

JUDICIAL DISQUALIFICATION AFTER *CAPERTON V. A.T. MASSEY COAL
COMPANY*: WHAT’S DUE PROCESS GOT TO DO WITH IT?

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I. INTRODUCTION

The influence of special-interest money on judicial elections may be the greatest threat to the public’s continued trust in the independence and impartiality of the judiciary.¹ No set of circumstances could better illustrate

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¹ See Symposium, *Call to Action: Statement of the National Summit on Improving Judicial Selection*, 34 LOY. L.A. L. REV. 1353, 1354 (2001) (“Unregulated issue advertisements and independent expenditures by special interests present a particularly grave and immediate threat [to judicial independence.]”); Editorial, *Fair Courts in the Cross-Fire*, N.Y. TIMES, Sept. 29, 2010, at

the nature of that threat than those presented in *Caperton v. A.T. Massey Coal Co.*² In *Caperton*, the United States Supreme Court found that the Due Process Clause required the disqualification of a judge from a case in which the CEO of a corporate defendant had contributed three million dollars in support of the judge's election.³ Because the legal community has an overarching concern about the influence of money on the selection of judges, it is no surprise that post-*Caperton* literature has focused upon the decision's implications for judicial campaign reform.⁴ In the main, the scholarly discussion has failed to unpack the Court's "new" test for determining when the Due Process Clause prohibits a judge's participation in a case.⁵

A30 ("As spending in state judicial races by special interests has vastly escalated in recent years, so has the threat to public confidence in judicial neutrality that is fundamental to the justice system."); Editorial, *From Scandal to Example in West Virginia*, N.Y. TIMES, Mar. 19, 2010, at A24 ("[J]udicial neutrality and the appearance of neutrality is under severe threat across the country from escalating special-interest spending on judicial campaigns."); Tony Messenger, *Missouri's Chief Justice Sheds Light on Judge Selection—Independent Panels, Which Used to Meet in Secret, Will Interview Candidates in Public, Disclose Results of Votes. Moves Are Intended to Head Off Critics who Want Direct Election of Judges*, ST. LOUIS POST-DISPATCH, Oct. 1, 2010, at A1 (reporting Missouri state supreme court Chief Justice William Ray Price Jr.'s belief that "[b]ig money in judicial elections is a scandal"); Ralph Thomas, *Incumbent Justices Spar with Better-Financed Rivals over Judicial Independence—Special-Interest Money Seen as Threat to Courts Issue of Recusal Raised at Forum*, SEATTLE TIMES, July 20, 2006, at B2 (reporting Washington Supreme Court Chief Justice Gerry Alexander's fear that "the rising tide of special-interest money is threatening the notion of an independent judiciary").

² 129 S. Ct. 2252, 2257 (2009).

³ *Id.*

⁴ See Bert Brandenburg, *Big Money and Impartial Justice: Can They Live Together?*, 52 ARIZ. L. REV. 207, 207–09 (2010) (examining *Caperton* in the context of judicial campaign fundraising, special interest groups, and public financing and disclosure laws); Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80, 80 (2009) (discussing how *Caperton* "fits into a stream of cases involving judicial elections"); Stanley A. Leasure, *Cash Justice and the Rule of Law: Post-Caperton Financing of Judicial Elections*, 46 IDAHO L. REV. 619, 645 (2010) ("*Caperton* has drawn a flood of attention to the manner in which judicial campaigns are financed in this country."); James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 788 (2010) (examining *Caperton*'s effect on judicial election and campaign reform efforts); see also Norman L. Greene, *How Great is America's Tolerance for Judicial Bias? An Inquiry into the Supreme Court's Decisions in Caperton and Citizens United, Their Implications for Judicial Elections, and Their Effect on the Rule of Law in the United States*, 112 W. VA. L. REV. 873, 875–76 (2010).

⁵ See *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting) (proclaiming the "Court's new 'rule'").

The failure to explore the parameters of the new disqualification test established in *Caperton* is justified on two grounds. First, the importance of the holding is minimized because of the extraordinary facts surrounding the three-million-dollar campaign contribution by a litigant to a judge.⁶ Because it is assumed that such extreme⁷ circumstances are unlikely to reoccur, the Due Process Clause's application to judicial disqualification is given little import.⁸ Second, according to the Court in *Caperton*, as a practical matter, most disqualification issues will be decided under more rigorous state and federal recusal rules, rather than under the Due Process Clause.⁹ Thus, the argument goes, there is little need to study the application of due process to questions of judicial disqualification.¹⁰

But the purported justifications for neglecting a thorough analysis of *Caperton*'s central holding beg the question. If state and federal recusal standards are more rigorous than the dictates of due process, how are they more rigorous? In other words, how does the due process disqualification test differ from the test enunciated in state rules and the federal disqualification statute? Indeed, the tests appear to be very similar.¹¹ Under *Caperton*, due process requires disqualification whenever the circumstances offer a temptation to the average judge to abandon his or her impartiality.¹² State and federal disqualification rules, which are based on the ABA Model Code of Judicial Conduct, mandate disqualification whenever a judge's impartiality may reasonably be questioned.¹³ What is the difference between the two standards? Is it possible for a judge's impartiality to be reasonably questioned in the absence of a temptation to decide a matter on considerations other than the facts and the law? Unfortunately, these questions are not purely academic. Courts are

⁶ See *id.* at 2265 (majority opinion) ("Our decision today addresses an extraordinary situation where the Constitution requires recusal.").

⁷ *Id.* ("The facts now before us are extreme by any measure.").

⁸ See andré douglas pond cummings, *Procuring "Justice"? Citizens United, Caperton, and Partisan Judicial Elections*, 95 IOWA L. REV. BULL. 89, 102 (2010), http://www.uiowa.edu/~ilrb/bulletin/ILRB_95_cummings.pdf ("Truly, [*Caperton*'s] recusal guidance will likely have very little impact because of its excruciatingly narrow holding.").

⁹ *Caperton*, 129 S. Ct. at 2267 ("[M]ost disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.").

¹⁰ See *id.*

¹¹ Compare *infra* Part II, with *infra* Part III.

¹² See *infra* Part II.

¹³ See *infra* Part III.

routinely called upon to interpret and apply *Caperton*'s new due process test.¹⁴

This essay addresses two related questions. First, is there a difference between the due process test for judicial disqualification established in *Caperton* and the more rigorous test established by non-constitutionally based state and federal disqualification rules? As it turns out, the answer to this question lies in the resolution of a related inquiry propounded by Justice Roberts in dissent in *Caperton*: is the due process disqualification issue analyzed "through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge?"¹⁵

II. THE *CAPERTON* DISQUALIFICATION TEST

Tumey v. Ohio set forth the controlling principle in determining whether the Due Process Clause requires a judge's disqualification.¹⁶ Rejecting the argument that due process only protects against actual judicial bias, the Supreme Court held that disqualification is constitutionally mandated whenever the circumstances, viewed objectively, "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused."¹⁷ Sixty years later, the Court trimmed the *Tumey* test to its bare bones by stating that disqualification is constitutionally required if remaining on a case "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true."¹⁸ Applying this test, the *Caperton* majority found a due process violation when an Alabama Supreme Court justice refused to disqualify himself from a case involving a litigant who had contributed three million dollars to promote the judge's

¹⁴ See, e.g., *People v. Freeman*, 222 P.3d 177, 184 (Cal. 2010) ("The rule of judicial disqualification limned in *Caperton* may be complex but its application is limited."); *U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 773 N.W.2d 243, 246 (Mich. 2009) (Corrigan, J., dissenting from denial of disqualification motion) ("The scope of *Caperton* and how courts will implement it present significant unanswered questions . . ."); *State v. Allen*, 778 N.W.2d 863, 880 (Wis. 2010) ("How should the principles articulated in *Caperton* be applied in different factual settings? Answering this question is no easy task . . .").

