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PROCESS, OUTCOMES AND THE INVENTION OF TRADITION: THE GROWING IMPORTANCE OF THE APPEARANCE OF JUDICIAL NEUTRALITY

Anne Richardson Oakes* and Haydn Davies**

INTRODUCTION

Legitimacy, it has been asserted, is “the belief that authorities, institutions, and social arrangements are appropriate, proper, and just.”¹ According to this view, legitimacy and institutional credibility go hand in hand. Unpopular rulings or decisions which attract widespread hostility can be accepted by citizens who recognize the legitimacy of the institutions that hand them down. Empirical studies that locate the issue of legitimacy at the heart of the law’s authority stress the role of fair institutional procedures in fostering internalized compliance, but in this respect what seems to be important is the role of appearance; citizens’ acceptance of institutional legitimacy depends in large measure on the extent to which the procedures of the institution or decision-making body are perceived to be procedurally fair.²

In the United States, it is axiomatic that the due process guarantee of the Fourteenth Amendment embraces a commitment to fair trial procedures—“a fair trial in a fair tribunal.”³ In similar fashion, Article 10 of the Universal

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2. Tom R. Tyler, Why People Obey the Law (Princeton University Press 2006) [hereinafter Tyler, Why People Obey the Law]. See also Tom R. Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?, 19 BEHAV. SCI. & L. 215, 233 (2001) (finding that the public’s evaluations of the police and courts are linked primarily to whether individuals perceive these systems to be procedurally fair).
Declaration of Human Rights and Article 6 of the European Convention on Human Rights purport to guarantee "a fair and public hearing . . . by an independent and impartial tribunal," but, as this paper argues, the relationship of appearances to fairness in these formulations is not well understood.\(^4\)

In the United States, the issue has recently presented itself in the context of judicial elections and the question of whether contributions to the campaign expenses of a state judge, by a party to proceedings in which the judge subsequently participated, compromised the judge's neutrality.\(^6\) Here, the fear that appearances may undermine the due process commitment even where no irregularity in fact exists underpins the Supreme Court majority ruling that Fourteenth Amendment jurisprudence incorporates an "objective standard" whereby issues of judicial bias are to be determined not by a search for actual bias but by reference to appearances.\(^7\) The court, must ask whether "under a realistic appraisal of psychological tendencies and human weakness" there is "such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."\(^8\)

The ruling appears to bring U.S. due process jurisprudence into line with that of other jurisdictions. In *R. v. Sussex Justices, Ex parte McCarthy*, Lord Hewart C.J. famously asserted that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."\(^9\) From this position, the European Court of Human Rights now also claims to determine issues of judicial neutrality by reference to the existence of a "doctrine of appearances"; but as the dissent in

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7. Id. at 2263. See *Republican Party of Minn. v. White*, 536 U.S. 765, 788–90 (2002) (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.").
Kress v. France has pointed out, “case-law which places too much emphasis on appearances” can operate “to the detriment of respectable national traditions and . . . litigants’ real interests.” The context here has primarily been that of the role of court officials but the implications have found their effect in the modification of U.K. court practice and delayed the implementation of reforms designed to enhance the efficiency of domestic civil procedure. Specifically, the role of legal advisors has been called into question, while the extended use of assessors as judicial assistants—envisaged by Lord Woolf as a means of enhancing the quality of judicial outputs—has been stillborn.

The “appearance of bias” jurisprudence of both the U.S. Supreme Court and the European Court of Human Rights draws on formulations of due process which are said to derive from, or be inherent in, the English common law tradition but as historian Eric Hobsbawm has explained, traditions which appear or claim to be old or well established may on closer inspection turn out otherwise. As he points out, the ceremonial pageantry of the modern British monarchy draws on a rhetoric of traditional practices rooted in an “immemorial past,” but these are largely nineteenth and twentieth century developments, and the claimed tradition is in the main fictitious. Hobsbawm describes the term “invented tradition” as:

a set of practices, normally governed by overtly or tacitly

14. Id.
accepted rules and of a ritual or symbolic nature, which
seek to inculcate certain values and norms of behaviour by
repetition, which automatically implies continuity with
the past.\textsuperscript{15}

It is their "peculiarity," however, that this continuity is
largely "factitious."\textsuperscript{16} "[T]hey are responses to novel
situations which take the form of reference to old situations,
or which establish their own past by quasi-obligatory
repetition."\textsuperscript{17}

In this paper we examine the "doctrine of appearances" in
relation to issues of judicial neutrality as just such an
element of the invention of tradition. We take the view that
while the doctrine is said to rest upon well-established
tradition, in terms of its current operation it is in fact a new
arrival with a disruptive potential. We locate the
development in the context of a growing concern with the
importance of procedural transparency in public life and
suggest that this is a particular manifestation of late
twentieth and early twenty-first century concern with the loss
of public confidence in the institutions and operating
principles of government.

In her Reith lectures, the philosopher Baroness Onora
O'Neill has suggested that talk of a "crisis of trust" in public
life is more accurately formulated in terms of a "culture of
suspicion" and that the underlying concern may be directed
towards the reliability of outcomes.\textsuperscript{18} "[C]laims about a crisis
of trust," she suggests "are mainly evidence of an unrealistic
hankering for a world in which safety and compliance are
total, and breaches of trust are eliminated."\textsuperscript{19} The emerging
consensus that we detect on both sides of the Atlantic
concerning the importance of appearance as a fundamental
aspect of fair procedure rests upon acceptance of the link
between legitimacy and public confidence. In the formulation
of the European Court of Human Rights, "[w]hat is at stake is
the confidence which the courts must inspire in the public in

\begin{itemize}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.} at 2.
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} ONORA O'NEILL, A QUESTION OF TRUST: THE BBC REITH LECTURES 2002, at 18 (2002).
\item \textsuperscript{19} \textit{Id.} at 19.
\end{itemize}
a democratic society."\textsuperscript{20} The underlying assumption is that procedures have a value which is independent of outcomes and can be justified on that basis. In \textit{Caperton v. Massey}, the U.S. Supreme Court appears to have acceded to this view; but nowhere is the premise challenged.\textsuperscript{21} As Professor Galligan suggests, however, the theoretical model underpinning this assumption pays insufficient attention to the issue of accuracy.\textsuperscript{22} The empirical research of social science notwithstanding, to the extent that this purports to show that procedures generate their own normative framework but neglects the importance of correct outcomes in shaping the popular confidence from which legitimacy is said to derive, it is, he asserts, fundamentally flawed.\textsuperscript{23}

This article consists of three main sections. In Section I we examine the growing importance of appearances as a determinant of judicial bias by reference to the jurisprudence of the U.S. Supreme Court and the European Court of Human Rights and note that, as both the \textit{Caperton} and \textit{Kress} dissents have pointed out, an appearance test is not easy to apply.\textsuperscript{24} The open invitation of Chief Justice Roberts's parade of the horribles will undoubtedly ensure that the contours of the doctrine will be tested at litigants' expense, but our specific concern in this paper is with the quality (by which we mean accuracy or reliability) of judicial outcomes.\textsuperscript{25}

In this connection, in Section II we take as our example the use of judicial assistants and advisors the purpose of which we suppose is to enhance the accuracy of judicial fact-finding and evaluation and thus the reliability of outcomes. An appearance test must have implications here. We frame the issue thus: does the proximity of the relationship between judge and an advisor—whose function is to assist her in matters of factual complexity—have the potential to generate

