, Minnesota, Missouri, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming).

¹⁷⁴ See *id.* at 769–70, 772–74 (noting that preemptory challenge statutes or rules typically require the application to be “timely” made and limiting the right to use such procedures to one challenge per side per proceeding, as well as imposing other restrictions).

838 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

disqualification challenges must demonstrate sufficient cause.¹⁷⁵ Thus, the majority of disqualification decisions in state courts will, at least initially, be considered by the challenged jurist who is permitted to exercise considerable discretion over the disqualification decision.

IV. THE CHANCY COMBINATION OF OBJECTIVE STANDARDS, SELF-DISQUALIFYING PROCEDURES, AND THE BIAS BLIND SPOT

While each of these aspects of disqualification disputes—the objective reasonable person standard, the “self-disqualifying” procedures used in most courts, and the Bias Blind Spot affecting the decision maker—present unique problems in themselves, the manner in which all three are combined in current disqualification practice introduces systemic error affecting a large number of proceedings and that, in turn, erodes public confidence in the courts.¹⁷⁶ Although ubiquitous in American law, the often used reasonable person standard is increasingly under scrutiny as both judges and scholars question its objectivity and reliability.¹⁷⁷ Also, the procedures followed in most federal and state courts that allow challenged jurists to decide disqualification motions directed at them (so called “self-disqualification”), especially when coupled with a lack of other procedural protections, are highly controversial because the practice leaves litigants vulnerable to the challenged jurist’s subjective and biased interpretation or application of the disqualification standard.¹⁷⁸ These problems with the current substantive standard and the procedural practices are exacerbated by the Bias Blind Spot, which often causes the jurist to be unaware of how his objectivity about his own impartiality is impaired and causes “others” evaluating the jurist’s recusal decision to doubt his impartiality.¹⁷⁹ Thus, the current substantive standards and

¹⁷⁵ See *id.* at 769 (indicating that a substantial minority of states use unconditional peremptory disqualification but limit its use to a single challenge per side in each proceeding).

¹⁷⁶ Portions of this section have been adapted from Melinda Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Re-shape Recusal Reform*, originally published in 32 ST. LOUIS PUB. L. REV. 235 (2013), which outlines the argument that even with the methods employed by the courts to avoid judicial bias, there are still problems with the methodologies that can affect confidence in the court system.

¹⁷⁷ See generally MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 144–46 (2003) (discussing problems with the “reasonable person” standard in a gendered, multi-racial, and multi-cultural society).

¹⁷⁸ See Hayes, *supra* note 90, at 100–01 (proposing changes to substantive standards to avoid “self-judging” in disqualification disputes).

¹⁷⁹ See generally Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37–41 (2006) (investigating the effects of individual perceptions on bias and prejudice).

procedural practices exacerbate the Bias Blind Spot, and all three combined introduce cognitive errors that lead to defective disqualification decisions affecting substantive outcomes in ways that are difficult, if not impossible, for the challenged jurist to gauge or correct.

A. *The Bias Blind Spot Distorts Disqualification Decisions*

The Bias Blind Spot has three important sources that create a distorted view of the self-disqualifying jurist's own impartiality and cause the jurist's perception of his own bias to conflict with others' view of his impartiality.¹⁸⁰ First, the Bias Blind Spot is motivated, at least in part, by well-documented self-enhancement and self-interest biases, which color our views of self.¹⁸¹ Second, the Bias Blind Spot is based upon Naïve Realism, which at its core is the conviction that we perceive objects and events in the world the way "they really are"—in other words, objectively—and when others do not perceive things as we do, then we infer there is something wrong with them.¹⁸² Third, the Bias Blind Spot causes one to assess his own biases based upon introspective evidence (which seldom reveals any traces of biases at work), but use extrospective evidence when judging others.¹⁸³ Finally, these aspects of the Bias Blind Spot create an asymmetry in perception of biases between the "self" and "others," which leads to attributions of improper motives in making assessments of partiality.¹⁸⁴ Thus, the Bias Blind Spot, especially when combined with the substantive standards and procedures currently used in most disqualification disputes, causes jurists to make incorrect or, at least, seemingly incorrect, decisions about their own impartiality, which ultimately undermines the public confidence in the judiciary.

¹⁸⁰ See *id.* at 37 (discussing the different sources of cognitive, perceptual, and motivational biases).

¹⁸¹ *Id.* at 37-38.

¹⁸² See Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, STAN. CTR. ON CONFLICT & NEGOTIATION 103, 110-11 (1995) (explaining the layperson's social understanding).

¹⁸³ Emily Pronin & Matthew V. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 570 (2007).

¹⁸⁴ See Pronin, *supra* note 179, at 37, 41 (discussing the differing perceptions of bias between the self and others); see also Joyce Ehrlinger et al, *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1, 2 (2005) (suggesting self-enhancement motivation and naïve realist cognitive illusions as among the reasons we rely upon introspection when evaluating our own bias).

840 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

1. Self-Enhancement and Self-Interest Blind Us to Our Own Biases

The Bias Blind Spot is actuated, at least in part, by two well-documented egocentric biases: (1) self-enhancement and (2) self-interest.¹⁸⁵ The self-enhancement bias reflects the fact that people are inclined to see themselves in a positive light, even when they are presented with objective evidence of their own biases.¹⁸⁶ The self-interest bias results in people either denying the influence of self-interest on their own behavior or claiming such interests make them more objective.¹⁸⁷ Although we generally acknowledge the existence of the ego-protecting biases, at least in the abstract, people are blind to the impact of self-enhancement and self-interest biases on them in specific instances.¹⁸⁸ Moreover, while we are slow to acknowledge the possibility that we are biased by ego-protection concerns, we are quick to infer such factors influence others' decisions and conduct.¹⁸⁹ Thus, we are more likely to view others as improperly influenced by self-enhancement or self-interest concerns, but are blind to see how the same biases operate to affect our own decisions and behavior.

a. *Self-Enhancement Concerns Help Create the Bias Blind Spot*

We are all susceptible to the self-enhancement bias and often we do not even realize we are affected by this well-documented bias.¹⁹⁰ At least in the abstract, most people acknowledge the role that the self-enhancement bias plays in human cognition.¹⁹¹ However, we tend to overlook or downplay the impact it has on our own judgments.¹⁹² In fact, even when people "rate themselves as 'better than average' on a wide range of traits and abilities, most people also claim that their overly positive self-views are objectively true."¹⁹³ Moreover, they hold to their skewed view of themselves even after they are confronted by the evidence of the self-enhancement bias that afflicts us all.¹⁹⁴ Thus, people's judgments of themselves usually are more favorable than

¹⁸⁵ Pronin, *supra* note 179, at 37.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 37-38.

¹⁸⁸ *See id.* (providing examples of studies).

¹⁸⁹ *See id.* (noting that human behavior is often guided by others' judgments and actions).

¹⁹⁰ *Id.* at 37.

¹⁹¹ Pronin, *supra* note 179, at 37.

¹⁹² *Id.*

¹⁹³ *Id.* (endnote omitted).

¹⁹⁴ *Id.*

objective assessments and people seldom realize their self-assessments are biased.¹⁹⁵

b. Self-Interest Colors Our View of Our Own Biases

In addition to self-enhancement bias, people unwittingly suffer from self-interest bias, which also colors their judgment.¹⁹⁶ Generally, people believe self-interests motivate human judgments and actions.¹⁹⁷ However, people tend to overestimate the role that self-interest plays in others' decisions and to underestimate the impact of self-interest in their own judgments.¹⁹⁸ When people acknowledge that their self-interest may affect their judgments and actions, they usually believe those self-interests are particularly enlightening rather than a source of bias.¹⁹⁹ Thus, people are more likely to believe that others are motivated by self-interest and that they themselves are free from distorting self-interested biases.²⁰⁰

2. Naïve Realism Distorts Our View of Our Own Biases and Our View of Others' Biases

A second major cause of the Bias Blind Spot is Naïve Realism.²⁰¹ Naïve Realism is the conviction that we perceive objects and events in the world the way they really are—in other words, objectively—and when others do not perceive things as we do, we infer there is something wrong with them.²⁰² As described by the renowned social psychologist

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Pronin, *supra* note 179, at 37.

¹⁹⁸ *See id.* at 37–38 (indicating that people believe hard work is motivated by external incentives whereas personal motivation stems from internal incentives).

¹⁹⁹ *See* EMILY PRONIN ET AL., UNDERSTANDING MISUNDERSTANDING: SOCIAL PSYCHOLOGICAL PERSPECTIVES 636, 647 (2002) [hereinafter UNDERSTANDING MISUNDERSTANDING] (recognizing that there are cases where our views and priorities reflect our unique status or experiences). In such cases:

[W]e are inclined to feel that our particular vantage point (e.g., that of a devout Christian, the child of an alcoholic, a volunteer at the local battered women's shelter, or the CEO of a Fortune 500 company) has been particularly *enlightening*. By contrast, we see others' unique status or unique experiences as a source of inevitable and understandable biases that distort their objectivity and lead them to unwise or unreasonable positions on the relevant issues.

Id.

²⁰⁰ Pronin, *supra* note 179, at 37.

²⁰¹ *See* Ross & Ward, *supra* note 182, at 110 (explaining Naïve Realism).

²⁰² *See id.* at 110–11 (providing examples of a layperson's convictions about subjective experiences).