¹⁵ *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., dissenting).

¹⁶ See 273 U.S. 510, 532 (1927).

¹⁷ *Id.*

¹⁸ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *Ward v. Monroeville*, 409 U.S. 57, 60 (1972)).

election effort.¹⁹ The Court concluded that the *Tumey* test was met because the circumstances surrounding the three-million-dollar contribution created a “serious risk of actual bias” on the part of the judicial recipient of the largesse.²⁰ Thus, under the *Tumey* test as interpreted by *Caperton*, due process requires recusal whenever the circumstances: (1) viewed objectively; (2) demonstrate a serious risk of actual bias; (3) on the part of the average judge.²¹

III. THE ABA DISQUALIFICATION TEST

The 2007 ABA Model Code of Judicial Conduct requires a judge to “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.”²² This same overarching standard of disqualification appeared in the 1972 ABA Code of Judicial Conduct²³ and the 1990 ABA Model Code of Judicial Conduct²⁴ and has been integrated into nearly every state’s code of judicial conduct.²⁵ In 1974 Congress incorporated the ABA disqualification standard into federal law by amending 28 U.S.C. § 455²⁶ to provide that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”²⁷

The test established by the ABA and adopted by most jurisdictions is an objective one.²⁸ The judge’s subjective opinion as to his or her ability to fairly decide a case is irrelevant.²⁹ Because the primary focus of the ABA

¹⁹ *Caperton*, 129 S. Ct. at 2257.

²⁰ *Id.* at 2263.

²¹ *See id.* at 2263, 2265.

²² MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

²³ CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

²⁴ MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (1990).

²⁵ *See* JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS 17 (2008), available at http://brennan.3cdn.net/1afc0474a5a53df4d0_7tm6brjhd.pdf (stating that the ABA disqualification standard has been incorporated into the judicial codes of 47 states).

²⁶ H.R. REP. NO. 93-1453, at 1 (1974) (“The purpose of the amended bill is to amend section 455 of title 28, United States Code, by making the statutory grounds for disqualification of a judge in a particular case conform generally with the recently adopted canon of the [ABA] Code of Judicial Conduct . . .”).

²⁷ 28 U.S.C. § 455(a) (2006).

²⁸ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009) (“Almost every State . . . has adopted the American Bar Association’s objective standard . . .”).

²⁹ *See id.* (“Under [ABA] Canon 3E(1), ‘[t]he question of disqualification focuses on whether

disqualification standard is to protect the public image of the judiciary, it is the ordinary reasonable person on the street who decides if the facts warrant an appearance of partiality.³⁰ Thus, if the fully informed reasonable observer would question the judge's ability to remain impartial, the judge is disqualified under the ABA standard.³¹

The ABA rule, however, does not mandate disqualification every time a suspicion arises as to a judge's ability to remain fair. For example, under the federal version of the ABA disqualification standard, "a judge should be disqualified only if it appears that he or she harbors an aversion, hostility, or disposition of a kind that a fair-minded person could not set aside when judging the dispute."³² Most courts have accepted this limiting interpretation of the ABA standard, concluding that recusal is necessary only where the "reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits."³³ In other words, under the ABA test, a judge is disqualified whenever the circumstances

an objective assessment of the judge's conduct produces a reasonable question about impartiality, not on the judge's subjective perception of the ability to act fairly.'" (alteration in original) (quoting *State ex rel. Brown v. Dietrick*, 444 S.E.2d 47, 52 n.9 (W. Va. 1994)).

³⁰ See *Liteky v. United States*, 510 U.S. 540, 548 (1994) (observing that what matters under § 455(a) "is not the reality of bias or prejudice but its appearance"); *United States v. Balistrieri*, 779 F.2d 1191, 1204 (7th Cir. 1985) ("Section 455(a) . . . is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.").

³¹ ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 186 (2004).

³² *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring in judgment).

³³ *In re Mason*, 916 F.2d 384, 385 (7th Cir. 1990); see also *Ekokotu v. Fed. Express Corp.*, No. 10-12433, 2011 WL 149509, at *4 (11th Cir. Jan. 19, 2011) ("Under § 455(a), recusal is appropriate only if 'an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.'" (quoting *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003))); *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) ("Section 445(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." (quoting *In re Mason*, 916 F.2d at 385)); *In re Request for Recusal of Dist. Judge*, No. MC-3-94-030, 1994 WL 1631038, at *1 (S.D. Ohio Oct. 12, 1994) ("Section 445(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits." (quoting *In re Mason*, 916 F.2d at 385)); *McPherson v. U.S. Physicians Mut. Risk Retention Grp.*, 99 S.W.3d 462, 490 (Mo. Ct. App. 2003) (finding recusal necessary where a disinterested layman perceives a "significant risk" that the judge could not be impartial); cf. *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 428-29 (2d Cir. 1988) (citing *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985)) ("The test for an appearance of partiality is . . . whether an objective, disinterested observer . . . would entertain a significant doubt that justice would be done in the case.").

lead: a (1) reasonable lay person; (2) to objectively perceive; (3) a significant risk that the judge will not be impartial.

So how does this “more rigorous” ABA disqualification standard differ from the less demanding due process test described in *Caperton*?

IV. COMPARING THE *CAPERTON* AND ABA DISQUALIFICATION STANDARDS

The ABA judicial disqualification test requires a judge’s removal when a reasonable person objectively perceives a “significant risk” that the judge will resolve a matter on a basis other than the merits.³⁴ According to *Caperton*, the Due Process Clause requires disqualification when the circumstances objectively demonstrate a “serious risk of actual bias.”³⁵ As pointed out by at least one state court judge, the tests appear to be identical.³⁶ But, there must be a difference. *Caperton* unambiguously states that the ABA disqualification provision is more rigorous than the due process standard.³⁷ It therefore necessarily follows that a judge excluded from a proceeding by an ABA-based state or federal disqualification rule is not necessarily disqualified under a due process analysis.

The difference between the ABA test and the due process test must lie in the identity of the objective, informed, reasonable person who evaluates the facts surrounding the potentially disqualifying circumstance.³⁸ The ordinary reasonable person on the street controls the ABA test because the purpose of the ABA standard is to protect the appearance and image of an impartial judiciary.³⁹ On the other hand, the Due Process Clause is not

³⁴ See *In re Mason*, 916 F.2d at 385.

³⁵ *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263–64 (2009).

³⁶ *In re Marriage of O’Brien*, 912 N.E.2d 729, 754 (Ill. App. Ct. 2009) (O’Malley, J., specially concurring) (“Although the Supreme Court indicated that the objective standard described in *Caperton* is less protective than the objective standard described in most states’ codes of judicial conduct . . . , I question whether there is any practical difference between the application of the two standards.”).