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  \item \textsuperscript{21} \textit{Caperton v. A.T. Massey Coal Co.}, 129 S. Ct. 2252, 2264 (2009).
  \item \textsuperscript{22} D.J. \textsc{Galligan}, \textsc{Due Process and Fair Procedures: A Study of Administrative Procedures} 89--95 (1996).
  \item \textsuperscript{23} \textit{Id.} at 94.
  \item \textsuperscript{25} \textit{Caperton}, 129 S. Ct. at 2269--72 (Roberts C.J., dissenting) (outlining forty possible situations in which a "reasonable suspicion" test would be difficult or impossible to apply).
\end{itemize}
popular suspicion of influence such as to compromise the appearance of judicial neutrality? Jurisprudence of the European Court of Human Rights now appears to answer: “yes.” Current interpretations seem to require a complete ban where the advisor does not form part of the decision-making tribunal.\(^\text{26}\) This has had a particular impact in the United Kingdom where courts have been directed to adapt their procedures accordingly.\(^\text{27}\)

To date, the position in the United States has been different. Some circuit courts, notably the Ninth Circuit, have drawn up procedural guidelines to ensure that the advice given by an advisor to the judge is brought onto the record and thus made amenable to appellate review.\(^\text{28}\) In so doing, they demonstrate some sensitivity to the issue we raise, but on the whole we detect a reluctance to problematize these appointments. The general explanation given is that the technical advisor, like the law clerk, is a member of the judge’s personal staff.\(^\text{29}\) Trial judges possess “inherent power to provide themselves with appropriate instruments required for the performance of their duties”;\(^\text{30}\) the advisor thus appointed becomes part of the machinery of the court and thus outside the mischief of the “appearance” principle. This we consider is a pragmatic and outcome-focused approach, but in a climate of increasing sensitivity to the importance of transparency in public life we query the extent to which the analogy with the law clerk can or should be sustained.

We suggest the doctrinal key to the difference lies in the degree of sensitivity that the reviewing court is prepared to

\(^{26}\) See infra notes 117–36 and accompanying text.

\(^{27}\) See Bow Spring v. Manzanillo II [2004] EWCA (Civ) 1007, [57]–[65], (2005) 1 W.L.R. 144.

\(^{28}\) Techsearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1378–79 (Fed. Cir. 2002) (opining that these guidelines now formed part of Ninth Circuit law (citing Ass’n of Mexican-American Educators (AMAE) v. California, 231 F.3d 572, 611 (9th Cir. 2000) (Tashima, J., dissenting))). See also Fed. Trade Comm’n v. Enforma Natural Prods., Inc., 362 F.3d 1204, 1214 (9th Cir. 2004) (“We take this opportunity to join a number of courts that have endorsed Judge Tashima’s recommendations.”); Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 31 n.3 (D.C. Cir. 2002) (noting that the court had been guided “in large part by the extremely thoughtful and oft-cited dissent of Judge Tashima in [AMAE].”)


\(^{30}\) In re Peterson, 253 U.S. 300, 312 (1920).
display to “insider” perspectives when considering the attributes of the “informed and fair-minded observer.”\textsuperscript{31} We suggest that whereas both U.S. federal courts and the European Court formulations manifest a degree of similarity, we detect in the latter a greater willingness to attach weight to the perspective of the ordinary man or woman in the street who is unacquainted with the conventions and norms of judicial process and for that reason perhaps more willing to infer bias or impropriety than the reviewing court might be. This approach implies acquiescence to the assumption that in determining the respective balance between procedure and outcomes, priority must go to the former. The effect is to ignore the extent to which public confidence in judicial process—upon which legitimacy is said to depend—requires a similar confidence in the accuracy of the outcomes produced.

It has been suggested that a way to protect the reliability of outcomes from the unwarranted suspicions of the uninformed is to be robust about substituting the perspective of the review court for the lay observer of contemporary formulation.\textsuperscript{32} However, this suggestion fails to address the argument that the courts should not be exempt from accepting their share of responsibility for engaging in the process of overcoming the disconnect between appearance and legitimacy, which continues to exercise the popular imagination. In this connection we bear in mind Baroness O’Neill’s warnings on the dangers of an excessive desire for transparency:

Perhaps the culture of accountability that we are relentlessly building for ourselves actually damages trust rather than supporting it. Plants don’t flourish when we pull them up too often to check how their roots are growing: political, institutional and professional life too may not flourish if we constantly uproot it to demonstrate that everything is transparent and trustworthy.\textsuperscript{33}

As we say in the vernacular, “if it ain’t broke, don’t fix it.” If we are satisfied that the use of technical advisors is sometimes necessary to enhance the quality of judicial outcomes, then from a pragmatic view, a robust approach

\textsuperscript{31} See infra notes 105–12 and accompanying text.
\textsuperscript{33} O’NEILL, supra note 18, at 19.
may be desirable.

In our final section we revisit the theme of bias in a culture of suspicion. We are attracted to the view that the increased concern with appearances which we claim to detect is largely a function of a loss of confidence in the possibility of neutrality. The great Jerome Frank sitting as a circuit judge in the U.S. Court of Appeals for the Second Circuit asserted: "[d]emocracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness." This should not, however, be taken to require complete judicial passivity:

If . . . "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper.

We endorse the distinction between judicial "bias" and "partiality" or as we prefer to call it "preference" or "predisposition." The former is impermissible but the latter is now widely understood to be a normal characteristic of the human condition. We claim that it is the failure to differentiate between the two that underpins the current concern with transparency and now fatally threatens the use of experts as judicial advisors. As to whether the situation can now be retrieved, we are pessimistic. As has been observed: "[p]ublic confidence in the judicial process and the administration of justice is based on trust. Once that trust turns into suspicion, the system of justice begins to unravel."

34. In re JP Linahan Inc., 138 F.2d 650, 651 (2d Cir. 1943).
35. Id.
36. "We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired ‘slants,’ pre-conceptions, life could not go on." Id.
SECTION I: JUDICIAL NEUTRALITY AND THE APPEARANCE OF BIAS

1. The European Court of Human Rights and a "Doctrine of Appearances": A Late Twentieth Century Arrival

Although the European Court has never made the direct claim, the frequent references in its appearance jurisprudence to the dictum "justice must not only be done; it must also be seen to be done" indicate an implicit assumption of a continuity with a tradition that derives from the English common law.

However, the case of *R v. Sussex Justices, Ex parte McCarthy*—from which the dictum derives—was decided in 1924, and as Justice Scalia has pointed out, there was no common law requirement of judicial recusal for bias at the time of Blackstone.

In the following section we locate the U.S. Supreme Court's current concern with appearances in the context of a similar late twentieth century development in European human rights jurisprudence.

1.1. The European Commission: "equality of arms," "external perspectives" and "objective/subjective" analysis

The so-called "doctrine of appearances" of modern
jurisprudence finds its genesis in four early decisions of the European Human Rights Commission and Committee of Ministers, which predate the formal law reporting of the Council of Europe and the creation of the European Human Rights Reports. All four cases involved Article 6 challenges to the procedures of the Austrian criminal courts. In Ofner and Hopfinger, the Commission and Committee considered the role of the Generalprokurator of the Supreme Court of Austria and specifically whether the latter's practice of advising the Court's Rapporteur on a plea of nullity, where that advice was given and the decision reached in the absence of the defendant's counsel, contravened the principle of "equality of arms," said to be "an inherent element of a 'fair trial'" protected by Article 6. In the context of the Austrian criminal code as a whole, and in the particular circumstances


42. The full text of Art. 6 Eur. Conv. on H.R. (right to a fair trial) reads as follows:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b) to have adequate time and the facilities for the preparation of his defence; c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

European Convention on Human Rights art. 6, supra note 4.

of these cases, the Commission was able to conclude that no inequality in the position of the parties existed. In *Pataki* and *Dunshirn*, however, Article 6 challenges were sustained where, on an appeal against sentence and despite the potential for the outcome to adversely affect the defendants' position, the Chief Public Prosecutor addressed the court in private but the defendants themselves were afforded no opportunity to be heard. Observing that Article 6 did not define the notion of a fair trial in a criminal case, the Commission adopted an expansive approach: the article's provisions were not to be interpreted restrictively and a trial may fail to meet the required standard of fairness even though the "minimum rights" guaranteed by paragraphs 3 and 2 have been respected. Specifically, the Commission asserted "it is beyond doubt that the wider and general provision of a fair trial, contained in paragraph (1) of Article 6, embodies the notion 'equality of arms'."