842 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49

Lee Ross and his collaborator, Andrew Ward, Naïve Realism is deceptively simple and is made up of only three essential tenets:

1. *I “see” the world objectively – “as it really is.”*
2. *Other reasonable people should “see” the world the way I do.*
3. *If other people don’t “see” the world as I do, then they aren’t seeing clearly.*²⁰³

Although we acknowledge, at least in the abstract, the subjectivity of our perceptions when we look at the world, we assume what we perceive is an unmediated reality – the objects and events “as they really are” with no cognitive filters.²⁰⁴ Given this belief in our own objectivity and a conviction that we are reasonable people, we do not attribute the difference with the other to something faulty with our perception or assume that the disagreement simply reflects different choices made by two reasonable and honest people.²⁰⁵ Instead, when others who have all the pertinent information do not agree with our view, we attribute undesirable traits (such as a lack of intelligence) or improper motives (a lack of impartiality) to make sense of the disagreement.²⁰⁶ Thus, we infer those others have shortcomings that explain their disagreement with us rather than concede that there may be something wrong with us or that our view of “reality” may not be correct.²⁰⁷

²⁰³ *Id.* This syllogism was articulated by Lee Ross and Andrew Ward in their seminal work on Naïve Realism as follows:

1. *That I [perceive] entities and events as they are in objective reality and that my social attitudes, beliefs, preferences, priorities, and the like follow from a relatively dispassionate, unbiased, and essentially “unmediated” apprehension of the information or evidence at hand.*
2. *That other rational social perceivers generally will share my [worldview, including my] reactions, behaviors, and opinions – provided that they have had access to the same information that gave rise to my views, and provided that they too have processed that information in a reasonably thoughtful and open-minded fashion.*
3. *That the failure of [other] individual[s] or group[s] to share my [worldview] arises from one of three possible sources – [they (a) are not informed; (b) are irrational; or (c) are not impartial – being biased] by ideology, self-interest, or some other distorting personal influence.*

Id. (emphasis added).

²⁰⁴ Emily Pronin et al, *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 783 (2004) [hereinafter *Objectivity in the Eye of the Beholder*].

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

a. *The Illusion of Objectivity*

We cannot attribute the others' disagreement to our faulty perception because as naïve realists, we suffer from the illusion that our version of the thing or event in question reflects an objective reality.²⁰⁸ We believe we are objective in spite of the fact that most of us concede, at least in the abstract, that "reality" is a mixture of sensory stimuli and our perception of those stimuli.²⁰⁹ This "subjective construal" of reality relies upon our "own needs, own emotions, own personality, [and] own previously formed cognitive patterns[]" to create a complete picture.²¹⁰ In other words, we do not perceive an objective reality, but merely a mediated version of objective facts that are interpreted through a variety of cognitive filters.²¹¹ Nevertheless, we believe we perceive an objective "reality" that reasonable others should perceive as well.²¹²

Not only do we construct our version of "reality," but we are seemingly unaware that we suffer from this "illusion of objectivity."²¹³ We are convinced that we are objective about our perceptions of the objects in the world—the smells, sights, and sounds.²¹⁴ This illusion of our objectivity also extends to interpersonal relations and other more complex social events.²¹⁵ These subjective interpretations of the phenomena we encounter affect the way we perceive ourselves, others, and our situations and, in turn, impact how we interact with others in a

²⁰⁸ *Id.*

²⁰⁹ See Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, in 24 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 319, 320-21 (Mark P. Zanna ed., 1991) (quoting Jerome Bruner's famous 1957 statement "that the perceiver must, in seeking to understand an event, 'go beyond the information given'").

²¹⁰ See *id.* at 321 (quoting DAVID KRECH & RICHARD S. CRUTCHFIELD, *THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY* 94 (1948)).

²¹¹ See *id.* (citing to Krech and Crutchfield's argument that "there are no impartial 'facts'").

²¹² Pronin, *supra* note 179, at 37.

²¹³ *Id.*

²¹⁴ See, e.g., Ross & Ward, *supra* note 182, at 114 (citing a study designed to test subjective construal of stimuli—the "Musical Tapping" test). The study volunteers were assigned the task of either listening to or tapping out songs from twenty-five well-known musical pieces and the listeners were required to identify the song. *Id.* The difference in the experience of musical tappers and listeners seems obvious—seeing it from the vantage point of the study's architects—but the differences in perception were not so obvious to the study participants. *Id.*

²¹⁵ See *id.* at 106-07 (1996) (describing a study that was a variation on the classic Prisoner's Dilemma Game in which the object of the game was to win money). The name of the game was changed to suggest whether the game should be played competitively or cooperatively. *Id.* at 106. The results of the experiment reflected that how the game was labeled and, presumably, the different subjective construals evoked by such labels, had the most significant impact on how the volunteers behaved—competitively or cooperatively. *Id.*

844 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

variety of complex social settings.²¹⁶ More importantly, the brain plays this trick—subjectively construing the stimuli we encounter to create perceptions of “reality”—without us ever knowing we are doing it.²¹⁷ Thus, our minds make us believe that we “see” the world objectively, though what we actually “see” is our subjective construal of what we perceive.²¹⁸

b. The Confirmation Bias and Unwarranted Perseverance of Beliefs

The subjective interpretations we construct are likely to persevere, even in the face of contradictory evidence, because of the “confirmation bias.”²¹⁹ When we assimilate new evidence, we “go beyond the information [actually] given”—by “fill[ing] in [the] details . . . to give events coherence and meaning.”²²⁰ Of course, we have little reason to think critically of how we select and process new information because we start from the naïve premise that we are objective.²²¹ Our illusion of objectivity, coupled with the way we “fill in the gaps” leads us to accept with little scrutiny the evidence that is consistent with our existing perspectives and beliefs.²²² On the other hand, we intently scrutinize any evidence that is inconsistent with our understanding to resolve the cognitive dissonance such new information creates.²²³ This process of “biased assimilation of new information”—the confirmation bias—often “leads to unwarranted perseverance of beliefs” including an unwarranted belief in our objectivity.²²⁴ Thus, not only does our mind fool us into thinking we are objective, it fools us into confirming that belief by selectively relying solely on information that confirms our belief about our own objectivity.²²⁵

²¹⁶ See Ross & Ward, *supra* note 182, at 104 (asserting that differences in subjective or construal “matter” have an impact on everyday life and that social perceivers usually make “insufficient allowances” for the impact of subjective construal when making inferences or predictions about others).

²¹⁷ See *supra* Part IV.A.2 (discussing people’s unconscious perception of reality).

²¹⁸ See Ross & Ward, *supra* note 182, at 110 (comparing the relation between subjective experience and the event that gave rise to the subjective experience).

²¹⁹ See *Objectivity in the Eye of the Beholder*, *supra* note 204, at 788–89 (analyzing perceived attitudes and behavior discrepancy in attributions of bias).

²²⁰ Ross & Ward, *supra* note 182, at 118.

²²¹ See *Objectivity in the Eye of the Beholder*, *supra* note 204, at 796 (describing several studies that demonstrate this biased assimilation and the resulting perseverance of unwarranted beliefs).

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* (citation omitted).

²²⁵ *Id.*

3. The Introspection Illusion Confirms Our False Belief That We are Unbiased

We are able to maintain this false belief in our own objectivity, even after making an effort to determine whether our beliefs are biased because of the way we evaluate our own biases.²²⁶ This is true because in assessing our own biases, we rely heavily on introspection.²²⁷ In essence, we search our private thoughts, feelings, motives, and beliefs, rather than evaluate our own behavior, to detect our own biases.²²⁸ This method of assessing our own biases may confirm our capacity for bias—at least in the abstract or in past circumstances—but introspection often results in our detecting no bias in the present instance.²²⁹ This introspective method of assessing bias—using internal evidence—is not particularly reliable because we have no direct conscious access to “the cognitive and motivational processes (to say nothing of the underlying biochemical processes) that influence our perceptions [of reality].”²³⁰ Thus, it is not surprising that our introspective analysis seldom reveals any conscious bias in our behavior or our beliefs.

4. The Bias Blind Spot Creates Differing Perceptions of Bias in Self and Bias in Others

While we use introspection to assess our own biases, we evaluate extrospective evidence when assessing the impartiality of others and this difference in perspective results in an asymmetry in perceptions of bias between self and other.²³¹ When we discern bias in others, we mostly rely upon external evidence—the others’ conduct and our theories of what constitutes biased behavior.²³² Even when we do have access to others’ thoughts, feelings, beliefs, and conscious motives about their own biases, we tend to give that introspective evidence little, if any, weight.²³³ We give others’ introspective accounts of their decisions and conduct

²²⁶ See Pronin & Kugler, *supra* note 183, at 566 (defining “introspection illusion”).

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 378 (2002) (citations omitted) [hereinafter *The Bias Blind Spot*].

²³¹ See Pronin, *supra* note 179, at 38 (evaluating the difference in perceptions of bias).

²³² See Pronin & Kugler, *supra* note 183, at 566 (discussing the reliance on feelings when evaluating one’s own biases).

²³³ See *id.* at 575 (examining how participants in the study reported attending more to introspective information than behavioral information for assessing bias in themselves but not for others).

846 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

less weight because we believe that such accounts are not objective, *reflect bias, or otherwise are not valuable*.²³⁴ Thus, we assess our own biases using introspective evidence and use extrospective data to evaluate the biases of others and, thereby, create different standards for self-perception and social perception of bias.

B. Bias Blind Spot Leads to Defective Disqualification Decisions and Corrodes Confidence in the Judiciary

These biased perceptions of self and misperceptions of bias in others have important implications for specific judicial disqualification decisions and public confidence in the judiciary as a whole. First, the Bias Blind Spot creates biased perceptions of the jurist's own biases, which when combined with the current procedural practice of "self-disqualification" can lead to defective disqualification decisions in specific cases.²³⁵ Second, the Bias Blind Spot causes us to misperceive bias in others, which misperception—when combined with the current substantive standards and the practice of self-disqualification—can corrode public confidence in the judiciary as a whole.²³⁶ Given these problems, we need to reform either the disqualification standards or the procedural practices currently used by most courts in deciding disqualification disputes. However, given the current disagreements about the proper substantive standards for bias-based disqualification, the most efficient and effective reforms are likely to be changes in the procedures used in disqualification disputes.

1. The Bias Blind Spot Leads to Defective Disqualification Decisions

The current procedural practices followed in most state and federal courts make it nearly impossible for a challenged jurist to avoid making a defective disqualification decision because the Bias Blind Spot creates biased perceptions of the jurist's impartiality without him even knowing it.²³⁷ The common practice in state and federal courts of "self-disqualification" permits the challenged jurist to determine, at least in

²³⁴ See *id.* at 570, 575-76 (expounding on how participants perceived more bias in others than they did in themselves).