³⁷ *Caperton*, 129 S. Ct. at 2267 (“[C]odes of judicial conduct provide more protection than due process requires . . .”).

³⁸ See *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) (“The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge’s impartiality.”).

³⁹ See *United States v. Amico*, 486 F.3d 764, 775 (2d Cir. 2007) (“Section 455(a) requires that a judge recuse himself ‘in any proceeding in which his impartiality might reasonably be

designed to protect appearances but to protect reality.⁴⁰ Under the Due Process Clause, the task is not to evaluate how the public will view a judge's participation in a case but to quantify the probability that the judge's decision will be tainted by actual bias.⁴¹ To quantify this probability, it must be determined whether the "average judge" is likely to be neutral or whether the facts create an unconstitutional potential for bias.⁴² Accordingly, under the due process test, the arbiter of a judge's ability to preside over a case is no longer the guardian of public opinion, John Q. and Jane Q. Public, but the best critic of the likelihood of actual prejudice befalling a judge—namely, the average judge.⁴³ Otherwise stated, the reasonable person who decides due process disqualification issues is the reasonable person skilled in the art of judging.

This sounds like sacrilege. The ordinary reasonable lay person is so entrenched in the law generally, and in codes of judicial conduct specifically, that the tendency is to assume no one can take his and her place.⁴⁴ Indeed, most judicial ethicists assume that the ordinary reasonable person will decide whether a judge's presence on a case violates due process.⁴⁵ But that assumption is almost certainly wrong. The ordinary lay

questioned.' . . . [T]his test deals exclusively with appearances." (quoting 28 U.S.C. § 455(a)); *Couch*, 896 F.2d at 82 ("It is this additional, systemic concern for avoiding the appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause.").

⁴⁰ *United States v. Rodriguez*, 627 F.3d 1372, 1382 (11th Cir. 2010) ("[T]he Supreme Court has never rested the vaunted principle of due process on something as subjective and transitory as appearance." (quoting *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371–72 (7th Cir. 1994) (en banc))), *cert. denied*, 79 U.S.L.W. 3568 (U.S. April 4, 2011) (No. 10-9394).

⁴¹ See *Caperton*, 129 S. Ct. at 2259.

⁴² See *id.* at 2262.

⁴³ See *Couch*, 896 F.2d at 82; 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).

⁴⁴ See, e.g., Keith R. Fisher, Selva Oscura: *Judicial Campaign Contributions, Disqualification, and Due Process*, 48 DUQ. L. REV. 767, 818 (2010) (concluding that "it seems sensible to use the perspective of the reasonable person" when determining whether due process requires disqualification).

⁴⁵ See, e.g., Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 DRAKE L. REV. 709, 734 (2010) ("In effect, the Court used a reasonable person approach—in the extreme *Caperton* case, a reasonable person would believe that the total amount spent by Blankenship, the proportion of that amount in the election, and the effect of the contribution on the election's outcome would require Judge

person is not the standard by which the legitimacy of an actor's conduct is measured when special knowledge is needed to make the call.⁴⁶ For example, the assessment of whether the circumstances establish probable cause for a search or seizure under the Fourth Amendment is not made through the eyes of the ordinary observer, but by the ordinary law enforcement officer "through the lens of his police experience and expertise."⁴⁷ In the context of the legal profession, the average lawyer, not the average observer, is often the designated arbiter of the appropriateness of a fellow lawyer's professional conduct.⁴⁸ Similarly, the average judge is sometimes employed as the standard by which the propriety of another judge's conduct is measured.⁴⁹ As Part V demonstrates, the average lawyer or judge replaces the reasonable person particularly where the professional conduct under scrutiny implicates constitutional safeguards.

V. THE REASONABLE MEMBER OF THE LEGAL PROFESSION

There are many instances where the ordinary lay person standard is not used to evaluate the legitimacy of a lawyer's or judge's professional conduct.⁵⁰ For example, attorney disciplinary schemes frequently prohibit "conduct that is prejudicial to the administration of justice."⁵¹ While this vague prohibition would violate due process if applied to non-lawyers, it comports with due process when applied to a member of the legal profession because:

Benjamin's recusal."); Fisher, *supra* note 44, at 818; Jeffrey W. Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV. 1, 17 (2010) ("The Blankenship-Benjamin situation violated the Due Process Clause, according to the majority, in that it raised for the reasonable lay observer the significant probability that Justice Benjamin could not be fair in assessing such an important case implicating his sponsor Blankenship's finances."); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120, 126 (2009) (stating that due process "requires an objective evaluation of the probability of actual bias conducted from the perspective of an average person knowing all of the attendant facts and circumstances").

⁴⁶ See, e.g., *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

⁴⁷ *Id.*

⁴⁸ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part and dissenting in part).

⁴⁹ See Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755, 764 (2009).

⁵⁰ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2009).

⁵¹ *Id.*

Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession."⁵²

Therefore, the vague disciplinary standard, "conduct prejudicial to the administration of justice," withstands due process scrutiny because it is the ordinary reasonable lawyer who knows and therefore can judge whether an attorney's behavior is prejudicial to the legal profession.⁵³ If reasonable attorneys would differ in appraising the propriety of the conduct, no discipline can be imposed.⁵⁴ The ordinary reasonable lay person is not involved in the assessment because a non-lawyer is unfamiliar with court rules, ethics codes, case law, and the unwritten customs, traditions, practices, and norms of the legal profession.⁵⁵ Whether the lawyer's conduct appears improper to the person on the street is simply irrelevant.⁵⁶ It is the ordinary reasonable lawyer who determines if a fellow attorney's conduct is sanctionable as a violation of professional norms.⁵⁷

The ordinary reasonable attorney standard is also used in determining whether a lawyer's criticism of a judge's integrity is protected by the First Amendment.⁵⁸ The test is whether the lawyer possesses an objectively reasonable basis upon which to base the criticism.⁵⁹ The lawyer's critical

⁵² *Zauderer*, 471 U.S. at 666 (Brennan, J., concurring in part and dissenting in part) (quoting *In re Ruffalo*, 390 U.S. 544, 555 (1968) (White, J. concurring)).

⁵³ See MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

⁵⁴ *In re Ruffalo*, 390 U.S. at 555–56 (White, J., concurring).

⁵⁵ Cf. Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 93–94 (2005) ("Application of a vagueness analysis depends on the context, and judges, like lawyers, are professionals who have the benefit of guidance provided by case law, court rules, the lore of the profession, the traditions of the judicial profession, and its established practices." (citations omitted) (internal quotation marks omitted)).

⁵⁶ See *id.* at 93.

⁵⁷ See *Zauderer*, 471 U.S. at 666.

⁵⁸ Margaret Tarkington, *A Free Speech Right to Impugn Judicial Integrity in Court Proceedings*, 51 B.C. L. REV. 363, 422 (2010) ("[C]ourts punish speech for impugning judicial integrity under an objective reasonableness standard.").