In these early decisions the basis of the objective and subjective tests of impartiality or bias which later become the "doctrine of appearances" is already discernible. In *Pataki* and *Dunshirn*, although the precise term is not used, the Commission recognized the importance of external perceptions. Conceding that the absence of any record of the national court's deliberations would preclude a definitive decision concerning the Public Prosecutor's actual role, the fact of his physical presence was crucial; the Commission could not ignore the potential effect on the public perception:

Even on the assumption ... that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had an

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47. *Pataki*, 1963 Y.B. EUR. CONV. ON H.R. 714; *Dunshirn*, 1963 Y.B. EUR. CONV. ON H.R. at 730. See JOSEPH M. JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS 9 (2007) (explaining that the term "equality of arms" is "more familiar in civilian jurisprudence than in the common law" and is "an omnibus term embracing a number of separate rights" of a disparate nature arising in connection with issues of access to the courts and the right to be heard).
opportunity of influencing the members of the Court, without the accused or his counsel having any similar opportunity or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which, in the opinion of the Commission, is incompatible with the notion of a fair trial.\footnote{48}{Dunshirn, 1963 Y.B. EUR. CONV. ON H.R. at 732.}

In this methodology, objective analysis operates as a fall-back position. If potential inequality is to be equated with actual inequality, then despite the absence of evidence of actual subjective bias on the part of the decision-makers, the court must err on the side of caution and a declaration of incompatibility will ensue.

\subsection*{1.2. The modern formulation}

Some seven years later, the early Commission decisions were cited before the European Court of Human Rights in cases involving Article 6 challenges to the procedures of the Belgian Court of Cassation.\footnote{49}{Article 6(1) does play a part in the earlier decision of Neumeister v. Austria, but the court decided that article 6(1) was not engaged in requests for provisional release from incarceration. Neumeister v. Austria, 1 Eur. H.R. Rep. 91, 132 (1968). Elsewhere, Article 6(1) is invoked, though unsuccessfully, in the context of the timeliness aspect of a fair trial rather than partiality which is what concerns us here. See id. at 130–31.} At issue in \textit{Delcourt v. Belgium} (a criminal case) was the role of the Procureur Général in Belgium’s highest court.\footnote{50}{Delcourt v. Belgium, 1 Eur. H.R. Rep. 355 (1970).} The office heads a multilevel organization whose role and personnel differ between the lower courts and the Court of Cassation. In the latter, the representative of the office acts as an advisor to the court in a manner similar to that of the Advocate General of the European Court of Justice but with one important difference: unlike the representative of the Procureur Général, the Advocate General of the European Court does not retire with the judges during their deliberations.\footnote{51}{Id. at 359–60.} Clearly reluctant to be seen as interfering with a long-established national legal system, the court emphasized that the procedure at issue “appears never to have been put in question by the legal profession or public opinion in Belgium,”\footnote{52}{Id. at 371.} and ruled that because the Procureur Général was not “considered as a
party,” then vis-à-vis the defendant, the doctrine of “equality of arms” did not apply.⁵³

Nevertheless, noting that the defendants—as persons outside the legal system—might see the official as an “adversary” in a way which “insiders” familiar with the system’s practices and norms would not,⁵⁴ the court continued:

The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum “justice must not only be done; it must also be seen to be done,” these considerations may allow doubts to arise about the satisfactory nature of the system in dispute.⁵⁵

The proviso that sufficient objective evidence of safeguards of the defendants’ rights could satisfy the requirements of Article 6 indicated a reluctance to condemn the propriety of well-established procedures of national courts (as opposed to the conduct of individual personnel),⁵⁶ which has continued to characterize the court’s jurisprudence.⁵⁷ We return to these issues later.

Piersack v. Belgium, the next important case to come before the court, concerned the propriety of a judge participating in an appeal to the Belgian Court of Appeal when he had previously acted as public prosecutor in the trial court below.⁵⁸ The European Court emphasized that although the judge’s personal integrity was not in issue, the Article 6 requirement could not be purely subjective; “[i]n this area,” it concluded:

even appearances may be of a certain importance . . . .

[A]ny judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society.⁵⁹

With this formulation, the doctrine has assumed

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⁵³. Id. at 368.
⁵⁴. Id. at 369.
⁵⁵. Id.
⁵⁶. Delcourt v. Belgium, 1 Eur. H.R. Rep. 355, 369 (1970) (“Looking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with [the Article 6 right].”).
⁵⁹. Id. at 179 (emphasis added).
recognizable shape and the phrases emphasized appear more or less verbatim in subsequent judgments. By 1993, in *Borgers v. Belgium*, the third element of the court’s modern jurisprudence was in place. Commenting that the concept of a fair trial had undergone considerable evolution, the court, justifying a new importance to be attached to appearances, referred to an “increased sensitivity of the public to the fair administration of justice.” The supporting citations derive from *Piersack* to the effect that “[w]hat is at stake is the confidence which the courts must inspire in the public in a democratic society,” but the *Borgers* justification goes further than previous versions in its assertion of an underlying public concern, which the court must address.

At no stage did the court provide evidence to substantiate this claim and indeed, in subsequent cases involving the Belgian, French or Portuguese “Courts of Cassation” or their equivalents, the European Court appears to have gone out of its way to record that the national system under scrutiny commands considerable respect amongst the public and profession alike. At this point we continue to record doctrinal development, but we return to these issues in our conclusion.

Thus, by the 1990s, the three elements of the court’s jurisprudence: the *Delcourt* concern with appearance, the *Piersack* subjective/objective juxtaposition, and the *Borgers* assertion of public sensitivity to which the court must respond have come together in the modern formulation which the court now either spells out in full or, as in *Kress v. France*, refers to in shorthand form as the court’s “doctrine of appearances,” binding on national courts in both criminal and civil cases although not necessarily in precisely the same way.

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62. Id. at 108.
2. Appearance Jurisprudence in the U.S. Supreme Court

2.1. Recusal before Caperton

Despite the absence in pre-twentieth century English common law jurisprudence of a requirement of judicial recusal for bias, in the United States, federal statutes have compelled district judges to recuse themselves on the grounds of interest or prior involvement since 1792. Recusal on the grounds of generalized bias was not required until 1911. The current provisions applicable to U.S. judges are found in Sections 144 and 455(a) of Title 28 of the United States Code. Section 144 provides a procedure whereby a party may challenge a district judge on the grounds of “personal bias or prejudice” by way of affidavit. Section 455(a) applies

942 (2010).

According to the Court’s constant case law, the existence of impartiality for the purposes of art. 6(1) must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

Id.

For the duty of national courts to give effect to the requirements of the duty in civil and criminal proceedings see Dombo Beheer BV v. The Netherlands, 18 Eur. H.R. Rep. 213, 227 (1993) (asserting that the requirements inherent in the concept of a “fair hearing” are not necessarily the same in civil and criminal cases. Contracting States have greater latitude when dealing with civil cases concerning civil rights and obligations than they have when dealing with criminal cases).

67. See Liteky v. United States, 510 U.S. 540, 543–44 (1994) (recounting the history of judicial recusal); see also Frank, supra note 40, at 609–12 (discussing English common law disqualification and concluding “[i]n short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.”); Peter W. Bowie, The Last 100 years: An Era of Expanding Appearances, 48 S. TEX. L. REV. 911 (2007) (outlining the development of attempts to regulate the federal judiciary).

68. Liteky, 510 U.S. at 533–44. See Frank, supra note 40, at 627.


70. 28 U.S.C. § 144.