²³⁵ See *infra* Part III.C (examining how in both state and federal court a challenged jurist can practice "self-disqualification").

²³⁶ See *supra* Part IV.B (elaborating on how the Bias Blind Spot causes misperception of bias in others, and therefore can corrode public confidence in the judiciary system).

²³⁷ See *supra* Part IV.B.1 (analyzing how the Bias Blind Spot leads to defective disqualification decisions).

the first instance, if he is actually, probably, or apparently impartial.²³⁸ However, the challenged jurist, like the rest of us, suffers from the Bias Blind Spot—which impairs the challenged jurist’s ability to be an impartial arbiter of his own impartiality.²³⁹ Moreover, the jurist is unlikely to be aware of the impact of his biases on the disqualification decision—even after searching his feelings, opinions, and thoughts for evidence of bias—because the Bias Blind Spot operates on a nonconscious level, which makes it difficult, if not impossible, to detect.²⁴⁰ Thus, the current practice of allowing “self-disqualification” increases the chance a defective disqualification decision will be made because the challenged jurist suffers from the Bias Blind Spot.

2. The Bias Blind Spot Causes Reasonable Others to Doubt the Self-Disqualifying Jurist’s Decision

In addition to creating incorrect disqualification decisions, the challenged jurist’s use of “self-disqualification” procedures coupled with a self-centered standard to judge his own biases likely will lead to a loss of public confidence in the courts. This is another predictable consequence of the Bias Blind Spot that happens because the challenged jurist’s subjective perception of his own actual, probable, or apparent partiality is different from the objective standard that “others” — whether the litigants, other judges, the public, or the press—are likely to use to evaluate the jurist’s partiality.²⁴¹ The targeted jurist will use introspective evidence—primarily his thoughts, feelings, beliefs, and conscious motives—to determine if he believes he is actually, probably, or apparently biased.²⁴² Those “others” will assess the jurist’s bias upon

²³⁸ See *supra* Part III.C (discussing current procedures used in federal and state disqualification disputes).

²³⁹ See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 820–21 (2001) (demonstrating that judges are just as likely to be affected by a number of cognitive illusions as the ordinary public). Although the myriad of studies demonstrating various aspects of the Bias Blind Spot did not use judges, justices, or other judicial officers as participants, there is no reason to believe jurists are immune from this cognitive illusion. *Id.* In fact, when jurists have been tested for other common cognitive illusions the results are similar to results in other studies. *Id.*; see also *supra* notes 117–53 and accompanying text (discussing the causes and consequences of the Bias Blind Spot).

²⁴⁰ See *supra* note 234 and accompanying text (explaining the introspection illusion and unconscious impact of the Bias Blind Spot).

²⁴¹ See *supra* Part III.C.4 (addressing the use of different evidence to evaluate bias in self and others and the related differences in self and social perspectives).

²⁴² See *supra* Part IV.A (establishing the ways in which the Objectivity Illusion, the Confirmation Bias, and the Introspection Illusion help create our Bias Blind Spot).

848 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

his words and deeds.²⁴³ This asymmetry in perception between the self-disqualifying jurist and those reasonable “others” evaluating his actual, probable, or apparent bias is likely to cause differences in opinion regarding the dependability of specific disqualification decisions.²⁴⁴

In addition, the Bias Blind Spot causes “others” to misperceive or at least perceive differently the challenged jurist’s actual, probable, or apparent bias.²⁴⁵ This leads “others” to unwittingly be overconfident in their own assessment of the challenged jurist’s bias and to readily believe the jurist’s self-assessments are motivated by a lack of proper information, intelligence, or integrity.²⁴⁶ As a result, the current substantive standards and “self-disqualifying” procedural practices, when combined with the cognitive illusions created by the Bias Blind Spot are likely to undermine the public confidence in the challenged jurist, the resulting disqualification decision, and the courts generally. Thus, we should reform recusal practice by reshaping recusal procedures in specific ways to avoid the distortions caused by the Bias Blind Spot.

V. RESHAPING RECUSAL PROCEDURES TO AVOID THE BIAS BLIND SPOT

In order to counter how the Bias Blind Spot distorts disqualification decisions, we must either reform the substantive standards or we must reshape recusal procedures, and doing the latter holds the most promise for actually achieving recusal reform. The substantive standards for disqualification could be changed—but currently there is no consensus on what substantive changes to make and there likely will not be agreement any time soon.²⁴⁷ This is true, at least in part, because of disagreements about two fundamental issues: (1) whether jurists should enjoy a strong presumption of impartiality; and (2) what, if any, interests (personal, relational, or political) are required to overcome that presumption.²⁴⁸ So, currently the only realistic option is to reshape the

²⁴³ See *supra* Part III.C.4 (reiterating the use of introspective evidence to evaluate bias in self and the use of extrospective evidence to assess bias in others).

²⁴⁴ See *supra* Part IV.A (providing asymmetries in perceptions of bias).

²⁴⁵ See *supra* Part IV (analyzing the Bias Blind Spot).

²⁴⁶ See *supra* Part IV.A.2 (presenting the viewpoint that naïve realism makes us confident in our objectivity and causes us to make attributions about others who do not share our view of “reality”).

²⁴⁷ See Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 677 (2011) [hereinafter *Why Judicial Disqualification Matters*] (explaining that there is no agreement between the legal establishment and the public—or even within each sphere—regarding what constitutes an appearance of partiality).

²⁴⁸ See *id.* (discussing the appearances regime). Dean Geyh argues:

Currently, the legal establishment is deeply divided over when it is reasonable for the presumption of impartiality to yield to the suspicion that extralegal influences may have compromised the judge's impartial

procedural practices used to decide disqualification disputes. Thus, the reforms proposed in this Article are focused on procedural changes that are designed to address the distorting influence of the Bias Blind Spot in disqualification decisions.

A. Self-Disqualification Must Be Eliminated and Other Procedural Reforms Must Be Made

Given the mechanisms that contribute to creation of the Bias Blind Spot, at least three procedural reforms are required.²⁴⁹ First, Part V.A.1 discusses how the challenged jurist must be removed as the sole or final judge of his own partiality either by adopting peremptory challenges or requiring a judge, panel of judges, or other neutral decision maker rule on disqualification motions.²⁵⁰ If the challenged jurist is not eliminated in one of these ways, then the targeted jurist's denial of disqualification must be subject to immediate or interlocutory review using the less deferential *de novo* review.²⁵¹ Next, Part V.A.2 shows how, in order to make these two reforms worthwhile, all jurists and the parties must provide meaningful, timely disclosure of possible grounds for conflict or bias.²⁵² Finally, Part V.A.3 explains the decision to deny any recusal request must be in writing and provide a thorough application of the facts to the substantive standard for disqualification.²⁵³ If these three reforms are endorsed and executed, then the Bias Blind Spot can be corrected and the litigants, press, and public will have a clear vision of an impartial judiciary.

1. The Challenged Jurist Must Not Be the Sole or Final Arbiter of His Own Partiality

The first and most important reform is the removal of the challenged jurist as the sole or final judge of his own partiality because the best way

judgment. The general public is comparably divided, and between the legal establishment and the general public, there are still further divisions. The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.

Id.

²⁴⁹ See *infra* Part V.A (evaluating the three reforms this Article proposes).

²⁵⁰ See *infra* Part V.A.1 (proposing that a challenged jurist should not be the final arbiter of his own impartiality).

²⁵¹ See *infra* Part V.A.1 (providing alternative repercussions if the challenged jurist is not removed).

²⁵² See *infra* Part V.A.2 (analyzing the timely disclosures of challenged jurists).

²⁵³ See *infra* Part V.A.3 (examining the reasons for denying disqualification).

850 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

for “avoiding bias is to avoid the situations that produce it.”²⁵⁴ First, the courts or legislatures could adopt the use of a limited number of peremptory challenges—either with or without factual substantiation.²⁵⁵ Second, the challenged jurist could be removed from the disqualification decision entirely by referring the decision to another jurist or panel of neutral decision makers.²⁵⁶ Third, if the circumstances at the court do not permit either of these reforms, then the challenged jurist may be permitted to make an initial decision regarding disqualification but would be removed as the sole or final arbiter by providing for prompt *de novo* review by another judge or an *en banc* panel of the court if the initial decision by the targeted jurist is to deny disqualification.²⁵⁷ Each of these modified procedures has clear benefits and some costs as well, which must be evaluated to determine which solution is best to implement given the circumstances of each federal or state court.

²⁵⁴ Daniel Gilbert, *I'm O.K., You're Biased*, N.Y. TIMES (Apr. 16, 2006), <http://www.nytimes.com/2006/04/16/opinion/16gilbert.html?pagewanted=all&r=0>, archived at <http://perma.cc/8XV5-DK2>. Daniel Gilbert is a Professor of Psychology at Harvard University who researches and writes about cognitive psychology and is the author of the New York Times Bestseller “Stumbling on Happiness.” *Id.*

²⁵⁵ See Louis J. Virelli, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1218 (2011) (arguing that Congressional attempts to define the recusal standards for SCOTUS violates the constitutional Separation of Powers and offends federalism principles). It is entirely possible that if the courts do not themselves adopt some type of procedural solutions that state legislatures or Congress will mandate changes. See, e.g., Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (2011) (proposing that the *U.S. Code of Judicial Conduct* be applied to SCOTUS and expounding on the need to establish certain procedures with respect to the recusal of the Justices); IA CODE OF JUD. CONDUCT Canon 2(4)(a)–(b) (2014) (expounding on how judges must disqualify themselves when certain campaign contributions are made); OK CODE OF JUD. CONDUCT Canon 1 cmt. 5 (2014) (elaborating on the test for the appearance of impropriety by a judge); UT CODE OF JUD. CONDUCT Canon 2 (2014) (discussing rules that govern the judge’s appoint of lawyers to administrative positions, especially relating to campaigns). However, whether any attempts to legislate in the area of judicial ethics and recusals would be valid exercises of legislative authority or otherwise effective remains to be seen.