⁵⁹ See *U.S. Dist. Court for E. Dist. of Wash. v. Sandlin*, 12 F.3d 861, 867 (9th Cir. 1993).

remark is evaluated in terms of what the reasonable attorney—not the reasonable person on the street—”considered in light of all his professional functions, would do in the same or similar circumstances.”⁶⁰ If a reasonable attorney would consider the accusations baseless, the speaking attorney may be disciplined.⁶¹ If the average attorney would find that a reasonable factual basis exists for the statement, the speech is protected.⁶² Thus, a Wyoming attorney was disciplined for accusing a judge of an ex parte communication and favoring a particular law firm because a reasonable member of the legal profession would not have made such statements under similar circumstances.⁶³ The ordinary lay resident of Wyoming was not the legal standard in assessing the lawyer’s culpability.⁶⁴

To protect judicial independence, the ordinary reasonable jurist, rather than the ordinary lay person, is relied upon in determining whether a judge should be disciplined for committing a legal error. Because all judges make errors of law,⁶⁵ to be elevated to sanctionable misconduct, a judge’s legal mistake must be compared against what the ordinary reasonable judge would have done under the circumstances.⁶⁶ “[I]f a reasonably prudent and competent judge would consider [the] conduct obviously and seriously wrong in all the circumstances,” then the error will justify the imposition of discipline.⁶⁷ If reasonable judges would disagree, discipline is

⁶⁰*Id.*; see also *In re Disciplinary Action Against Graham*, 453 N.W.2d 313, 322 (Minn. 1990); *Disciplinary Counsel v. Frost*, 909 N.E.2d 1271, 1277 (Ohio 2009) (quoting *Sandlin*, 12 F.3d at 867)); *Tarkington*, *supra* note 58, at 422–23 (“[C]ourts punish speech for impugning judicial integrity under an objective reasonableness standard. This standard requires attorneys to show that ‘the attorney had an objectively reasonable factual basis for making the statements’ or that ‘the reasonable attorney, considered in light of all his professional functions,’ would make such statements under ‘the same or similar circumstances.’” (citations omitted)).

⁶¹See *Sandlin*, 12 F.3d at 867 (stating that the district court did not err in concluding that “Sandlin had no reasonable basis . . . for making these statements”).

⁶²See *id.*

⁶³Bd. of Prof’l Responsibility, *Wyo. State Bar v. Davidson*, 205 P.3d 1008, 1014 (Wyo. 2009).

⁶⁴See *id.*

⁶⁵*In re Curda*, 49 P.3d 255, 261 (Alaska 2002).

⁶⁶See *In re Comm’n on Judicial Tenure & Discipline*, 916 A.2d 746, 755 (R.I. 2007).

⁶⁷*In re Benoit*, 487 A.2d 1158, 1163 (Me. 1985); see also *In re Comm’n on Judicial Tenure & Discipline*, 916 A.2d at 755 (“‘[I]f a reasonably prudent and competent judge would consider that conduct obviously and seriously wrong in all the circumstances,’ the judge’s action constitutes judicial misconduct.”) (quoting *In re Benoit*, 487 A.2d at 1163)); *Swisher*, *supra* note 49, at 764 (“[T]he test adopted by Maine’s highest court may be the best . . . standard: whether a

impermissible.⁶⁸ The ordinary lay observer's assessment of the gravity of the mistake is not considered.⁶⁹

The special knowledge necessary to determine whether a lawyer or judge should be disciplined in the situations described above precludes the services of the ordinary reasonable lay person. The same is true in assessing whether the likelihood of judicial bias is so great as to violate due process. The Fifth Circuit Court of Appeals recognized as much two decades before *Caperton*.⁷⁰

In *United States v. Couch*, the defendant claimed that the trial judge violated both the Due Process Clause and the federal disqualification statute because the judge had invested money in an oil drilling venture with the defendant and also shared oil and gas leases with the defendant's children.⁷¹ After noting that the "conundrum is in blazing the parameters" of the disqualification test established by federal statute and the parameters of the less protective due process test,⁷² the Fifth Circuit distinguished the two disqualification standards as follows:

The inquiry commanded by section 455 and that commanded by the Due Process Clause are not the same. The Due Process Clause requires a judge to step aside when a *reasonable judge* would find it necessary to do so. Section 455 requires disqualification when *others* would

reasonable and competent judge would have considered the ruling 'obviously . . . wrong in all circumstances.'" (second alteration in original) (citation omitted)).

⁶⁸ See Swisher, *supra*, note 49 at 764 n.31 ("[I]mplicit in [the test is] that *all* reasonable and competent judges would agree.").

⁶⁹ See *In re Comm'n on Judicial Tenure and Discipline*, 916 A.2d at 755 (illustrating the application of the reasonableness test, encompassing the "reasonably prudent and competent judge"). In the cited disciplinary action, a convicted misdemeanor was brought before Judge Pirraglia because of the defendant's alleged failure to appear on previous court dates and his alleged failure to pay court-ordered fines and costs. *Id.* at 748. The judge suggested that if the defendant admitted to the violations and agreed to serve a six-month jail sentence, the judge would vacate the fines and costs. *Id.* When the defendant asked to speak to a public defender before making a decision, the judge said he could, but if he did the offer would be rescinded. *Id.* The defendant accepted the offer without consulting an attorney. *Id.* The court found that the judge violated the state's code of judicial conduct not because the public might view the judge's plea offer as coercive or inappropriate, but because it would be obvious to the average judge that an individual cannot be imprisoned without the assistance of counsel. *See id.*

⁷⁰ See *United States v. Couch*, 896 F.2d 78 (5th Cir. 1990).

⁷¹ *Id.* at 79.

⁷² *Id.* at 81.

have reasonable cause to question the judge's impartiality. It is this additional, systemic concern for avoiding the appearance of impropriety that makes the section 455 standard for disqualification more demanding than that imposed by the Due Process Clause.⁷³

Couch answered Chief Justice Roberts's question long before he penned it: the average judge decides due process disqualification claims while ordinary, reasonable "others" decide statutory disqualification claims.⁷⁴ Several pre-*Caperton* decisions adopted the distinction set forth in *Couch*.⁷⁵

VI. THE ORDINARY JUDGE AS AN EXTRAORDINARY OBSERVER

It is one thing to say that under the Due Process Clause disqualification is measured by the average judge and another to define how that hypothetical judge's determination will differ from that of the ordinary non-judge.⁷⁶ Most assuredly, however, a judge's opinion as to whether a serious risk of partiality exists will differ from the opinion of the lay observer.⁷⁷ This conclusion is unavoidable. The judge's oath, belief in the presumption of judicial impartiality, and training cause judges to see matters through

⁷³ *Id.* at 82 (emphasis added).

⁷⁴ *See id.*

⁷⁵ *See, e.g., In re African-Am. Slave Descendants Litig.*, 307 F. Supp. 2d 977, 991 (N.D. Ill. 2004) ("[R]ecusal pursuant to the Due Process Clause of the Fifth Amendment is required where a reasonable judge would find it necessary to do so." (citing *Couch*, 896 F.2d at 82)), *aff'd in part and rev'd in part*, 471 F.3d 754 (7th Cir. 2006); *Pub. Citizen, Inc. v. Bomer*, 115 F. Supp. 2d 743, 745 (W.D. Tex. 2000) ("The Due Process Clause requires a judge to recuse himself only if a reasonable judge in his situation would find it necessary to do so." (citing *Couch*, 896 F.2d at 82)); *Brown v. State*, 816 P.2d 818, 858–59 (Wyo. 1991) (stating that due process "requires recusal when a reasonable judge would find it necessary to do so" (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986))).