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
to all justices, judges, and magistrates and puts the onus on the particular individual to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455 underwent considerable revision in 1974 designed to bring it into conformity with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974) by replacing a subjective "in his opinion" standard with an objective test with the aim of improving public confidence in the judicial system. The U.S. Supreme Court considered the scope of the current provision on two occasions, first in 1988, and again in 1994, and confirmed that this is indeed an appearance test: "what matters is not the reality of bias or prejudice, but its appearance." The perspective is that of a "reasonable observer who is informed of all the surrounding facts and circumstances," but the Court has yet to give detailed guidance concerning the application of the test in particular circumstances.

Sections 144 and § 455(a) apply to federal judiciary only. The position of the state judiciary is usually determined by reference to state codes and the Due Process clause of the

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Id. 71. 28 U.S.C. § 455(a).


73. Liljeberg, 486 U.S. 847.


75. Id. at 548. See also Liljeberg, 486 U.S. at 860 ("The goal of section 455(a) is to avoid even the appearance of partiality." (quoting Hall v. Small Bus. Admin., 695 F.2d 175, 179 (5th Cir. 1983))); Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (the requirement of judicial neutrality "preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring))).

Fourteenth Amendment, but whether the latter incorporated an appearance test was, prior to Caperton v. Massey, by no means clear. Caperton concerned the election of a member of the state judiciary and at a narrow level represents the Supreme Court's attempt to tackle the potential of what Justice O'Connor has termed the "judicial arms race" generated by state judiciary election practices to undermine public confidence in the judiciary. At a broader level, Caperton can be located in the context of a developing emphasis on the importance of the appearances generally irrespective of whether concerns of impropriety are sustained by an underlying substance.

2.2.Appearances and the Due Process Clause

The facts of Caperton are, by now, well-known. Newly elected to the West Virginia Supreme Court of Appeals, Justice Benjamin voted—with a 3:2 majority—to overturn a jury verdict awarding victory to Caperton in his action for punitive damages against A.T. Massey Coal Company (Massey), a competitor whose CEO, Don Blankenship, had made substantial contributions to the judge's election campaign expenses. The contributions exceeded those of the

77. U.S. CONST. amend. XIV §1. The ABA's Codes of Judicial Conduct have been adopted by forty-nine of the states in one form or another. See Leslie W. Abramson, Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned," 14 GEO. J. LEGAL ETHICS 55, 55 (2000) ("The American Bar Association's Codes of Judicial Conduct are the foundation for judicial discipline and disqualification in American courts.").


79. Sandra Day O'Connor, Fair and Independent Courts, 137 DAEDALUS 8, 9 (Fall 2008).

80. See id. (expressing the view that the absence of a "ceiling for fundraising in state judicial races" is contributing to a "judicial arms race" undermining public confidence in the neutrality of judges and indicating that "the level of anger directed toward judges today exceeds that of the past"); Pamela S. Karlan, Electing Judges, Judging Elections, and the Lessons of Caperton, 123 HARV. L. REV. 80, 96 (2009) ("[W]e believe that reapportionment is one area in which appearances do matter." (quoting Shaw v. Reno, 509 U.S. 630, 647-48 (1993))); id. at 98 n.102 ("[T]he State's 'interest in protecting public confidence' as a factor supporting the imposition of voter ID requirements that was 'independent' of any showing that such requirements actually prevented voter fraud." (quoting Crawford v. Marion County Board of Elections, 128 S. Ct. 1610, 1620 (2008))). The decision in Caperton "involve[d] a complex jurisprudence of appearance." Id. at 98.

81. Caperton, 129 S. Ct. at 2257.
rest of Benjamin's donors combined and were three times greater than the sum spent by Benjamin's own campaign committee.\textsuperscript{82} Justifying at length his refusal to recuse himself, Justice Benjamin rejected what he termed "apparent or political justice" in favor of "actual justice" as the touchstone of judicial propriety.\textsuperscript{83} The former was dependent upon "the manipulation of appearances or the vagaries of sensationalism," but the latter depended upon "actualities" and should be measured in terms of "the quality of [the court's] legal reasoning".\textsuperscript{84}

Through its written decisions, a court gives that transparency of decision-making needed from governmental entities. Apparent or political justice is based instead on appearances and is measured not by the quality of a court's legal analysis, but rather by the political acceptability of the case's end-result as measured by dominant partisan groups such as politicians and the media, or by the litigants, themselves. Apparent or political justice is based on half-truths, innuendo, conjecture, surmise, prejudice and bias. Since all cases will generally have a winner and a loser, a system based upon "apparent or political justice" will be the subject of constant criticism-all partisan, little academic.\textsuperscript{85}

His conclusion that Due Process required recusal "only in those rare cases wherein a judge or justice has a 'direct, personal, substantial [or] pecuniary interest' in the outcome of the case"\textsuperscript{86} was not accepted by the Supreme Court majority which opted for an "appearance" test.\textsuperscript{87} The emphasis on "actualities" was not the "proper inquiry."\textsuperscript{88} On "a realistic appraisal of psychological tendencies and human weakness" the campaign contributions posed "such a risk of

\begin{thebibliography}{99}
\bibitem{82} \textit{Id.}
\bibitem{84} \textit{Id.} at 285, 286 n.2. Justice Benjamin pointed out that Canon 2A, of the W. Va. Code of Judicial Conduct, which prohibits judges from engaging in activities which are improper or which give the appearance of impropriety was not applicable here. \textit{Id.} at 293 n.13. His "activities," i.e. running for office, were perfectly legitimate. \textit{Id.} at 293. The activities complained of were those of third parties over whom he had no control. \textit{Id.}
\bibitem{85} \textit{Id.} at 294.
\bibitem{86} \textit{Id.} (citing Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 821–22 (1986)).
\bibitem{88} \textit{Id.} at 2264.
\end{thebibliography}
actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. 89

Chief Justice John Roberts's dissent—in which Justices Scalia, Thomas and Alito joined—spelled out forty grounds for potential challenge, but essentially amounted to an attack on workability; an appearance test, the Chief Justice asserted, “cannot be defined in any limited way” and “provides no guidance to judges and litigants about when recusal will be constitutionally required.” 90 The “probability of bias” standard articulated by the majority failed “to provide clear, workable guidance for future cases,” and raised far more questions than it answered. 91 The Court’s decision, he predicted, would “inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.” 92 Justice Scalia, picking up this point, asserted that far from promoting confidence in the judicial system, an “appearance test” with its opportunities for “lawyerly gambits,” which reinforce the perception of litigation as “just a game” and “incapable of delivering real-world justice,” would have the opposite effect. 93 In this respect, we find echoes of the criticisms of the appearance jurisprudence of the

89. Id. at 2263 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975) (internal quotation marks omitted)).

90. Id. at 2267 (Roberts, C.J., dissenting). See also Ronald Rotunda, Judicial Ethics, The Appearance of Impropriety and the Proposed New ABA Judicial Code, 34 Hof. L. Rev. 1337, 1341 (2006) (describing the ABA Code appearance of impropriety test as a clumsy weapon with the potential to encourage unwarranted attacks on a judge’s reputation, which themselves do much to undermine public confidence in the judiciary).

Hurling the charge of “appearance of impropriety” . . . is like using a blunderbuss. Nowadays, we might describe a blunderbuss as a weapon of terror. It was not a very precise weapon, and marksmen never used it. Instead, it was good for crowd control, when the goal was to shoot multiple balls simultaneously in the hope of hitting something. The ABA has chosen to arm any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge by giving its imprimatur to a charge of violating the “appearances of impropriety.” The attack on the judge’s ethics seldom results in discipline or disqualification, but it does serve to besmirch and tarnish a judge’s reputation.