²⁵⁶ See Virelli, *supra* note 255, at 1221 (discussing ways in which a challenged jurist can be removed); see also Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of NFIB v. Sebelius*, 47 VAL. U. L. REV. 883, 905 (concluding that “[n]o individual can have a clear perspective on his or her own impartiality, and decisions would therefore be better made by objective colleagues”); Sullivan, *supra* note 122, at 916 (“Just as there is no recognized exception to the hearsay rule for ‘really important hearsay,’ there can be no exception to the requirement of judicial impartiality based on the fact that a particular Justice believes that he or she has a unique perspective and contribution to make to the decision of a case, even if his or her colleagues agree that the Justice’s participation is desirable or ‘really needed.’”).

²⁵⁷ See *id.* (assessing the approaches that could occur if a challenged jurist denies disqualification).

This idea of requiring that the challenged jurist step aside certainly is not new and may even seem obvious—at least those who do not sit on the bench and make disqualification decisions.²⁵⁸ In fact, in recent years, a growing number of academics have called for this precise type of procedural reform.²⁵⁹ Also, some commentators who have questioned the practice of “self-disqualification” have even derisively referred to the custom.²⁶⁰ These criticisms have not been limited to a handful of legal academics—but, instead, are part of an increasingly bitter public dialogue surrounding disqualification decisions in high profile cases and the debate about recusal reform.²⁶¹ In fact, “one of the most criticized

²⁵⁸ See Note, *Disqualification of a Judge on Grounds of Bias*, 41 HARV. L. REV. 78, 81 (1927) (“A biased mind rarely realizes its own imperfection and would normally prevent that perfect equipoise so desirable in our system of trial.”); Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification— and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 794 (2011) (arguing why recusal motions should be heard by independent judges). Professor Stempel writes:

The solution is obvious: recusal motions should be heard and decided, even in first instance, by another trial judge in the relevant district. Where a challenge targets an appellate judge, it should be heard and decided by other members of the panel or, if necessary, by the court as a whole. Where the challenge targets a United States Supreme Court Justice or a judge or justice of any other jurisdiction's highest court, the disqualification decision should be made by the entire court.

Id. Of course, the suggestion that this proposed solution is obvious may— itself— be a naïve realist expression of the “objective” reality perceived by those who believe this procedural reform is the reasonable answer.

²⁵⁹ See, e.g., Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 584 (2005) (arguing that having neutral judges make the disqualification decision will create greater confidence in the judicial process); *Why Judicial Disqualification Matters*, *supra* note 247, at 693–94 (suggesting that given the lack of consensus on substantive disqualification standards, procedural reforms are needed); Stempel, *supra* note 258, at 804–05 (arguing that disqualification decisions made by the challenged jurist are suspect given a host of biasing influences and a professional culture that creates reluctant recusants); ADAM SKAGGS & ANDREW SILVER, BRENNAN CTR. FOR JUSTICE, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM 9, 10 (Aug. 2011), available at http://brennan.3cdn.net/09c926c04c9eed5290_e4m6iv2v0.pdf, archived at <http://perma.cc/HJ8C-VRM8> (discussing eleven separate recusal reforms, including use of peremptory challenges to jurists).

²⁶⁰ See, e.g., Bassett & Perschbacher, *supra* note 92, at 197 (referring to Justice Benjamin’s opinion rejecting any consideration of “appearances” of impropriety); Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG 2D 79, 79 (2006) (labeling the practice of permitting a jurist to judge his own biases as ironic); John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 244 (1987) (suggesting that allowing the challenged jurist to decide the disqualification dispute is inappropriate).

²⁶¹ See Marbes, *supra* note 164, at 264 (examining how the Bias Blind Spot creates a bias conflict spiral that has affected specific cases and is impacting the debate about recusal reform within the academe and the larger legal community); see also Laurel A. Rigertas, *The*

852 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

features of recusal practice is the fact that in many states [and at the Supreme Court of the United States], the judge subject to a recusal request has the unreviewable last word on whether to step aside from a case.”²⁶² These criticisms often are based on nothing more than common sense.²⁶³ However, social science studies regarding institutional legitimacy of the courts have indicated that procedural fairness is an important factor in public confidence and adherence to court decisions, even unpopular outcomes.²⁶⁴ Thus, it seems likely that implementing this single procedural safeguard—eliminating “self-disqualification”—would go a long way toward addressing much of the criticism of current disqualification practices in specific cases and restoring public confidence in the judiciary as a whole.

a. “Self-Disqualification” Must Be Eliminated

The challenged jurist must be removed as the sole or final judge of his own partiality—this is the only sure way to avoid the impact of the Bias Blind Spot on disqualification decisions. The targeted jurist must be taken out of the decision making process because the jurist cannot be unbiased about his own actual, probable, or apparent biases.²⁶⁵ This goal can best be accomplished by either: (1) giving litigants the right to use peremptory challenges to disqualify actually, probably, or apparently

Supreme Court and Recusals: A Response to Professor Lubet, 47 VAL. U. L. REV. 939, 945 (suggesting that a proposal requiring the remaining eight Supreme Court Justices to review the recusal of a fellow Justice “raise[s] some concerns about whether the public would construe such a review process as a way for a group of Justices to exclude a Justice for the purpose of pursuing a perceived partisan agenda”).

²⁶² See SKAGGS & SILVER, *supra* note 259, at 3 (“It flies in the face of fundamental notions of disinterested, impartial decision-making to allow a judge accused of bias to be the only one who decides whether he or she should be disqualified.”).

²⁶³ See *Disqualification of a Judge on the Ground of Bias*, *supra* note 258, at 81 (“A biased mind rarely realizes its own imperfection that would normally prevent the perfect equipoise that is so desirable in our system of trial.”).

²⁶⁴ See Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC’Y REV. 621, 626–27 (1991) (finding that “the legitimacy of the U.S. Supreme Court is based [at least indirectly] on the [public’s] belief that [the court] makes decisions in fair ways, not on agreement with its decisions”). *But see* James L. Gibson, *Institutional Legitimacy, Procedural Justice, and Compliance with Supreme Court Decisions: A Question of Causality*, 25 LAW & SOC’Y REV. 631, 631 (1991) (finding a lack of evidence of direct causal link between perceptions of procedural fairness and the public’s willingness to comply with unpopular SCOTUS decisions).

²⁶⁵ See *supra* Part IV (discussing the chancy combination of objective standards, self-disqualifying procedures, and the Bias Blind Spot).

partial jurists; or (2) requiring a judge, panel of judges, or other neutral decision maker to rule on disqualification motions.²⁶⁶

While these proposed reforms will require adjustments to how disqualification decisions are administered, those changes are both possible and positive. In fact, several state courts already use either peremptory challenges or neutral decision makers for disqualification disputes and those systems are mostly successful.²⁶⁷ Thus, the federal and remaining state courts should end the practice of “self-disqualification” and adopt one of these alternative procedures in order to avoid defective or seemingly defective disqualification decisions caused by the Bias Blind Spot.

b. Denial of Self-Disqualification Decisions Must Be Reviewed Promptly and De Novo

If the removal of the challenged jurist as arbiter of his own disqualification is not practicable, then his decision must be subject to a right of immediate appeal using the less deferential *de novo* standard of review. It is possible that some courts—especially those with only one jurist who regularly sits—or a court that is geographically remote cannot practically implement the preferred reforms—using peremptory challenges or eliminating self-disqualification. In those jurisdictions where the challenged jurist is the only person who can make the initial decision, an immediate right of appeal using the less deferential *de novo* standard of review must be provided to preserve litigants’ rights to a fair trial and preserve public confidence in the judiciary.

Currently, there are few, if any, realistic avenues for review of a decision denying disqualification—even one decided by the challenged jurist himself. Although the disappointed party can seek reconsideration of the order denying disqualification, courts are very reluctant to grant relief where self-disqualification procedures are used.²⁶⁸ The remaining methods of review are: (1) right of appeal from final order; (2)

²⁶⁶ See *supra* Part V.A (reshaping recusal procedures to avoid the Bias Blind Spot).

²⁶⁷ See FLAMM, *supra* note 76, at 505–07 (indicating that while most states require the challenged jurist to decide, at least initially, a number of states either use peremptory challenges or permit or require that another judge or panel of jurists decide disqualification disputes). *But cf.* Order Repealing Rule 21.1(a) of the Wyoming Rules of Criminal Procedure & Order Amending Rule 40.1 of the Wyoming Rules of Civil Procedure, In the Matter of the Repeal of Rule 21.1(a) of the Wyoming Rules of Criminal Procedure & Amendment of Rule 40.1 of the Wyoming Rules of Civil Procedure (Nov. 26, 2013) (repealing the rule permitting peremptory challenges in criminal and juvenile cases due to blanket uses and other abuses but continuing to permit such challenges in civil cases).

²⁶⁸ See FLAMM, *supra* note 76, at 960 (noting that courts are “typically quite reluctant to grant a motion seeking reconsideration of a disqualification order[]” (footnote omitted)).

854 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

interlocutory appeal of order that is certified as final and reviewable; (3) immediate review under the collateral order doctrine; or (4) an extraordinary writ.²⁶⁹ However, there are serious roadblocks along the way for each of these potential routes for review. First, a disqualification decision is unlikely to resolve the underlying case and, therefore, the final order rule will block review through the right of direct appeal.²⁷⁰ Second, a “self-disqualification” order is unlikely to be reviewed using an interlocutory appeal because those procedures typically require the jurist whose order is being appealed to certify that the order is a “final judgment” and that “there is no just reason for delay” – something that is unlikely to happen.²⁷¹ Third, immediate review under the collateral order doctrine will most likely not be available because it requires that the challenged jurist agree the decision he just made about his lack of bias is a reasonably close question about “which there is substantial ground for a difference of opinion.”²⁷² Fourth, the writs of *mandamus* or *prohibition* are extraordinary remedies that will be successful only if the party seeking relief can meet the high standard of demonstrating the disqualification decision was a clear abuse of discretion – in other words, so far out of bounds as to be unreasonable.²⁷³ Thus, without an express right of immediate appeal, most orders denying disqualification are not subject to meaningful review, even though the challenged jurist was the arbiter of his own partiality.