⁷⁶ Adam J. Safer, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 792–93 n.33 (1993) (asking, but not answering: "What is the difference between a reasonable judge and a reasonable person?").

⁷⁷ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 19–20 (1960) ("The judges are therefore not mere Americans. They have been law-conditioned. They see things, they see significances, both through law-spectacles, in terms of torts and trusts and corporations and due process and motions to dismiss; and this is the way they sort and size up any welter of facts." (emphasis omitted)). *But see* Fisher, *supra* note 44, at 818 (positing that the Supreme Court would be unlikely to concede that a reasonable person would make a different disqualification decision than the average judge).

“law-spectacles.”⁷⁸ Thus, a judge’s view of potentially disqualifying circumstances will differ from an individual viewing the identical circumstances with the naked eye.

A. Faithfulness to the Judicial Oath of Office

The judicial oath differs from the oaths of other public office holders in that it is tailored to ensure that the oath-taker understands his or her primary directive—to decide cases impartially without regard to personal predilections or the social, economic, religious, financial, or political status of a litigant.⁷⁹ The oath taken by federal judges illustrates the personal guaranty of impartiality that a judge makes when assuming office:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.⁸⁰

The oath is not a “composite oath”⁸¹ but an individual undertaking which directly influences how a judge views his or her role and therefore bears directly on how a judge decides cases.⁸² “All judges, pragmatists and legalists alike, take the oath seriously”⁸³ It puts personal philosophies aside and is the reason why Judges Posner and Easterbrook, who describe the role of a judge so differently, often vote together.⁸⁴ The oath, and its preoccupation with neutrality and impartiality, has a permanent

⁷⁸ See LLEWELLYN, *supra* note 77, at 19–20.

⁷⁹ See 28 U.S.C. § 453 (2006).

⁸⁰ *Id.*

⁸¹ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 401 (1937) (Sutherland, J., dissenting).

⁸² Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 CONST. COMMENT. 97, 163 (2009) (“[T]he oath thus ‘bears directly on how the judge carries out his duties and understands his role in relationship to other governmental officials.’”) (quoting H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 3 (2008)) (book review).

⁸³ Jeffrey S. Sutton, *A Review of Richard A. Posner, How Judges Think* (2008), 108 MICH. L. REV. 859, 874 (2010) (book review).

⁸⁴ See *id.* at 876.

preeminence in judicial decision-making.⁸⁵ That fact is apparent from the frequency with which judges offer the oath as a reason for ruling in a particular manner.⁸⁶ The average judge referred to in *Caperton* is personally and professionally aware of the oath's meaning and application. The reasonable lay person is not.

B. *The Presumption of Impartiality*

Emphasizing the overriding importance of the judicial oath, Blackstone observed that “the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.”⁸⁷ The presumption of impartiality is not only born of the solemn words of the oath but also rests upon the fact that, as professionals, judges are presumed to possess the ability to distinguish between personal values and beliefs and judicial duties.⁸⁸ The presumption is further supported by the training

⁸⁵ See William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (“[The judge] remembers above all else that it is the Constitution which he swore to support and defend . . .”).

⁸⁶ See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989) (Scalia, J., dissenting) (“I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face.”), *overruled by* *Payne v. Tennessee*, 501 U.S. 808 (1991); *O’Bryan v. Estelle*, 691 F.2d 706, 710 (5th Cir. 1982) (“We believe that our sworn obligation is to grant a stay of Petitioner’s execution.”); *People v. Tanner*, 596 P.2d 328, 359 (Cal. 1979) (“If we were to shrink from the obligations of our oath, the Declaration of Rights would become meaningless.”); *Evans v. Firestone*, 457 So. 2d 1351, 1359 (Fla. 1984) (Ehrlich, J., concurring) (“[T]his Court has no alternative but to strike [the proposed constitutional amendment] from the ballot. To do less is to violate our oath of office . . .”); *Motorists Mut. Ins. Co. v. Johnson*, 218 N.E.2d 712, 722 (Ind. App. 1966) (Mote, J., dissenting) (“[W]e cannot violate our oaths of office, nor can we accept jurisdiction of the cause once transferred to the Supreme Court.”); *Pellegrino v. Ampco Sys. Parking*, 789 N.W.2d 777, 787 (Mich. 2010) (Corrigan, J., not participating) (“[T]he duty to sit clearly cannot require official acts that would violate our oaths to uphold the federal and Michigan constitutions.”); *Eakin v. Raub*, 12 Serg. & Rawle 330, 339 (Pa. 1825) (opinion of Tilghman, C.J.) (“[W]hen a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void, by his oath . . .”); *Archuleta v. Galetka*, 197 P.3d 650, 654 (Utah 2008) (“Our judicial oath . . . [requires] that we take measures . . . to see that the mandates of the Constitution are observed.”).

⁸⁷ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting 3 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (1768)); see also *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (Roberts, C.J., dissenting) (“All judges take an oath to uphold the Constitution and apply the law impartially, and we trust that they will live up to this promise.”).

⁸⁸ *United States v. Kehlbeck*, 766 F. Supp. 707, 713 (S.D. Ind. 1990) (“As a professional, a

judges receive to set aside their personal opinions and experiences when they sit in judgment⁸⁹ and to ignore inadmissible evidence.⁹⁰ Courts consistently recognize the continuing validity and relevancy of the presumption of impartiality and characterize it as “heavy,”⁹¹ “strong,”⁹² “basic,”⁹³ and “well accepted.”⁹⁴

Judges apply this presumption when deciding disqualification motions because they know that the overwhelming majority of judges live up to their oath.⁹⁵ “Virtually every judge has ruled against a friend, suppressed essential evidence, acquitted an alleged sex offender, granted probation to a defendant considered by most to be unworthy of the privilege, or ruled against public officials who would be helpful in the judge’s next retention

judge is presumed to be capable of distinguishing his personal life from his professional obligations.”); *see also* *Voss v. State*, 856 N.E.2d 1211, 1218 (Ind. 2006) (“The fact that a judge may have a personal opinion regarding an issue in a case does not, standing alone, create a rational inference that the judge’s decision will be governed by bias and prejudice. To the contrary, we presume that judges will set aside their personal values and opinions and will impartially follow the law.”).

⁸⁹ *Mann v. Thalacker*, 246 F.3d 1092, 1098 (8th Cir. 2001) (“Judges are trained to lay aside personal opinions and experiences when they sit in judgment . . .”).

⁹⁰ *See, e.g., McElhanon v. Hing*, 728 P.2d 273, 282 (Ariz. 1986) (“A judge often hears prejudicial evidence, allegations, or accusations against one party. Judges are trained to hear and consider such information and, if they find it irrelevant or inadmissible, to put it aside and discharge their duties in accordance with the law.”); *People v. Lichens*, 381 P.2d 204, 205 (Cal. 1963) (noting the ability of a trial judge to disregard “irrelevant evidence to which he has sustained objections, or has stuck from the record”). *But see* Charles L. Barzun, *Rules of Weight*, 83 NOTRE DAME L. REV. 1957, 1988 (2008) (“For when a judge serves as both legal decisionmaker and factfinder, it may be impossible for her to ignore entirely a piece of evidence she has deemed inadmissible.”).