91. Caperton 129 S. Ct. at 2269 (Roberts, CJ., dissenting).
92. Id. at 2267.
93. Id. at 2274 (Scalia, J., dissenting).
European court made by the Borgers dissent.94 Jurisprudential changes, claimed the latter, which prefer form over substance and seek justification in the need to respond to changes in popular perceptions, require "a proper basis in fact."95 In this area, at least, American courts may be more vulnerable than their European counterparts and we return to this point below.96 At this stage we comment on the tensions between legalism and policy, which find their reflection in the Caperton dissent and constitute, we suggest, a fundamental dilemma of recusal jurisprudence.

2.3. Legalism versus Policy in Appearance Jurisprudence

In his analysis of the role of appearance discourse in the context of official impropriety, Andrew Stark has observed that an appearance test may be open to objection on the grounds that it is inherently anti-legalistic but this is usually countered by considerations of policy expressed in terms of the need to preserve public confidence in the structures of public life.97 Two arguments sustain the "legalistic attack": a) the test involves an element of "anti-legalistic" factual prejudgment of behavior and b) it violates the principle against legal retroactivity.98 The factual prejudgment is that of the public whose reaction is to be estimated. As Professor Stark explains:

[No trier of fact weighs all the evidence, exculpating and mitigating as well as incriminating, against a legal standard of proof, in order to establish that an act of . . . impropriety has been committed. Instead the task . . . is to estimate the (more or less incomplete) level of the public's factual knowledge of the case, and the (more or less) prejudiced inferences the public will draw from that knowledge. If the public so imagined would believe that an act of official impropriety has occurred, [the conclusion must follow] that a violation of the appearance standard has taken place. [The review body] may then impose sanctions. Hence, viewed legalistically, appearance

95. Id.
96. See infra Section III.
98. Id. at 213–20.
proceedings entail "punishment without crime."99

The charge of "legal retroactivity" is a function of the vagueness or uncertainty, which accompanies the distinction between "actual" impropriety and "apparent" impropriety. The argument goes like this: by definition the circumstances in which an appearance test is in issue are those in which there is no clear act of "actual" impropriety. The act complained of is not one which has been expressly identified as within the range of legislatively prohibited conduct but is wrong because it looks wrong by reference to perceptions which arise only after the act has occurred.100 Moreover the fact that the act has not been expressly targeted for prohibition must indicate that there is no moral consensus regarding its inherent impropriety:

To say that an official did something that looks wrong is to enter a realm of normative uncertainty in which citizens more or less disagree . . . whether a given act is or should be deemed "official impropriety." Notwithstanding the formal existence of the appearance rule, then, the term "appearance of official impropriety" is arguably so vague that the rule's application, in a given situation, is nothing the officeholder could have anticipated. The standard thus becomes retroactive for all intents and purposes. A law "so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application [may begin to] violate the first essential of due process."101

Taking these two challenges together, the argument then is that an appearance test violates what may be termed the basic principle of legality, namely that there should be "no punishment without crime . . . and no crime without law."102

In the context of judicial recusal, what this criticism amounts to is essentially a point about standards: judges

99. Id. at 213.
100. Id. at 217–20.
101. Id. at 218 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) and referring to Bostjan M. Zupancic, On Legal Formalism: The Principle of Legality in Criminal Law, 27 LOY. L. REV. 369, 423–24 (1981) ("[T]he issue of vagueness really does not differ from the issue of retroactivity: in both cases the determination of the precise limit between what is punishable and what is not is determined post factum . . . . In this sense, a vague law is an ex post facto law.").
102. Id. at 210 (quoting JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 152 (1964)).
must be able to identify danger situations in advance so that they then can avoid the kind of circumstances that will give rise to negative perceptions, specifically those having the effect of undermining public confidence. In the absence of clear criteria to ground recusal decisions, an appearance test will not only be difficult to apply but in so far as it will require judges to recuse themselves in situations where they feel that they have done nothing wrong and on the basis of a popular perception—which may be difficult to ascertain and in terms of its factual basis misguided—it runs the risk of offending fundamental intuitions of what constitute the basic norms of legal process and procedure.

In terms of the standard to be applied, the characteristics of the observer whose perceptions are to be second-guessed constitute a definitional threshold, the purpose of which is to achieve a balance between the competing public policy considerations of appearance jurisprudence. Specifically, the desire to protect judges from "unsupported, irrational, or highly tenuous speculation" or "judge-shopping" has generally been considered to require setting a high threshold which will operate to preclude the perspective of the ordinary person in the street. Formulations within the Anglo-American tradition vary but typically envisage a disinterested observer who is not only independent of the court (an "outsider" rather than "insider") but also "fair-minded," "balance[d]" in the way she arrives at her judgments and, above all, equipped with more understanding and knowledge of judicial process than the ordinary person might be expected to have because she is "informed." Two recent

103. See United States v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986).

There are twin, and sometimes competing, policies that bear on the application of the § 455(a) standard. The first is that courts must not only be, but must seem to be, free of bias or prejudice . . . . A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.

104. See In re Mason, 916 F.2d 384, 386 (7th Cir. 1990); see also In re Mann, 229 F.3d 657, 668 (7th Cir. 2000); Sullivan v. Conway, 157 F.3d 1092, 1096 (7th Cir. 1998); United State v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990).

formulations of the U.K.'s highest court envision this paragon at length:

The "fair-minded and informed observer" is probably not an insider . . . . Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded.106

The sort of person "who always reserves judgment on every point until she has seen and fully understood both sides of the argument," she is not "unduly sensitive or suspicious" but neither is she complacent:107

She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.108

However, the observer is "informed"; she takes a "balanced approach to any information she is given" and before doing so takes the trouble "to inform herself on all matters that are relevant";

She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.109

"Gender-neutral [and possessed of] attributes to which many . . . might struggle to attain," it is trite observation that this "newcomer . . . [to the] legal village" of characters by reference to whom courts justify their narratives of rational behavior is a legal fiction.110 The role of the informed

106. Gillies, 1 W.L.R. at 793.
108. Id.
109. Id.
110. Id. at 2417–18. See also Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000) ("What matters under § 455(a) 'is not the reality of bias or prejudice but its appearance.' This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." (citing Liteky v. United States, 510 U.S. 540, 548 (1994))).
observer in reconciling the competing claims of popular perception upon which public confidence in the integrity of the judicial system is said to depend and the desire to protect judges from unwarranted accusations which interfere with the efficiency of judicial process may be well-understood, but the danger is that when too much weight is accorded to the latter, as the Seventh Circuit has observed, "the appearance of impropriety standard . . . [collapses] into a demand for proof of actual impropriety"\textsuperscript{111} and a mismatch opens up between recusal decisions and the perceptions of the ordinary person in the street. As the Seventh Circuit admonished, courts must bear in mind that the "reasonable, well-informed observer of the judicial system" may be "less inclined [than themselves] to credit judges' impartiality and mental discipline."\textsuperscript{112} The nature of the exercise then shapes the unsatisfactory nature of the outcome, an "appearance" jurisprudence which demonstrates reluctance to engage as the European Court now seems willing to do with the perspective of ordinary people who are unfamiliar with the mysteries of court proceedings but upon whose approbation legitimacy depends.\textsuperscript{113} We consider these issues now in relation to the use of technical advisors and comment further in our conclusion when we return to the growing importance of appearances in public life.

\textbf{SECTION II: APPEARANCES AND TECHNICAL ADVISORS}

In this section we comment on the differing attitudes of U.S. courts and the European Court of Human Rights concerning the application of a doctrine of appearances to the position of a court advisor. We begin with an extract from a recent judgment of the U.K. High Court in litigation against three drug companies concerning the safety of various brands

\textsuperscript{111} \textit{In re} Mason, 916 F.2d 384, 386 (7th Cir. 1990).
\textsuperscript{112} \textit{Id.} The Supreme Court made a similar point in \textit{Liljeberg}. 486 U.S. at 864–65 ("The problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.").
of the Combined Oral Contraceptive.\textsuperscript{114} Reviewing the evidence, MacKay J. commented that the expert witness:

proceeded from the witness box to produce four pages of detailed algebraic calculations . . . .