In addition, the current standard of review used by most federal and state trial courts to decide disqualification disputes is too deferential given the importance of the right to fair trial that is at stake. Most federal and state court disqualification decisions are reviewed using an “abuse of discretion” – rather than the *de novo* – standard.²⁷⁴ It is true that the standards of review are somewhat difficult to rank because the

²⁶⁹ See *id.* at 959–68 (exploring these various routes for appellate review and concluding that few requests for review are likely to be successful).

²⁷⁰ See *id.* at 959–63 (outlining the different routes for appellate review of disqualification decisions and finding relief on appeal unlikely); see also Stempel, *supra* note 258, at 797–98 (finding a right of direct appeal from disqualification decisions generally does not exist).

²⁷¹ See FLAMM, *supra* note 76, at 959–61 (discussing appellate review of disqualification decisions); see also Stempel, *supra* note 258, at 797 & n.195 (finding it unlikely courts will certify interlocutory appeals from disqualification decisions given the standards).

²⁷² Stempel, *supra* note 258, at 798; see FLAMM, *supra* note 76, at 963–64 (noting that a party who is aggrieved by a disqualification decision can attempt to invoke the collateral order exception).

²⁷³ See FLAMM, *supra* note 76, at 967–68 (pointing out that appellate courts have been reluctant to issue writs of mandamus); see also Stempel, *supra* note 258, at 797–98 (finding it unlikely the challenged jurist will certify interlocutory appeals from disqualification decisions because he would have to concede he may be or appear to be biased).

²⁷⁴ See FLAMM, *supra* note 76, at 984–86 (stating that “abuse of discretion” is the predominant standard of appellate review of disqualification decisions).

abuse of discretion standard focuses on the decision maker, and *de novo* review is undertaken from the perspective of the appellate court.²⁷⁵ However, the abuse of discretion standard is too deferential when applied to “self-disqualification” decisions because the review standard is based upon two incorrect premises. First, the abuse of discretion standard improperly presumes that disqualification is a matter of judicial discretion rather than a mandatory rule that protects the litigant’s fundamental right to a fair trial.²⁷⁶ Second, use of the abuse of discretion standard does not properly account for the Bias Blind Spot because the standard improperly presumes the correctness of the initial self-disqualification decision.²⁷⁷ Thus, a more rigorous appellate review using a *de novo* standard is needed to protect the litigant’s right to a fair trial and ameliorate the effect of the Bias Blind Spot in disqualification disputes.

2. Meaningful and Timely Disclosure of Interests and Relationships Must Be Made

Second, in order to make these two reforms regarding who will be the sole or final arbiter in disqualification disputes worthwhile, all jurists and the parties must provide meaningful and timely disclosure of possible grounds for conflict or bias. It is true that under most federal and state judicial ethics codes jurists are required to make financial disclosure of gifts and other things of value received by the jurist.²⁷⁸ However, the *Code of Conduct for US Judges*—which applies to all district court judges and justices on the courts of appeals—does not expressly require the jurist to disclose known connections with the parties in the

²⁷⁵ See *id.* at 996–97 (providing that under the *de novo* standard, the reviewing court “approaches the task as if it were the first judicial body to consider the matter”). By contrast, use of the abuse of discretion standard means an erroneous disqualification decision would be reversed only if the appellate court found that the “decision is one that can[not] be rationally defended.” *Id.* at 990.

²⁷⁶ See *Serbulea*, *supra* note 92, at 1138 (suggesting that the loss of impartiality infringes on the due process guarantee of a fair trial); see also *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that [a] fair trial in a fair tribunal is a basic requirement of due process.”).

²⁷⁷ See *Marbes*, *supra* note 164, at 250–51 (describing the Bias Blind Spot, “which is the tendency to fail to discern one’s own biases while at the same time inferring bias in others” (footnote omitted)).

²⁷⁸ See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4H(3) (2009) (“A judge should make required financial disclosures, including disclosures of gifts and other things of value, in compliance with applicable statutes and Judicial Conference regulations and directives.”); see also ABA MODEL CODE OF JUDICIAL CONDUCT R. 3.15 (2011) (requiring that a judge must “publically report the amount or value of: (1) compensation received for extrajudicial activities . . .”).

856 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

litigation.²⁷⁹ Some courts have gone so far as to suggest it is the litigants' burden to ferret out such information.²⁸⁰ Even in jurisdictions where jurists have an affirmative obligation to disclose information relevant to disqualification, that duty often is limited to only those connections or interests that the challenge jurist believes are possibly or likely disqualifying.²⁸¹ Thus, there is currently a lack of meaningful obligation to disclose possible disqualifying interests or connections.

This lack of a consequential judicial disclosure obligation means that most litigants lack necessary factual information to easily evaluate the actual, probable, or apparent bias of the jurist. This lack of information forces the litigant who believes the jurist may be biased to make one of two difficult choices. First, the litigant can expend significant resources investigating the financial, familial, and other connections of the jurist.²⁸² Second, if the rumored information is serious enough, a party must take the risk of making a disqualification motion based upon information and belief and requesting the challenged jurist to disclose the suspected connections.²⁸³ Alternatively, those litigants who lack the resources or are not comfortable taking the risk of calling out the jurist actually may be denied a right to a fair trial, or the party, and public, may perceive such rights has been denied because the decision maker is actually, probably, or apparently biased.²⁸⁴ Thus, the procedures governing disqualification disputes must be reformed to include an explicit obligation on part of jurists to reveal *all* interests and connections so that

²⁷⁹ See generally CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3 (2009) (omitting language requiring that a judge must disclose a connection to the parties in litigation before them).

²⁸⁰ See, e.g., *U.S. ex rel. Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 179 F.R.D. 541, 546 (S.D. OH 1997) (“[l]itigants have a duty to investigate and inform the court of any perceived biases before the court and the parties invest time and expense in a case”), *rev'd*, 190 F.3d 729 (6th Cir. 1999).

²⁸¹ See, e.g., *Porter v. Singletary*, 49 F.3d 1483, 1489 (11th Cir. 1995) (holding that under Florida’s judicial ethics code judges have an ethical duty to “disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification”).

²⁸² See, e.g., *Motion of Respondent Corporations for Disqualification of Justice Benjamin*, reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 104a–320a (2009) (No. 08-22), and *Hugh M. Caperton’s Motion for Disqualification Directed to Justice Brent D. Benjamin*, reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 321a–35a (2009) (No. 08-22) (describing information gathered in the investigation of Justice Benjamin’s financial connections with Massey and its CEO Blankenship).

²⁸³ See *Hugh M. Caperton’s Motion for Disqualification Directed to Justice Elliott E. Maynard*, *A.T. Massey Coal Co. v. Caperton*, No. 33350 (W.Va. 2008) (seeking judicial disclosure of rumored connections between the challenged Justice Maynard and Massey CEO Blankenship).

²⁸⁴ See *Frost*, *supra* note 259, at 568–69 (noting that lack of information and its impact on the likelihood that a disqualification motion will even be filed).

others—the litigants, other judges, the public, or the press—may evaluate the actual, probable, or apparent bias of the jurist.²⁸⁵

3. Decisions Denying Disqualification Must Include Reasons and Be in Writing and Published

Third, in order to be legitimate, the decision to deny any recusal request must be a “reasoned decision” that is in writing and made available to the public.²⁸⁶ Although scholars may not agree on *why* procedural protections legitimize judicial decision making, most do agree on the specific procedures that are essential to legitimate judging.²⁸⁷ Among those essential procedures is the requirement of a “reasoned decision”—a decision for which an articulated rationale has been given—which reason is situated within and constrained by precedent or another identifiable body of law.²⁸⁸ The legitimizing function of the reasoned decision is bolstered by the requirement that the decision must be in writing and made available to the public.²⁸⁹ These procedures will not only legitimize the specific disqualification decision, but will help create an entire body of law on disqualification that will guide future disputes and legitimize the judiciary as a whole.

The practice of articulating a rationale for a decision is the hallmark of legitimate judging because giving reasons commits and constrains decision-making both with respect to the current decision and future disputes. The rationale commits the decision maker to a broader principle because the reasons given for a specific decision creates a more abstract or general rule that goes beyond the concrete and specific

²⁸⁵ See *supra* note 279 and accompanying text (providing that the current ethical rules governing most jurists, the *ABA Judicial Code of Conduct* and *U.S. Code of Judicial Conduct*, already include disclosure requirements for financial interests and gifts, but do not address disclosure of other possible conflicts or grounds of bias in specific cases).

²⁸⁶ See Frost, *supra* note 259, at 592 (suggesting that producing a reasoned decision is vital to maintaining the integrity of the judiciary).

²⁸⁷ See *id.* at 555–56 (pointing out that although the sources of judicial legitimacy is contested, most agree on “several essential procedural components of adjudication that legitimize it as a method of decisionmaking in a democratic society”).

²⁸⁸ *Id.* Listing the five essential procedures for legitimate adjudication as:

- (1) litigants, not courts, initiate disputes;
- (2) the disputes are presented through an adversarial system in which two or more competing parties give their conflicting views;
- (3) a rationale must be given for decisions;
- (4) decisions must refer to, and be restricted by, an identifiable body of law; and
- (5) the decision maker must be impartial.

Id. (footnote omitted).

²⁸⁹ See *id.* at 562 (citing that public declarations are an additional legitimizing procedure or feature of judicial decision making).