⁹¹ *See, e.g., Worsham v. Greenfield*, 978 A.2d 839, 851 (Md. Ct. Spec. App. 2009), *cert. granted*, 984 A.2d 244 (Md. Dec. 9, 2009); *Armstrong v. Ypsilanti Charter Twp.*, 640 N.W.2d 321, 335 (Mich. Ct. App. 2001).

⁹² *See, e.g., Coles v. Del. River & Bay Auth.*, No. 08-636, 2010 WL 335612, at *4 (D. Del. Jan. 29, 2010); *State v. Condra*, No. 1 CA-CR 08-0723, 2010 WL 1328686, at *2 (Ariz. Ct. App. Apr. 6, 2010).

⁹³ *See, e.g., United States v. Jeffers*, 532 F.2d 1101, 1112 (7th Cir. 1976).

⁹⁴ *See, e.g., Ex parte Ellis*, 275 S.W.3d 109, 117 (Tex. App.—Austin 2008, no pet.); *see also, e.g., United States v. Conforte*, 457 F. Supp. 641, 659 (D. Nev. 1978) (“well established”); *Kimbrough v. Kimbrough*, 119 S.W.3d 66, 70 (Ark. Ct. App. 2003) (“long established”).

⁹⁵ *See Conforte*, 457 F. Supp. at 659; *Kimbrough*, 119 S.W.3d at 70; *Ex parte Ellis*, 275 S.W.3d at 117.

campaign.”⁹⁶ Justice Stevens acknowledged this fact when he observed that “countless judges in countless cases routinely make rulings that are unpopular and surely disliked by at least 50 percent of the litigants who appear before them.”⁹⁷ It is equally common for them to enforce rules that they think unwise, or that are contrary to their personal predilections.”⁹⁸

Lay observers may be considerably more hesitant to attribute a presumption of impartiality to judicial decision-making.⁹⁹ This hesitancy would certainly be understandable in light of the perpetual flood of headlines, commentaries, law review articles, and studies purporting to demonstrate that judges are “awash in a sea of conscious and unconscious motives,”¹⁰⁰ captives of their race, gender,¹⁰¹ age,¹⁰² emotions,¹⁰³ political and social ideologies,¹⁰⁴ work history,¹⁰⁵ religion,¹⁰⁶ education,¹⁰⁷ spending

⁹⁶Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis”*, 99 KY. L.J. 259, 305–06 (2011).

⁹⁷Republican Party of Minn. v. White, 536 U.S. 765, 798 (2002) (Stevens, J., dissenting).

⁹⁸*Id.*; see also Texas v. Johnson, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring) (“The hard fact is that sometimes we must make decisions we do not like.”).

⁹⁹See United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995) (observing that the average non-judge “is less likely to credit judges’ impartiality than the judiciary”).

¹⁰⁰John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 247 (1987).

¹⁰¹See Edward A. Adams, *Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find*, A.B.A. J., LAW NEWS NOW (Feb. 6, 2010), http://www.abajournal.com/news/article/race_gender_of_judges_make_enormous_differences_in_rulings_studies_find_aba.

¹⁰²See Abdon M. Pallasch, *Never Too Old—Justices Throw Out Age Limit on when Judges Can Seek Retention*, CHI. SUN-TIMES, June 19, 2009, at 14 (reporting a law professor’s opinion that an appearance of impropriety was created when an Illinois supreme court justice, who had reached the state’s statutorily mandatory retirement age, authored the opinion in Maddux v. Blagojevich, 911 N.E.2d 979 (Ill. 2009), finding the mandatory retirement age unconstitutional).

¹⁰³See David Brooks, *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25 (“Supreme Court justices, like all of us, are emotional intuitionists.”).

¹⁰⁴LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 9–10 (1998) (“[J]ustices, first and foremost, wish to see their policy preferences etched into law.”).

¹⁰⁵See Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 27–28 (2001) (examining the relative importance of various personal attributes, including career history, on judicial behavior).

¹⁰⁶Gregory C. Sisk et al., *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 614 (2004) (“In our study of religious freedom decisions, the single most prominent, salient, and consistent influence on judicial decisionmaking was religion—religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.” (emphasis omitted)).

¹⁰⁷See George, *supra* note 105, at 27–28 (examining the relative importance of various personal attributes, including education, on judicial behavior).

habits,¹⁰⁸ offspring,¹⁰⁹ lunch schedule,¹¹⁰ and campaign contributions.¹¹¹ Toss in indiscriminate claims that “judicial bribery may be a significant problem in the United States,”¹¹² and it is easy to see how former judge and law school dean Howard Markey opined that “[t]here is today no public presumption that judges can be impartial.”¹¹³

C. Judges’ Adherence to Professional Norms

While the public may not presume impartiality, it expects impartiality.¹¹⁴ And, “[J]udges strive to achieve what society values.”¹¹⁵ Judges conform to the cultural expectation of impartiality not only to be recognized by their peers, judicial superiors, lawyers, and community members but also because judges have been indoctrinated since law school to accept the concept of judicial neutrality as the defining aspect of their

¹⁰⁸ See Debra Cassens Weiss, *How Sonia Sotomayor Spends Her Money*, A.B.A. J. LAW NEWS NOW (June 8, 2009, 7:51 AM), http://www.abajournal.com/news/article/how_sonia_sotomayor_spends_her_money.

¹⁰⁹ See Inst. for Quantitative Soc. Sci. at Harvard Univ., *Sen on “How Having Daughters Affect Judges’ Voting”*, SOCIAL SCIENCE STATISTICS BLOG (Jan. 24, 2011), http://www.iq.harvard.edu/blog/ssss/archives/2011/01/sen_on_how_havi.shtml (“[J]udges with daughters consistently vote in a more liberal fashion on gender issues than judges without daughters.”).

¹¹⁰ See *Tired Judges Tougher, Study of Rulings Finds*, CHARLESTON GAZETTE (W. Va.), Apr. 12, 2011, at 8B (reporting the results of a study purportedly demonstrating that Israeli judges were more likely to grant parole to criminal offenders at the beginning of the court day and immediately after lunch).

¹¹¹ See Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 73 (“[E]very dollar of direct contributions from business groups [in partisan judicial elections] is associated with increases in the probability that elected judges will decide for business litigants.”).

¹¹² Stratos Pabis, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1904 (2009).

¹¹³ Howard T. Markey, *A Need for Continuing Education in Judicial Ethics*, 28 VAL. U. L. REV. 647, 655 (1994).

¹¹⁴ See *State ex rel. Comm’n on Judicial Qualifications v. Rome*, 623 P.2d 1307, 1317 (Kan. 1981) (“At the very least the public can expect its judges to be fair and impartial.”); *In re Broadbelt*, 683 A.2d 543, 549 (N.J. 1996) (“The public expects judges to be honest, competent and devoted to the fair and impartial administration of justice.”).

¹¹⁵ McCoski, *supra* note 96, at 300.

powerful position.¹¹⁶ Judges are subject to, and informed by, this socialization process.¹¹⁷ The ordinary lay person is not.