. . . I warned him [and counsel] that my own familiarity with algebra lay in the past and at an elementary level. Quite undeterred [the witness] proceeded over 8 pages of transcript, aided by several pages of a flip-chart, to go through a series of calculations at some speed which purported to support what he had just said. I considered the matter overnight with the benefit of the transcript. I concluded I did not understand this evidence so I thought it right the next morning to say so in open court. I said that if this evidence was being relied on as a means of resolving this dispute I would need to consider the appointment of a judicial assessor under Section 70 of the Supreme Court Act 1981 to assist me.\textsuperscript{115}

The increasing complexity of specialized evidence in civil litigation, coupled with trial efficiency pressures, raises the prospect of an increased role for technical advisors as judicial assistants on both sides of the Atlantic. In the United States the extended “gate-keeping” duties which the Supreme Court now requires in cases of scientific or technical complexity render the matter topical, but federal courts generally, and the Supreme Court in particular, have yet to take cognizance of the “appearance” implications which such appointments might entail.\textsuperscript{116} The United Kingdom, however, as a member of the Council of Europe is bound to consider the jurisprudence of the European Court, specifically the decision in \textit{Kress v. France} which we consider next. The effect of the decision has been interpreted by the U.K. courts in such a way as to require modification of existing civil procedure regarding the use of technical advisors but as we argue these modifications probably do not go far enough to address the

\begin{footnotesize}
\begin{enumerate}
\item[115.] Id. Counsel later informed the judge that the Claimants had decided not to persist with the evidence.
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European concerns.\textsuperscript{117} We compare the position of U.K. courts with that adopted by U.S. federal courts and comment that the preference for substance over form, which we detect in the latter, may promote the efficiency of judicial process, but pays insufficient attention to the growing importance of popular perceptions in public life, and sooner rather than later will need to be revisited.

1. Article 6 Jurisprudence and Court Advisors in the U.K.

In the U.K., Article 6 concerns in relation to the use of technical advisors stem from the 2001 medical negligence decision in \textit{Kress v. France}.\textsuperscript{118} At issue was the presence at the Conseil d'État's deliberations of the Government Commissioner who made his submissions after the parties had addressed the court but did not participate in the vote despite being a full member of the bench. The court acknowledged the Government Commissioner's objectivity and the positive contribution that his submissions made to the transparency of the decision-making process.\textsuperscript{119} The issues were not those of adversarialism—which could be addressed by the employment of "sufficient safeguards to counterbalance the Commissioner's power,"\textsuperscript{120} nor of judicial impartiality; during the deliberations the Government Commissioner, "is only one judge among others and his view cannot affect the decision of the other judges where he is in a minority".\textsuperscript{121}

Rather, the doctrine of appearances was called into play; "[i]n publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the Government Commissioner could legitimately be regarded by the parties as taking sides with one or other of them."\textsuperscript{122} Thus, for "a litigant not familiar with the mysteries of administrative proceedings," the apparent neutrality of the proceedings would be compromised.\textsuperscript{123} This perception would

\textsuperscript{118.} Id.
\textsuperscript{119.} Id. \S 78.
\textsuperscript{120.} Id. \S 80.
\textsuperscript{121.} Id. \S 78.
\textsuperscript{122.} Id. \S 81.
be reinforced if the litigant, having heard him make submissions unfavorable to his case at the end of the public hearing, then sees the Commissioner “withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers” where “if only to outward appearances” he would have “an additional opportunity to bolster his submissions in private, without fear of contradiction.”

Drawing attention once again to “the public’s increased sensitivity to the fair administration of justice,” and in that context to the importance to be attached to appearances, the court concluded by ten votes to seven that there had been a violation of Article 6 § 1 of the Convention.

The implications of the European Court’s approach for court officials who act as judicial advisors or assistants have yet to be fully understood. In Vermeulen and Lobo Machado, the court was unmoved by arguments to the effect that the presence of government officials at the deliberations of the national courts was in the capacity of advisor and was necessary to help ensure the consistency of case-law or to assist in the final drafting of the judgment.

As the court explained in Kress, “the benefit for the trial bench of this purely technical assistance is to be weighed against the higher interest of the litigant, who must have a guarantee that the [national official] will not be able, through his presence at the deliberations, to influence their outcome.”

In the United Kingdom, Article 6 concerns in relation to the role of the legal advisor to the justices in magistrates courts proceedings arose before the Human Rights Act of 1998 came into force and led to the issue of a practice direction requiring that any advice given to the justices in private should be repeated in open court and that the parties should have an opportunity to make representations on it.

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124. Id. ¶¶ 81–82.
In the unreported case of Mort v. United Kingdom, however, the European Court, noting that the role of the justices' clerk was confined to assisting the lay magistrates, distinguished the position from that of officials such as the Procureur-Général, Avocat-Général or Commissaire du Gouvernement, "who make submissions to the courts concerning their personal views on the outcome of particular cases." There being "no question of the justices' clerk enjoying any role in the proceedings independent of the justices, or in having any duty with regard to influencing a decision in any particular direction" then, "[a]ssuming the clerk fulfils the role provided by law, his or her presence during the deliberations of the justices must be regarded as part of the ordinary functioning of the court." In Clark v. Kelly the Privy Council, following this lead, noted the "essential role" of the legal advisor to lay magistrates and raised, but did not satisfactorily answer, "the underlying issue" of the court's independence and impartiality from the perspective of appearances. In the words of Lord Hope, "a balance must be struck" between the demands of process and the requirements of expediency. In a similar vein, the English Court of Appeal has now directed that admiralty and patent courts which have traditionally used technical assessors must modify their procedures in such a way as to require disclosure of the advice received and to afford to the parties an opportunity to contend that it should or should not be followed. This remains the current position but is vulnerable to the criticism that these modifications address

in English courts. Id. at 1886.


131. Id.

132. Id. at 681.

133. Id. at 697.

134. Id. at 701.

“equality of arms” issues but not appearances, and the problem raised by Kress remains—namely the potential for an appearance of injustice where a litigant sees an advisory relationship between the deciding judge and a court official who has made representations inimical to her case.136

2. Technical Advisors and Due Process Norms in U.S. Federal Courts

U.S. federal district courts have power to appoint non-testifying experts to act as judicial assistants under the Federal Rules of Evidence,137 the Federal Rules of Civil Procedure,138 and the inherent jurisdiction.139 In Reilly v. U.S., Senior District Judge Pettine outlined a range of activities for a technical advisor which may be regarded as permissible:

First, the technical advisor translates and interprets for the court the technical language used in the case. Second, he offers an exposition and delineation of the technical disagreement between the parties. Third, he relates this disagreement to the broader principles of the science or technical art involved. Fourth, he presents his own

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137. FED. R. EVID. 706(a).
138. FED. R. CIV. P. 53(a) (allowing for the appointment of a “special master” defined to include a “an assessor”). See Hart v. Cnty. Sch. Bd., 383 F. Supp. 699, 764 (E.D.N.Y. 1974) (“The rule is broad enough to allow appointment of expert advisors.”); see also Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir. 1979) (authority to appoint “expert advisors or consultants” derives from either Rule 53 or court’s inherent power); Reilly v. United States, 863 F.2d 149, 155 (1st Cir. 1988) (“[W]e need not analyze the suggestion (eschewed by all of the parties to this case) that Fed. R. Civ. P. 53, which deals with the naming of masters, may be a fertile source of judicial power to retain necessary technical assistance.”).
opinion on the technical facts and related matters at issue. Finally, he may conduct pertinent experiments, either on his own or in cooperation with others.  