858 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

context of the current dispute.²⁹⁰ Also, giving reasons constrains the current decision by situating the outcome within an existing and identifiable body of law or requiring the decision maker to acknowledge a new rule is being created.²⁹¹ In addition, the requirement of stating the rationale for a decision also promotes discipline in decision making by making it less likely decisions will be based upon bias, self-interest, or intuitive judgments rather than thoughtful reflection, which is particularly important given the effects of the Bias Blind Spot.²⁹²

The additional requirement that specific reasons be given in a writing made available to the public helps bolster legitimacy of the specific decision, while at the same time, it helps create a more general body of law on disqualification.²⁹³ The articulation of proper reasons for a decision is the best way to communicate with others regarding the decision-making process and legitimize the outcome.²⁹⁴ In fact, it is only through a reasoned decision that jurists can express that the parties' participation has been meaningful, the jurist heard and understood the litigants' proof and arguments, and the decision reached is not arbitrary, capricious or otherwise illegitimate.²⁹⁵ Also, the requirement of a written decision aids review of the grounds for the decision—not just by the litigants, the press, and the public—but, also by the appellate court.²⁹⁶ Thus, requiring reasons for denying disqualification will help insure that such decisions are based on rational and legitimate grounds and aid review of those decisions when necessary.

²⁹⁰ See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 641 (1995) ("The key point, indeed the linchpin for the entire analysis, is that, ordinarily, to provide a reason for a decision is to include that decision within a principle of greater generality than the decision itself." (footnote omitted)).

²⁹¹ See *id.* at 652 (explaining that if a jurist cannot articulate reasons for the decision, then either the result is not constrained by pre-existing law or there is relevance to some principle from which a new rule can be fashioned).

²⁹² See *id.* at 657-58 ("A reason-giving mandate will also drive out illegitimate reasons when they are the only plausible explanation for particular outcomes.").

²⁹³ See *id.* at 638 (noting that a judge is expected to provide, "ordinarily in writing," the reasoning for his or her conclusion).

²⁹⁴ See *id.* at 657-58 (concluding that giving reasons may be a sign of respect for those affected by the decision and is also a way of opening a conversation to help insure participants feel included in the process).

²⁹⁵ See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388 (1978) (examining whether an arbiter can rest his decision on grounds that are not argued by the parties).

²⁹⁶ See Frost, *supra* note 259, at 563 (providing that the federal court system requires reasoned decision making so that the appellate courts can review the lower court's findings).

B. Criticisms and Misplaced Confidence in Jurists' Impartiality Should Not Stand in the Way of Recusal Reforms

In spite of the genuine concerns for impartiality and clear calls for procedural reform of recusal practices—the practice of allowing one to “be a judge in his own [disqualification] case” still prevails in the majority of federal and state courts.²⁹⁷ This is due, at least in part, to resistance by judges and justices to the idea that the challenged jurist should be removed from the disqualification decision making process.²⁹⁸ The reasons given are somewhat varied, but can be reduced to four that require a response. First, critics point to the opportunities for judge shopping that are inherent in any disqualification system.²⁹⁹ Second, concerns are sometimes expressed regarding the administrative burden of such procedural reforms.³⁰⁰ Third, another roadblock to reform is the perceived loss of public confidence that allegedly will result from an increase in challenges to jurists' impartiality.³⁰¹ Fourth, many commentators and jurists continue to believe strongly that judges or justices are capable because of their integrity, experience, and intellect to

²⁹⁷ See *supra* Part III.C (discussing federal and state disqualification procedures); see also FLAMM, *supra* note 76, at 516 (noting that a litigant can seek judicial disqualification or argue the failure of a judge to recuse himself “as a grounds for error on appeal.” (footnote omitted)).

²⁹⁸ See Geyh, *supra* note 247, at 701-02 (explaining the “vicious cycle” of judicial resistance, recusal reform, and repeated resistance by the bench).

²⁹⁹ See, e.g., Glassroth v. Moore, 229 F. Supp. 2d 1283, 1286 (M.D. Ala. 2002) (“The Eleventh Circuit has articulated an additional important principle to be considered in recusal cases: although the duty to recuse is imperative in close cases, ‘[j]udges must not recuse themselves for imaginary reasons; judge shopping should not be encouraged.’”); see also Bassett, *supra* note 116, at 1254 (arguing that proponents to peremptory challenges have raised concerns about judge shopping); Seth E. Bloom, Note, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 665 (1985) (“Disqualification law must avoid excessive removal of judges, which may do serious harm to public confidence and judicial efficiency and promote judge shopping.”).

³⁰⁰ See *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1313 (9th Cir. 1982) (demonstrating the inefficiency of recusal when “after five years of litigation, a multi-million dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over Mrs. Muecke’s \$29.70”).

³⁰¹ See, e.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 903 (2009) (Scalia, J., dissenting) (arguing that the decision will have the opposite effect and will reinforce negative public perception of the judiciary). Justice Scalia argues:

What above all else is eroding public confidence in the Nation’s judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.

Id.

860 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49

make the right decision when their impartiality is challenged.³⁰² Finally, others point to the availability of appellate review as a check on incorrect disqualification decisions.³⁰³ However, not one of these concerns should stand in the way of reform of recusal procedures because the price paid by individual litigants' loss of the right to a fair trial and the resulting damage to the reputation of our judiciary is simply too great to ignore.

1. Judge Shopping Likely Will Decrease when Challenged Jurists No Longer Decide Disqualification

First, when procedural reforms such as eliminating the challenged jurist from the disqualification decision are suggested, critics often argue such changes would increase judge shopping. This criticism is usually leveled against calls to adopt peremptory challenges in disqualification disputes. However, in states where peremptory challenges (either with or without cause) are already used, there is little empirical evidence supporting the conclusion that such methods increase judge shopping.³⁰⁴ In addition, this Article proposes that each jurisdiction decide which of several methods of decision making to adopt, so long as the challenged jurist is not the real decision maker.³⁰⁵ Thus, concerns about judge shopping are misplaced in this instance because courts are free to select a method that requires litigants seeking to use disqualification to judge shop to prove to another judge or justice that the challenged jurist lacks impartiality. Most jurists are more reluctant to decide a colleague is

³⁰² See, e.g., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *supra* note 118, at 10 (discussing recusal). Chief Justice Roberts states:

I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.

Id.

³⁰³ See Stempel, *supra* note 258, at 753-54 (addressing the argument that appellate review of potentially erroneous disqualification decisions is available and finding such review lacking).

³⁰⁴ See ALAN J. CHASET, DISQUALIFICATION OF FEDERAL JUDGES BY PEREMPTORY CHALLENGE, FEDERAL JUDICIAL CENTER 26-27 (1981) ("Several of the state statutes have been in place for a long time, but little has been written about them or their operation: there appears to be only one empirical study that is sufficiently thorough to be useful." (footnote omitted))

³⁰⁵ See *infra* Part V.B (discussing the criticisms surrounding jurists' impartiality).

disqualified than to recuse themselves.³⁰⁶ So, it is unlikely that eliminating self-disqualification will lead to increased opportunities for judge shopping. In fact, the opposite result—a decrease in judge shopping—is the more likely result of this proposed procedural reform.

2. Administrative Burdens Are Outweighed By the Benefits of Recusal Reform

Second, the administrative burdens of the proposed reforms of recusal procedures are far outweighed by the actual costs in terms of denial of litigants' Due Process and the negative impact on public confidence in the judiciary. Since a challenged jurist—like the rest of us—cannot be impartial about his own impartiality, the risk of biased decisions is not limited to “extraordinary circumstances.”³⁰⁷ Rather, it is a systematic error with which litigants (and their lawyers) must deal each and every day in courts where the challenged jurist is the sole or final decision maker in a disqualification dispute.³⁰⁸ Given the enormous number of opportunities for this error throughout the federal and state court systems—erroneous disqualification decisions have the potential to create a serious impact in actual cases decided throughout the United States.³⁰⁹ So, by removing the challenged jurist at the outset (either through peremptory challenges or substituting another decision maker),

³⁰⁶ See JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 66-67 (1995) (describing a survey that shows judges are more likely to disqualify themselves than to disqualify their colleagues).

³⁰⁷ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 887 (2009) (describing the timing, amount, and relative size of the campaign support offered to Justice Benjamin as creating an extraordinary situation).

³⁰⁸ See SAMPLE ET AL., *supra* note 123, at 26 (describing that a total of nineteen states permit parties to use some form of peremptory challenge to remove one judge per proceeding); see also FLAMM *supra* note 76, at 753 (“[A] substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a peremptory basis.”). However, in most states, the peremptory challenge can be used by a party only once in a proceeding. *Id.*

³⁰⁹ See R. LAFOUNTAIN ET AL., NAT'L CTR. STATE CTS., EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS (Sept. 25, 2012), <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>, archived at <http://perma.cc/7ER5-7PYV> (stating that in 2010, the various state courts handled a total of approximately 19,000,000 civil and 20,000,000 criminal cases for a total of around 38,000,000 new cases (excluding domestic relations, juvenile, and traffic cases) that year). Of that total, approximately 5,565,000 civil cases were instituted in one of the seventeen states that permit litigants to use peremptory challenges to remove a judge without any cause. *Id.* So, that leaves approximately 13,435,000 cases brought in the state courts in which the decision to insure a fair trial before a fair tribunal relied on the use of “self-disqualification” by the challenged jurist. *Id.*

862 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

we actually will improve the efficiency by decreasing the number of likely appeals from denials of disqualification motions. So, rather than decrease efficiency, the suggested procedural reform will increase efficiency.

Moreover, removing the challenged jurist from the disqualification decision (or at least subjecting a denial to immediate *de novo* review by another judge or justice) properly protects the primary purposes of partiality—fair trials and institutional legitimacy. When a jurist who reasonably appears to be biased erroneously decides she need not step aside, that error may negatively impact the litigants' rights to a fair trial before a fair tribunal by introducing the jurist's bias into the decision making process.³¹⁰ The mistaken disqualification decision also effects public confidence in the justice system as a whole by creating negative perceptions of the jurist, which effect institutional legitimacy.³¹¹ In fact, the appearance of an unfair process may do more harm than the actual results reached in the particular cases as people are more likely to accept unfavorable or unexpected results if the decision making process is perceived as fair.³¹² Thus, preservation of fair trials and public confidence in the judiciary demands that we refocus recusal reforms on procedural protections that remove the challenged jurist as the decision maker.