D. Egocentric Bias: “Most of Us Stand Out in Our Own Minds”¹¹⁸

Another component of the judicial character that defines how the average judge will view a potentially disqualifying conflict lies in the not-so-flattering tendency of judges to overestimate their abilities.¹¹⁹ Lacking immunity to the egocentric bias, judges exhibit some difficulty in accurately assessing their decision-making abilities and recognizing their limitations.¹²⁰ A recent study indicates that the egocentric bias may cause judges to overestimate their ability to remain impartial.¹²¹

Administrative law judges attending a conference were asked to compare themselves to other attendees on their ability to assess witness credibility, facilitate settlements, and avoid bias.¹²² Not surprisingly, slightly better than eighty percent of the judges placed themselves in the top half of conference-goers in the ability to assess credibility and promote settlements.¹²³ But the egocentric bias shifted into high gear when 97.2 percent of the judges rated themselves in the top half of attendees in the ability to avoid bias.¹²⁴

¹¹⁶See Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243, 1260 (2010).

¹¹⁷See Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1697 (2008) (“Virtually without exception, judges and Justices are well-educated members of the upper or upper-middle classes who have been socialized to accept professional norms.”).

¹¹⁸Thomas Gilovich et al., *The Spotlight Effect in Social Judgment: An Egocentric Bias in Estimates of the Salience of One’s Own Actions and Appearance*, 78 J. PERSONALITY & SOC. PSYCHOL. 211, 211 (2000).

¹¹⁹See Chris Guthrie et al., *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1518–20 (2009) [hereinafter *Hidden Judiciary*].

¹²⁰See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 815 (2001) [hereinafter *Judicial Mind*]. Courts have been slow to recognize that judges are subject to an egocentric bias. *But see*, *Mood v. Prudential Ins. Co. of America*, 379 F. Supp. 2d 267, 271 (E.D.N.Y. 2005) (“Even the most egocentric federal judge . . . will give *some weight* to what the presumably more expert or experienced plan administrator actually did . . .”).

¹²¹See *Hidden Judiciary*, *supra* note 119, at 1519–20.

¹²²*Id.* at 1519.

¹²³*Id.*

¹²⁴*Id.*

While the egocentric bias exhibited by judges is not necessarily a bad thing and may actually benefit the justice system,¹²⁵ it is a perspective-influencing factor that will affect how the average judge views a potentially disqualifying circumstance.¹²⁶

VII. HOW WILL THE AVERAGE JUDGE'S DISQUALIFICATION DECISION DIFFER FROM THAT OF THE ORDINARY NON-JUDGE?

How will the oath-bound, presumption-observing, approval-seeking, egocentric judge view a potentially disqualifying circumstance differently from the ordinary reasonable person? *Aetna Life Ins. Co. v. Lavoie* may provide the answer.¹²⁷

As a member of Alabama's highest court, Justice T. Eric Embry authored an opinion recognizing that the intentional tort of bad faith could be asserted against an insurance company that unjustifiably failed to pay a valid claim.¹²⁸ At the time that he wrote the opinion, Justice Embry was a named plaintiff in two actions against insurance companies.¹²⁹ Both actions alleged that the defendant insurance companies had acted in bad faith when they failed to pay legitimate claims.¹³⁰ One of the suits was a class action brought on behalf of all Alabama state employees, including members of the supreme court.¹³¹ During his deposition in the class-action suit, Justice

¹²⁵ See *Judicial Mind*, *supra* note 120, at 815–16 (“[S]ociety surely prefers its judges to be resolute and self-assured rather than timid and insecure. Egocentric beliefs may induce judges to see the world in a self-serving fashion, but the justice system may ultimately be better off because of it.”).

¹²⁶ If the reasonable person rather than the average judge is chosen to determine whether a serious risk of partiality exists under the Due Process Clause, the reasonable person will not be assessing their own abilities but those of a third person—the average judge. As a result, it could be argued that use of the ordinary observer avoids any distortion caused by the average judge's egocentric beliefs. But the argument would be unavailing. While the reasonable person would avoid the tentacle of the egocentric heuristic which causes people to make self-serving judgments, an equally strong dynamic of the egocentric bias would still be present: the tendency of individuals to overstate the biases and shortcomings of others. See Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 PSYCHOL. REV. 781, 793 (2004) (recognizing “people's tendency to see bias more readily in others than in themselves”).

¹²⁷ 475 U.S. 813 (1986).

¹²⁸ *Id.* at 816–18.

¹²⁹ *Id.* at 817–18.

¹³⁰ *Id.* at 817.

¹³¹ *Id.*

Embry disclosed that he had referred persons with bad-faith claims against insurance companies to his private attorneys.¹³² He also admitted to a long-standing frustration with the insurance industry.¹³³ For example, when asked if he ever had difficulty with processing claims, Justice Embry replied, “[T]hat is a silly question. For years and years.”¹³⁴

The Supreme Court of the United States found that Justice Embry’s participation in the Alabama court’s decision violated due process because the state court opinion had the clear and immediate effect of enhancing both the legal status and the settlement value of Embry’s own cases.¹³⁵ In other words, when Justice Embry authored the state court’s opinion, he acted as a judge in his own case.¹³⁶ The Court, however, rejected the further claim that Embry’s bad-faith lawsuits and general hostility toward insurance companies created an unconstitutional likelihood or appearance of bias.¹³⁷ The Court, in effect, found that based upon the oath of office, the presumption of impartiality, judicial training, and a judge’s ability to set aside personal feelings, the circumstances did not create a serious risk that the average judge in Justice Embry’s situation would be swayed by his personal embroilment with the insurance industry.¹³⁸ Would the ordinary lay person examining the facts reach the same conclusion? Most likely not. Without the benefit of a judge’s experience and knowledge of the norms and traditions of the judicial profession and appreciation of the binding nature of the oath, how could the casual observer not perceive a significant risk that the judge would rule on a basis outside the record? Indeed, Judge Embry had filed two identical suits, marshaled people with complaints against insurance companies to his personal attorneys, and characterized a question about whether he ever had personal difficulty processing claims as “silly.”¹³⁹ And, the ordinary observer’s suspicion of partiality would have been sharpened when, after his retirement but while *Aetna* was still pending before the Supreme Court, Justice Embry publicly commented that, “The

¹³² *Id.* at 818.

¹³³ *Id.*

¹³⁴ *Id.* (alteration in original).

¹³⁵ *See id.* at 824–25.

¹³⁶ *Id.*

¹³⁷ *See id.* at 821. (“Appellant suggests that Justice Embry’s general frustration with insurance companies reveals a disqualifying bias Appellant’s allegations of bias and prejudice on this general basis, however, are insufficient to establish any constitutional violation.”).

¹³⁸ *See id.* at 820–21; *see also supra* Part VI.