However, a study conducted by Federal Judicial Center researchers in 1993 found little evidence of extensive use of these appointments and a corresponding "paucity of published opinions dealing with the exercise of this authority." In so far as they have considered the matter, federal courts have rationalized the appointment of a non-testifying technical court advisor as a member of the judge's staff equivalent to "a specialized law clerk" and thus apparently unproblematic. There are, however, indications that some circuit courts now recognize the limits of the analogy.  

In a class-action challenge to the use of the California Basic Educational Skills Test (CBEST) as a requirement for certification to teach and for other employment in California public schools where the judge had required the assistance of a court-appointed expert advisor, Ninth Circuit Judge Tashima noted a general consensus to the effect that the "law should in some way effectively use expert knowledge wherever it will aid in settling disputes" but observed:

In some important respects, a technical advisor is quite unlike a law clerk. A law clerk's function is to aid the judge in researching legal issues in cases pending before the court. Because the judge is an expert in the law and fully understands legal theory and analyses, it is unlikely, to say the least, that a law clerk will impermissibly usurp the judicial function. On the other hand, a technical advisor is brought in precisely because the judge is not familiar with the complex, technical issues presented in the case. There is therefore an understandable concern

142. Reilly, 682 F. Supp. at 152.
144. AMAE, 231 F.3d at 609 (Tashima, J., dissenting).
that the technical advisor's opinion will carry undue weight with the judge.\(^{145}\)

The thrust of Judge Tashima's concern, however, was to bring advice received onto the judicial record. This is in line with the general approach of federal courts to date, which has been to conceptualize problems in connection with the use of a technical advisor in terms of the risk of actual judicial impropriety or lack of neutrality on the part of the advisor.\(^{146}\)

In so far as the problem exists, the solution then lies in procedural safeguards designed to ensure transparency. In Judge Tashima's formulation:\(^ {147}\)

The use of a technical advisor is not without risks. First, whenever a court appoints a technical advisor, there is a danger that the court will rely too heavily on the expert's advice, thus compromising its role as an independent decisionmaker and the requirement that its findings be based only on evidence in the record. This risk is especially salient if the contents of the communications between the trial judge and the advisor is hidden from the parties (and appellate review), and where the parties have no opportunity to respond to the advisor's statements. Second, experts in the relevant field, particularly if it is a narrow and highly-specialized one, may be aligned with one of the parties; therefore, the district court must make every effort to ensure the technical advisor's neutrality, lest the advisor develop into, or give the appearance of being, an advocate for one side. Without some safeguards, the parties' confidence in the fairness of the trial will erode.\(^ {148}\)

These risks can be minimized by attention to procedure. Thus, "minimally" a district court appointing a technical advisor should:

1) utilize a fair and open [appointments] procedure . . . , 2) address any allegations of bias, partiality, or lack of qualification; 3) clearly define and limit the technical advisor's duties; 4) make clear to the technical advisor that any advice he gives to the court cannot be based on any extra-record information; and 5) make explicit, either through an expert's report or a record of ex parte

\(^{145}\) Id. at 613–14 (citations omitted).

\(^{146}\) Id. at 610–11.

\(^{147}\) Id. at 591 (Graber, J., majority opinion).

\(^{148}\) Id. at 610–11 (Tashima, J., dissenting) (citations omitted).
communications, the nature and content of the technical advisor's advice. 149

Judge Tashima's recommendations were designed to bring evidence of assistance received by a judge onto the judicial record and, thus, amenable to appellate review, but the focus on what might be termed "adversarial" issues fails to engage with the "appearance" issues, which we argue arise here. The Seventh Circuit decision in Edgar v. K.L. 150 represents possibly the closest federal courts have come so far in recognizing the potential for technical advisor appointments to raise problems of apparent bias. In Edgar, the court concluded that where a judge in a mental health case had private meetings and engaged in ex parte communications with a panel of court-appointed experts who were known to be partisan, he had compromised his impartiality. 151 Section 455(a) "appearance" issues arose because the judge made no secret of the confidence that he reposed in his advisors, 152 the relationship had become "excessively cozy" 153 and a reasonable observer would have had concerns about the court's ability to conduct the trial impartially as a result. 154 Closer reading, however, indicates that what really seems to have troubled the Seventh Circuit in Edgar was the substantive issue that the judge had in fact impermissibly accepted contestable conclusions, which had not been tested in court. 155 Thus, where the district judge had blocked discovery and declined to state on the record his own memories of what had happened, his claim of judicial privilege invited the inference of impropriety. 156

Two recent Ninth Circuit decisions evidence a similar preference for substance over form. In A & M Records v. Napster Inc., 157 the appellate court dismissed a challenge where the technical advisor did not "displace the district

149. Id. at 611.
151. Id.
152. See id. at 260.
153. Id.
154. Id.
155. Id.
court's judicial role” nor “unilaterally issue[] findings of fact or conclusions of law regarding [defendant Napster's] compliance.”

However, in Federal Trade Comm'n v. Entforma Natural Products, Inc., a similar challenge succeeded where the court found that, although the record was sparse, there was evidence of actual improper reliance.

In neither decision is there concern that the fact of the relationship per se might raise “appearance” issues.

Clearly there is scope for this type of allegation to be opportunistic in character and this may be a partial explanation for the lacuna we detect here. In Reilly itself—where there was no evidence to suggest that the district court had “allowed the boundaries to be overrun” but the judge had failed to provide written instructions and the advisor had submitted no written report—the First Circuit was unwilling to sustain a challenge motivated by opportunism.

Similar considerations may apply where the challenges have been generated in a context of a history of opposition to the authority of the court, clearly a factor in two decisions from the desegregation era: U.S. v. Yonkers Board of Education, a housing case, and Bradley v. Millikin, a school case. In Yonkers, where the district court had appointed an outside housing advisor to provide expert advice and assistance regarding the implementation of the court’s orders and to coordinate the activity of various parties, including government agencies, the Second Circuit concluded that the judge’s ex parte contacts were “merely part of the performance of [the judge’s] prescribed duty and did not create an appearance of partiality on the part of the district court judge.” Moreover, his refusal to disclose the content of communications with his advisors was upheld: “a degree of confidentiality [was] . . . justifiable in light of attempts to

158. Id. at 1097.
160. Id. at 1214 n.10 (“The district court judge indicated that ‘If the court-appointed expert agrees with the Defendants, I suspect I’m going to agree with him. If he agrees with the Plaintiffs, I suspect I'm going to agree with him.’”).
162. Id. at 161.
block implementation of [the consent decree] by the City and other groups.\textsuperscript{166}

Similarly, in Bradley, the Sixth Circuit upheld Judge DeMascio's refusal to recuse himself on the grounds that his ex parte contacts and discussions with court-appointed experts and community groups violated Canon 3A(4) of the Code of Conduct for United States Judges; there, the remedial phase of the litigation had been protracted and arduous,\textsuperscript{167} the judge had conducted himself in an exemplary manner,\textsuperscript{168} and the court's authority to utilize experts was not in issue. The Sixth Circuit asserted simply: "We do not believe Judge DeMascio's use of experts, or his receipt through them of community and expert views . . . required recusal."\textsuperscript{169} The court did, however, express its concern about the absence of a documentary record and required that all future expert assistance should be recorded in written reports, with copies to all parties.\textsuperscript{170}