3. The Public Will Not Lose Confidence in the Judiciary as a Result of Recusal Reform

Third, given the nature of these suggested procedural reforms there is no reason to believe that the public will have less confidence in specific disqualification decisions or the judiciary generally. The opposite is likely to be true since all of the suggested reforms—starting with removal of a potentially biased decision maker—make the process more transparent, which usually increases institutional legitimacy and adherence to outcomes.³¹³ In fact, it is hard to imagine how removing

³¹⁰ See *supra* Part IV (describing the important implications for judicial disqualification and public confidence in the judiciary).

³¹¹ Tyler & Rasinski, *supra* note 264, at 626–27.

³¹² See Kees van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERSONALITY & SOC. PSYCHOL. 1493, 1494 (1998) (“One of the most important discoveries in research on procedural and distributive justice has been the finding that perceived procedural fairness positively affects how people react to outcomes. This instance of the fair process effect is one of the most frequently replicated findings in social psychology.” (citations omitted)).

³¹³ See *supra* note 264 and accompanying text (discussing direct and indirect casual connections between perceived fairness of court procedures, institutional legitimacy, and adherence to unpopular court decisions).

the potentially biased decision maker and giving litigants more meaningful appellate review would result in less confidence (by the parties or the public) in the fairness of the process. Moreover, when powerful voices have suggested that reform may lead to more charges of biased jurists and a loss of public confidence in the judiciary, those criticisms have been directed at proposed substantive reforms that would increase the number of grounds for disqualification, not reform the procedural practices.³¹⁴ Thus, it seems likely that a more transparent process is likely to increase rather than decrease confidence in specific disqualification decisions and the impartiality of the judiciary as a whole.

4. Even Intelligent, Informed, and Well-Intentioned Jurists Have a Bias Blind Spot

Fourth, the conviction—no matter how genuine—that jurists are capable of making unbiased decisions about their own biases simply is not supported by the scientific evidence. In fact, the existence and effects of the Bias Blind Spot have not been seriously challenged in any of the cognitive or social psychology studies performed to date.³¹⁵ Also, there have been empirical studies demonstrating that jurists are subject to a variety of other cognitive biases just as are ordinary people.³¹⁶ In addition, there exists no scientific evidence to support the belief that the more intelligent among us are less prone to the Bias Blind Spot.³¹⁷ In fact, what little evidence does exist on the subject supports the contrary conclusion—that those who are more intelligent are more likely to believe they can overcome this cognitive illusion.³¹⁸

³¹⁴ See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 893–98 (2009) (Roberts, J., dissenting) (posing forty questions about the changed substantive standards for disqualification under the Due Process Clause).

³¹⁵ See Joachim I. Krueger & David C. Funder, *Towards a Balanced Social Psychology: Causes, Consequences, and Cures for the Problem-Seeking Approach to Social Behavior and Cognition*, 27 *BEHAV. & BRAIN SCI.* 1, 5 (2004) (reviewing the literature on a variety of cognitive illusions and noting no studies that seriously question the existence of the Bias Blind Spot).

³¹⁶ See Guthrie et al., *supra* note 239, at 4 (demonstrating that judges are just as likely to be affected by a number of cognitive illusions as the ordinary public).

³¹⁷ See Richard F. West et al., *Cognitive Sophistication Does Not Attenuate Bias Blind Spot*, 103 *J. PERSONALITY & SOC. PSYCHOL.* 506, 516 (2012) (indicating the lack of other scientific studies testing whether superior intellect may ameliorate the effects of the Bias Blind Spot on certain cognitive functions).

³¹⁸ See *id.* at 515 (providing that the bias blind spot effect is “unmitigated by increases in intelligence [and this result is] consistent with the idea that the mechanisms that cause the bias [blind spot] are quite fundamental and not easily controlled strategically [because the cognitive mechanisms at work are] evolutionary and computationally basic”).

864 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

Moreover, the conviction that judges are somehow immune to the cognitive processes that produce the Bias Blind Spot simply does not resonate with the common sense views held by many litigants, the press, and the public, as well as commentators. While our system of disqualification inherited from English common law included a strong presumption of judicial impartiality, in the 19th Century some legal thinkers began to challenge that view as advances were being made in the psychological sciences.³¹⁹ In addition, the naïve conviction that jurists are immune to the Bias Blind Spot is belied by a common sense review of those disqualification disputes for which we do have written reasons why the jurist chose to not step aside.³²⁰ As a result, there is no scientific nor common sense reason to doubt that, just like the rest of us, jurists are affected by the Bias Blind Spot. Thus, procedural reforms that prohibit the challenged jurist from being the sole or final arbiter of his or her own biases and other procedural changes designed to make the process more transparent should not be further stymied by this misplaced confidence in judicial impartiality.

5. Appellate Review Procedures Do Not Erase Errors in Disqualification Disputes

Finally, if the challenged jurist declines to disqualify himself and in so doing makes an erroneous decision because he is actually, probably, or apparently biased, there is a right to appellate review (except in the case of SCOTUS) – but there is little chance the decision will be corrected on appeal. The likelihood of reversal on appeal is remote for at least four reasons. First, only a fraction of those erroneous disqualification decisions will ever be appealed given the litigant’s limited time, money, and other resources.³²¹ Second, meaningful review of erroneous

³¹⁹ See, e.g., David Dudley Field, *A Few Words on Judicial Integrity*, 6 ALB. L.J. 265, 265 (1872) (“Judges are but men, and are swayed like other men by vehement prejudices. This is corruption in reality, give it whatever other name you please.”); *Civil Rights (1883): Robert Green Ingersoll*, SECULAR WEB, http://infidels.org/library/historical/robert_ingersoll/civil_rights.html (last visited Mar. 25, 2015), archived at <http://perma.cc/JT25-WHA6> [hereinafter *Robert Green Ingersoll*] (“We must remember, too, that we have to make judges out of men, and that by being made judges their prejudices are not diminished and their intelligence is not increased.”).

³²⁰ See *supra* Part III (discussing cases from the highest courts in federal and state judiciary where jurists attempt to explain their lack of bias apparently without considering or even acknowledging that reasonable others may view the situation differently).

³²¹ See Court Statistics Project, *State Court Caseload Statistics*, NAT’L CTR. STATE CTS. (2012), <http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx>, archived at <http://perma.cc/7ER5-7PYV> (explaining that in 2010, although a total of 37,945,591 civil and criminal cases were pending in the state courts, only 272,975 appeals were filed in either the intermediate court of appeal or the court of last resort in all fifty states). In 2013,

decisions is often not available due to the largely discretionary nature of the right to review most disqualification decisions.³²² Third, even when there is a right to appeal, the standard for review on appeal and the accompanying procedures result in delayed and less than meaningful reviews of such decisions.³²³ Fourth, some studies have found that due to cultural norms, jurists are less likely to direct disqualification of a colleague on their court or another court than they are to step aside themselves—even though recusal is a rare occurrence in cases not involving *per se* disqualification standards.³²⁴ Thus, even though the litigant may have a right to appeal the disqualification decision, the right does not provide meaningful relief in a large number of cases where an erroneous decision has been made.

Although all three of these factors impact the effectiveness of the appellate review of any disqualification decisions, it may not be possible for the judiciary to address all of these issues effectively. First, the judiciary can do little or nothing to increase the time, money, and other resources that litigants have available to appeal seemingly erroneous disqualification decisions. Second, while judicial education regarding the impact of cognitive biases affecting judicial decisions may improve the understanding and perspective jurists bring to disqualification disputes, that type of reform effort takes time and requires regular reinforcement. Moreover, we simply do not know if educating jurists in this way actually will work and what little evidence there is regarding the impact of such efforts suggests that enlightening people about the Bias Blind Spot and other cognitive errors does not negate their effect on our thinking.³²⁵ Thus, it appears that the judiciary can have little

although a total of 375,870 new cases, including 284,604 civil cases, were filed in the federal district courts, only 56,475 appeals (or fewer than 17% of pending cases) were commenced in the United States Courts of Appeals. JUDICIAL BUSINESS OF THE UNITED STATES COURTS: ANNUAL REPORT OF THE DIRECTOR 2013, U.S. COURTS, <http://www.uscourts.gov/statistics/judicialbusiness/2013.aspx> (last visited Apr. 21, 2015), *archived at* <http://perma.cc/2RLP-NPTL>.

³²² See *supra* Part V.A.1.b (describing the connection between the right to review and the discretionary nature of making the decision).

³²³ See Stempel, *supra* note 258, at 804–05 (arguing that abuse of discretion and harmless error standards should be replaced by a *de novo* review because disqualification decisions made by the challenged jurist is suspect given a host of biasing influences and a professional culture that creates reluctant recusants).

³²⁴ See SHAMAN & GOLDSCHMIDT, *supra* note 306, at 67 (“The data from this survey show that judges are more inclined to disqualify themselves than they are to recommend that a colleague do so. This finding, it could be argued, militates against having another judge rule on the disqualification issue.”).

³²⁵ See Pronin & Kugler, *supra* note 183, at 566–67 (explaining that the limited research conducted on the effects of educational efforts demonstrates that while such efforts might increase awareness of the existence of this cognitive illusion, there is no scientific support

866 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49]

meaningful impact on the first two factors, so procedures must be reformed to create meaningful change.

VI. THE PURPOSES OF IMPARTIALITY

Of course, any proposed reform of disqualification practices should promote the underlying purposes of judicial impartiality. There are a myriad of ways one could identify and explain those underlying purposes of judicial impartiality. First, an evaluation of the federal and state substantive standards for disqualification (whether code or common law based) and their application would reveal some explicit and implicit goals of judicial impartiality. Second, a similar review of the federal and state standards for judicial conduct and their application also would reveal a clearer understanding of the goals of those rules. Third, an assessment of historical materials that address the initial establishment of our tri-partite system of government and the role of the judiciary in that structure would reveal yet other desired reasons for judicial impartiality. However, in this Article, the purposes of impartiality will be assessed using the framework developed by Dean and Professor Charles Gardner Geyh in his recent piece exploring “the three dimensions of impartiality” in our judicial system.³²⁶

A. *The Three Dimensions of Impartiality*

There are three distinct, but somewhat overlapping, dimensions of impartiality: the procedural, the political, and the ethical.³²⁷ The “procedural dimension” of impartiality is aimed at affording the particular parties in a specific case a fair hearing, which necessarily requires a fair decision maker.³²⁸ The “political dimension” of

for the idea that education can overcome the effects of the Bias Blind Spot). Further, an experiment in which participants who were educated about the pitfalls of relying on introspection tended to cease claiming they were less prone to bias but noting such education made no actual impact on participants’ decision making. *Id.*; see also Cynthia McPherson Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 166 (2006) (discussing the backfiring effect of efforts to educate others about unconscious bias and correcting for liking or disliking somebody).