¹³⁹ *See Aetna*, 475 U.S. at 818.

insurance companies are desperate to fight these bad-faith actions. They'll resort to anything."¹⁴⁰

Cases like *Aetna*, illustrating that judges take a narrower view of disqualification rules than the general public, are easy to come by.¹⁴¹ Take, for instance, Justice Scalia's refusal to disqualify himself from a case involving his close friend and hunting companion, Vice President Richard Cheney, even though the "conclusion [was] inescapable that a reasonable person might question Scalia's impartiality in the case."¹⁴² The facts that Cheney was a party to the litigation before the Court, the two friends went on a hunting trip during the pendency of the case, and twenty of the thirty largest-circulation newspapers in the United States asked Justice Scalia to step aside, did not create an appearance of partiality as far as he was concerned.¹⁴³ Similarly, the "shockingly bad"¹⁴⁴ decision of Justice Rehnquist to participate in *Laird v. Tatum*¹⁴⁵ in the face of "stinging [public] criticism"¹⁴⁶ was applauded by the other members of the Court.¹⁴⁷ And, what ordinary lay person would not find an appearance of bias where a judge remains on a case challenging the constitutionality of a statute criminalizing flag burning when the judge holds the personal belief that all flag burners belong in jail?¹⁴⁸ But, Justice Scalia took part in *Texas v. Johnson* and, ignoring his personal predilection, cast the deciding vote invalidating the flag-burning statute.¹⁴⁹

¹⁴⁰ See Philip Hager, *Court Asked to Limit Damages for 'Bad Faith'*, L.A. TIMES, Nov. 3, 1985, at 1 (quoting retired Justice T. Eric Embry).

¹⁴¹ See, e.g., *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 926–27 (2004).

¹⁴² Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229, 234 (2004) (emphasis omitted).

¹⁴³ See *Cheney*, 541 U.S. at 914, 923, 926.

¹⁴⁴ Jeffrey W. Stempel, *Refocusing Away from Rules Reform and Devoting More Attention to the Deciders*, 87 DENV. U. L. REV. 335, 353 (2010).

¹⁴⁵ 408 U.S. 1 (1972).

¹⁴⁶ Adam Liptak & Jonathan D. Glater, *Papers Offer a Close-Up of Rehnquist and the Court*, N.Y. TIMES, Nov. 18, 2008, at A12.

¹⁴⁷ Stempel, *supra* note 144, at 340 n.13 ("Disturbingly, Justice Rehnquist's papers on file with the Hoover Institution reflect his brethren . . . supporting his decision [not to recuse] and minimizing the concerns of his critics.").

¹⁴⁸ Justice Scalia is reported as stating: "I don't like people who burn the American flag, and if I were king, I would put them in jail." Robert Barnes, *With a Book Coming Out, Scalia Is All Talk—Even with the Media*, WASH. POST, Apr. 10, 2008, at A4.

¹⁴⁹ See 491 U.S. 397, 398 (1989).

A more commonplace example of how the average judge and average citizen might differ in evaluating the likelihood of a serious risk of judicial partiality is illustrated by the following luncheon conversation. Judge A tells Judge B that attorney Smith is trying a case in his courtroom and, as usual, attorney Smith is a “train wreck.” He simply is poorly prepared, ineffective, and wastes a lot of the court’s time with frivolous motions. Judge B replies, “Too bad. I’m on trial with attorney Jones, and she is unbelievably good. Always prepared, she has the respect of all the judges and attorneys. I love to see her in my courtroom.”¹⁵⁰ Would the average judge believe the personal opinions of these two judges present a serious question as to their impartiality? No.¹⁵¹ Would the average non-judge have a serious question? Most probably yes, because laypersons would naturally put themselves in the shoes of a party who had hired the train wreck or who was opposing the apparent favorite of the judge.

Appearances, perceptions, and probabilities lie in the eye of the beholder.¹⁵² Those trained and skilled in the art of judging possess insights, experiences, and beliefs foreign to the unskilled observer.¹⁵³ These judicial attributes guarantee that the view from the bench on disqualification issues will not be the same as the view from the street.

VIII. CONCLUSION

The Due Process Clause mandates disqualification when the circumstances “would offer a possible temptation to the average . . . judge

¹⁵⁰ See John M. Burman, *Wyoming Attorneys’ Pro Bono “Obligation”*, 5 WYO. L. REV. 421, 436 (2005) (“[J]udges have opinions about lawyers, and just as lawyers talk about judges, judges talk about lawyers.”).

¹⁵¹ See *Ainsworth v. Combined Ins. Co. of Am.*, 774 P.2d 1003, 1018–19 (Nev. 1989) (finding that preconceived, negative impressions of an attorney’s abilities did not require disqualification); cf. *Kobos v. Sugden*, 694 P.2d 110, 111 (Wyo. 1985) (disqualification not required where judge stated that he held the professional skill and competence of the defendant in a medical malpractice case in high regard).

¹⁵² See *Andrews v. Agric. Labor Relations Bd.*, 623 P.2d 151, 156 (Cal. 1981) (“Appearance, after all, is generally in the eye of the beholder.”); *People v. Slack*, 258 Cal. Rptr. 702, 705 (Cal. Ct. App. 1989) (recognizing “that accuracy of perception depends on the eyes of the beholder”); Charles Gardner Geyh, *Judicial Selection, Judicial Disqualification, and the Role of Money in Judicial Campaigns*, 42 MCGEORGE L. REV. 85, 90 (2010) (“[P]robabilities can only be divined from appearances.” (internal quotation marks omitted)).

¹⁵³ Geyh, *supra* note 152, at 85 (noting that those within the legal establishment tend to be less skeptical of judicial motives, in contrast with outsiders, who are often more suspicious of judicial motives).

to . . . lead him not to hold the balance nice, clear and true.”¹⁵⁴ The ABA-based state and federal disqualification rules require that a judge avoid “any proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁵⁵ Both tests have been interpreted to disallow a judge’s participation in a case whenever a serious risk of actual bias exists.¹⁵⁶ Under the ABA test, whether a serious risk of partiality exists is gauged by the perception of the ordinary reasonable person.¹⁵⁷ If the due process test is also administered by the ordinary lay person, then the due process and ABA standards are identical.¹⁵⁸ But that cannot be the case for the simple and incontrovertible reason that the Supreme Court says that the tests are different.¹⁵⁹ *Caperton* defines the ABA test as more rigorous and teaches that the ABA standard may often require the removal of a judge when due process does not.¹⁶⁰ The difference in the two tests must lie in the identity of the hypothetical individual charged with assessing the likelihood that the circumstances present a serious risk of judicial bias.¹⁶¹ The average lay person is in the best position to protect the interests served by the ABA recusal standard—the public’s perception that impartial justice will be done. But when it comes to assessing the probability that a judge will actually forego his or her sworn obligation and succumb to irrelevant temptations, it is the average judge who is best fitted for the job. The person on the street can assess appearances, but only the reasonable person skilled in the art of judging is in a position to evaluate what the Due Process Clause protects—the probability that actual partiality will infect the decision-making process.

¹⁵⁴ *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (alterations in original) (quoting *Ward v. Monroeville*, 409 U.S. 57, 60 (1972)).

¹⁵⁵ MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007).

¹⁵⁶ See *supra* Parts II & III.

¹⁵⁷ See *supra* Part III (“Because the primary focus of the ABA disqualification standard is to protect the public image of the judiciary, it is the ordinary reasonable person on the street who decides if the facts warrant an appearance of partiality.”).

¹⁵⁸ See *id.*

¹⁵⁹ See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009).

¹⁶⁰ See *id.*

¹⁶¹ See *United States v. Couch*, 896 F.2d 78, 82 (5th Cir. 1990) (“The Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so. Section 455 requires disqualification when others would have reasonable cause to question the judge’s impartiality.”); *supra* Part III.