³²⁶ See *The Dimensions of Judicial Impartiality*, *supra* note 21, at 493 (“judicial impartiality [can be conceptualized] in three distinct dimensions: a procedural dimension, . . . a political dimension, . . . and an ethical dimension”).

³²⁷ See *id.* (discussing the procedural, political, and ethical dimensions).

³²⁸ See *id.* at 511 (discussing the interest of judicial impartiality). Geyh discusses the procedural dimension of impartiality as follows:

[T]he interest [of the parties] in judicial impartiality is personal to them, acutely felt, case-specific, and shaped by firsthand experience.

impartiality is concerned with the role that jurists play in the administration of justice and the public's perceptions of how that role is served within the larger governmental structure.³²⁹ The focus of the ethical dimension is yet a different constituency—jurists themselves, who have a stake in not only the legitimacy that impartiality creates for the judiciary as a whole but how it shapes their own identity in their role within that legal institution.³³⁰ Thus, any proposed reforms of recusal practices will be viewed through these three lenses: the procedural dimension, the political dimension, and the ethical dimension.

B. A Framework for Assessing Recusal Reforms

This Article uses these three dimensions of impartiality as a framework for assessing the current state of disqualification practice and to evaluate the proposed reforms of recusal procedures. This type of application of Dean Geyh's three-part framework of impartiality appears to be exactly how he hoped scholars would use his work.³³¹ Also, this

The focus of their attention is on the process employed to litigate their cases, and whether that process protected them adequately from the perils of partiality This, then, is the procedural dimension of impartiality.

Id.

³²⁹ See *id.* at 512 (distinguishing the connection between the public's interest and an impartial judiciary). Geyh states:

[T]he public's interest in an impartial judiciary is less personal than philosophical or ideological, more diffuse than acute, systematic rather than case-specific . . . and shaped less by firsthand experience than by impressions gleaned from public discussions on the acceptability of judges to the body politic. In other words, the focus of the public's attention is on the impartiality of judges in relation to the role they play in the administration of government, which is 'political' in the original sense of the term.

Id.

³³⁰ See *The Dimensions of Judicial Impartiality*, *supra* note 21, at 512 (discussing the interest of judges in impartiality). The following describes the dimensions of impartiality:

As adjudicators at the center of the litigation process, judges have an interest in the procedural dimension of impartiality; as representatives of the third branch of government, judges desire institutional legitimacy and consequently have an interest in the political dimension of impartiality, too. But as women and men whose self-identity as good judges is tethered to the oath they have sworn to be impartial—an oath judges have taken for centuries—there is a third dimension of impartiality: an ethical dimension.

Id.

³³¹ See *id.* at 493 (describing the need to re-think judicial impartiality). Geyh explains: Scholars have traditionally analyzed judicial impartiality piecemeal, in disconnected debates on discrete topics. As a consequence, current understandings of judicial impartiality are balkanized and muddled.

868 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49

three dimensional perspective of impartiality fits neatly within much of what SCOTUS has, in its Due Process Clause cases, declared about the purposes of impartiality in our judicial system.³³² Thus, this Article uses the framework of the three dimensions to assess judicial impartiality and proposed reforms of current procedures and practices used to decide disqualification disputes.

1. Promoting Fairness in Litigation

First, in the procedural dimension, if the proposed reforms are adopted, then the parties are more likely to get a fair trial than is possible using the self-disqualification method. This is true because any jurist who was actually, probably, or even apparently biased has been removed from the decision making process through either peremptory challenges, reassignment of the disqualification dispute to another jurist, or immediate *de novo* review of any self-disqualification decision.³³³ When that kind of structural bias is eliminated, we necessarily improve the outcomes.

In addition, the other proposed procedural protections will promote more openness and transparency that will positively affect outcomes in disqualification disputes. The requirement of full disclosure of all interests and connections beyond the more limited disclosures now required by both the jurist and the parties will help insure that all the relevant information is available to both the litigants and the decision maker. Also, the mandate of a written and published opinion when disqualification is denied will help because if the targeted jurist or other neutral decision maker knows her reasoning process will be subject to

This Article seeks to reconceptualize judicial impartiality comprehensively, across all contexts. . . . [Thus], this Article offers a new perspective, not just on judicial impartiality, but also on the role of the American judiciary in the administration of justice and the political process.

Id.

³³² See, e.g., *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 869, 877 (2009) (“Because the objective standards implementing the Due Process Clause do not require proof of actual bias, . . . [but do require disqualification when] ‘experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (declaring the need to “preserve[] both the appearance and the reality of fairness, ‘[which] generat[es] the feeling[], so important to a popular government, that justice has been done’ . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him”); see also *In re Murchison*, 349 U.S. 133, 136 (1955) (finding that an impartial judge is necessary to maintain the legitimacy of court proceedings).

³³³ See Stempel, *supra* note 258, at 804–05 (discussing the benefits of alternative forms of review).

some review, then she is more likely to insure that the reasoning is sound and meets the objective standard for disqualification. However, even if outcomes in disqualification disputes are not changed by these proposed procedural reforms, at least the litigants' comfort level will be increased by having an impartial jurist (or group of jurists) decide or immediately review the question of disqualification using the decision making process should give the parties more confidence in the outcome—even if the result is not to their liking.

2. Promoting Public Confidence in the Courts

Second, in the political dimension, these proposed changes mean the public also is more likely to have confidence in the impartiality of the specific jurist who hears the case and, in turn, the judicial system generally. This is true because when the potentially biased jurist who is the target of the disqualification motion is removed, the process is more impartial—or at least appears to be more open and fair. This resulting impartiality or perception of impartiality is bolstered by the twin requirements of complete disclosure and a full explanation that must be written and published if disqualification is denied. These more transparent procedures allow the public (as well as the litigants) to better understand the reasoning behind the disqualification decision. Again, the use of a seemingly fair process—which is in keeping with procedural norms used for other litigation—helps the public accept even negative outcomes in controversial cases. Thus, the proposed reforms will help enhance public perceptions of the impartiality of the bench by using disqualification procedures that eliminate or at least mostly avoid inherent biases (including the Bias Blind Spot) and do so using an open and transparent process.

3. Promoting the Role of Jurists as Ethical Actors

Third, in the ethical dimension, the proposed recusal reforms will promote an enhanced view of jurists as ethical actors among not only the parties and the public, but among members of the bench. As noted above, the proposed changes in the identity of the decision maker and the openness of the process will create a perception of greater fairness among the parties and the public, which in turn will create goodwill for the entire judiciary and individual members of the bench. Also, while jurists concerned about their own roles and reputations for impartiality may be a bit uneasy about another jurist making these disqualification decisions, there are some built-in safeguards. The targeted jurists should be somewhat comforted that in nearly all instances the question is not

870 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 49

about actual or even probable partiality but merely the appearance of possible bias (and if peremptory challenges are adopted no bias need be alleged). Also, since the proposed reforms do not require jurists to write and publish an opinion supporting a decision to recuse, the jurist can still quietly step aside when needed. In addition, since most jurists are even less likely to disqualify a colleague than recuse themselves, the instances of removal of a judge or justice from a specific case should not be so frequent as to unfairly jeopardize a specific jurists' ethical reputation. Moreover, this kind of self-policing of the profession will likely enhance the public perception of jurists as committed to the rule of impartiality—counterbalancing any negative effects that might come from a more open and transparent review of those situations when a jurist does not self-disqualify and that decision is reversed after review by others. Thus, all jurists—even when the subject of recusal requests—will benefit from the increased confidence the reforms create in the parties and the public, as well as a renewed sense of professionalism among members of the bench.

Using this three-part framework, the reforms to disqualification procedures proposed in this Article appear to support and even enhance the procedural, the political, and the ethical dimensions of impartiality.

VII. CONCLUSION

In recent years, several high profile disqualification disputes have caught the attention of the press, the pundits, and the public, and have raised serious questions about the impartiality of specific jurists and the judiciary generally. While it is too early to determine whether these controversies will create a long-term impact on the public's confidence in the courts, it is not too early to reform recusal practices to address one of the most significant problems—the impact of the Bias Blind Spot on disqualification decisions. The needed reforms could be achieved by either modifying substantive standards or changing procedural practices. Given that there is little agreement on the substantive standards for judicial bias beyond the currently enumerated grounds for disqualification, the best possible way to eliminate the Bias Blind Spot is to reshape the procedures used to decide disqualification disputes.

The recusal reforms should not only avoid this cognitive pitfall, but should further the primary purposes of impartiality: the protection of litigants' rights to a fair trial, the maintenance of public confidence in the courts, and the support of jurists' roles as ethical actors in the legal systems. The procedural reforms that are most likely to affect significant change in disqualification disputes demand we: (1) remove the challenged jurist from the disqualification decision or replace the

2015]

Reshaping Recusal Procedures

871

deferential abuse of discretion appellate review standard with a *de novo* review standard and permit intermediate or interlocutory appeals when disqualification is denied; (2) require meaningful and timely disclosure of potential conflicts by both the jurists and the parties; and (3) mandate that all decisions denying disqualification give reasons for the result, be written, and made available to the public. This reshaping of recusal procedures can go a long way towards protecting litigants' rights to a fair trial and preserving the institutional legitimacy of the judiciary, and, if these reforms are honored by the bench, correcting our vision of jurists as ethical actors within our democracy.