More recently, the D.C. Circuit's Brooks decision considered the extent to which a reasonable and informed observer would have questioned the impartiality of a district judge who had regular meetings with a special master and a court monitor who acted as his agents over a four-year period. Noting that the litigation was "complicated and contentious,"\textsuperscript{171} the court accepted the judge's unequivocal

\begin{footnotes}
\item[166] Yonkers Bd. of Educ., 946 F.2d at 185.
\item[167] Bradley, 620 F.2d at 1158 (noting that Canon 3A(4) of the Code of Conduct for United States Judges prohibits a judge from initiating or considering ex parte communications from "persons who are not participants to the proceedings"). The provisions of the Code are advisory and failure to comply does not necessarily attract sanctions. \textit{Id}.
\item[168] \textit{Id.} See also Jackson v. Fort Stanton Hosp. and Training Sch., 757 F. Supp. 1231, 1239–40 (D.N.M. 1990) (District judge refused to recuse himself on the grounds of ex parte communications with his court expert where the judge stated that he had not been influenced by nor relied on the expert's findings or opinions, a reasonable person would not have doubted the judge's impartiality and the challenge was an attempt to avoid the consequence of an anticipated adverse decision). \textit{But cf.} United States v. Craven, 239 F.3d 91, 101–03 (1st Cir. 2001) (In a criminal case \textit{ex parte} communications with court-appointed psychologist prior to sentencing constituted error; the sentence would be vacated and the case remanded to another judge for sentencing.).
\item[169] Bradley, 620 F.2d at 1158.
\item[170] \textit{Id.} In relation to 28 U.S.C. § 455(a) the court ruled that the judge's activities were judicial and thus outside the scope of the statute. \textit{Id.} at 1157. \textit{Post Liteky v. United States} these arguments no longer stand. Liteky v. United States, 510 U.S. 540 (1994).
\item[171] \textit{In re Brooks}, 383 F.3d 1036, 1043 (D.C. Cir. 2004) (denying petition
\end{footnotes}
assurance that no substantive information had been improperly obtained.\textsuperscript{172}

Judge Tashima's attempt to formulate procedural guidelines for judges using technical advisors, which now appears to form part of Ninth Circuit law, had been anticipated by the First Circuit in \textit{Reilly}, but the underlying purpose is far from clear.\textsuperscript{173} The \textit{Reilly} Court spoke of "prophylactic measures" and of "fundamental fairness,"\textsuperscript{174} but did not explain whether the prophylaxis was directed towards substance or appearance or both. Subsequent Ninth Circuit endorsement has stressed the importance of procedure in facilitating appellate review suggesting that the target is substantive impropriety rather than appearances.\textsuperscript{175} However, as the Third Circuit has pointed out, fairness-as-appearance itself has two aims and the requirements of § 455\textsuperscript{176} address "not only fairness to the litigants but also the public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted."\textsuperscript{177} Procedural safeguards designed to prevent substantive impropriety or to facilitate correction on appellate review address the first of these aims but not the second.

Moreover, it is difficult to understand how either prophylaxis or justification can have much of a role within an analytical matrix which purports to make no ontological

\textsuperscript{172} Id. at 1041–43.
\textsuperscript{173} AMAE v. California, 231 F.3d 572, 611 (Tashima, J., dissenting), applied in Techsearch, L.L.C. v. Intel Corp., 286 F.3d 1360, 1378–79 (Fed. Cir. 2002) (predicting that these guidelines now formed part of Ninth Circuit law). \textit{See} Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 31 n.3 (D.D.C. 2002) (noting that it had been guided "in large part by the extremely thoughtful and oft-cited dissent of Judge Tashima in [AMAE]"); \textit{see also} Fed. Trade Comm'n v. Enforma Natural Products, Inc., 362 F.3d 1204, 1214 (9th Cir. 2004) ("We take this opportunity to join a number of courts that have endorsed Judge Tashima's recommendations").
\textsuperscript{174} Reilly v. United States, 863 F.2d 149, 159–60 (1988).
\textsuperscript{175} \textit{Enforma Natural Products, Inc.}, 362 F.3d at 1215 ("On remand, the district court should consider implementing some or all of these safeguards [regarding the use of technical advisors] to assure the parties that the court is proceeding openly and fairly. Employment of these standards will aid in appellate review if such review becomes necessary").
\textsuperscript{177} \textit{In re Sch. Asbestos Litig.}, 977 F.2d 764, 776 (3d Cir. 1992) (citing Liljeborg v. Health Services Acquisition Corp., 486 U.S. 847, 859–60 (1988)).
distinction between appearance and substance. As Professor Stark points out, the fact that a process appears improper ought in principle to make it actually improper.\footnote{178} If as the cases suggest, appellate courts are willing to sanction occasional judicial forays outside the confines of adversarial process on the grounds of the particular circumstances of the case, the answer must be that they have done so pragmatically and because they recognize with Judge Tashima that the role played by a technical advisor is “unique.”\footnote{179} The question is whether in so doing they have succumbed to the temptation to “look into the mirror” of their own experience and understanding and as a result moved too far from the perceptions of the ordinary members of the public upon which confidence in the administration of justice must ultimately depend.\footnote{180} If, as we suggest, the reluctance of courts today to conceptualize relations between judge and advisor in impropriety terms stems from pragmatic grounds, what is at issue is the relative priority to be accorded to the reliability of outcomes over the norms of adversarial process.\footnote{181}

3. Rectitude in Decision-Making: The Connection between Process and Outcomes

It has been recently asserted that “[t]he sound

\footnote{178} See Stark, supra note 97, at 21–35 (explaining that “appearance” standards, as opposed to “conflict of interest” prohibitions should not be regarded as prophylactic).

\footnote{179} AMAE v. California, 231 F.3d 572, 613 n.8 (9th Cir. 2000).

\footnote{180} R v. Sec'y of State for the Env't, Ex parte Kirstall Valley Campaign [1996] 3 All E.R. (QB) 304 at 316 (Sedley, J.) (“The House also eliminated from the process of adjudication the imaginary reasonable man, recognizing that in imputing to him all that is eventually known to the court and asking him for his impression, the court is looking into a mirror.”).


The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert’s relevant testimony is reliable.

\textit{Id.}
administration of justice is grounded in rectitude of decision by the tribunal of fact.” For Jeremy Bentham rectitude, by which he meant accurate outcomes, or the correct application of the law to the facts, was dictated by the principle of utility, and procedure was to be its servant. It followed for him that the integrity of the end result or outcomes should not be compromised by extraneous considerations such as the desire to provide procedural protections for defendants in criminal trials. For this reason, asserts Galligan, “we can be sure [Bentham] would have disapproved” of the raft of procedural devices such as the “right to silence, the privilege against self-incrimination, the rules requiring voluntary confessions, and a general doctrine of fairness” to which, in one form or another, and to a greater or lesser extent, the modern common-law world has now become accustomed, despite the obstacles that such protections might place in the way of successful prosecution of a guilty defendant.

Extrapolating into the wider context, the insight that legal processes serve social goals which can be expected to change over time generates a model of procedural justice in which procedural norms can be linked to the values of the social and moral matrix within which they operate. If the behavior of legal officials is governed by legal standards which are normally ascertainable in accordance with the norms of positivist legal method, it is nevertheless to be expected that these legal standards will be reflexive with, and responsive to, the wider social context and specifically to the expectations of the wider public concerning legal outcomes.

Two points follow from this. The first is about change: “[s]ometimes a new normative standard will be adopted by officials, reflecting their concern to advance a particular social goal or moral value.” We suggest that the current enthusiasm for what we have termed the “doctrine of appearances” is best understood when seen in this light and we take up this point later.

183. See GALLIGAN, supra note 22 at 9–12.
184. Id. at 12.
185. Id. at 17.
186. Id.
187. See infra notes 243–62 and accompanying text.
The second point concerns the relationship between procedure and outcomes. Specifically, Galligan's contention that the fair treatment of individuals is directly bound up with the accurate application of law or rectitude of decision-making so that models of so-called "dignitary" or "process" values arising out of the principle of respect for persons, which purport to offer a non-instrumental or non-outcome-dependent account of procedural fairness, are misconceived. Laws may be made in pursuit of social goals and for the common good but the consequence is to generate normative entitlements for those individuals who come within the scope of the law when properly applied. If, as Galligan claims, fairness "rests on the general principle that a person is treated fairly if he is treated in a way to which he has a justifiable claim," it follows that a mistaken decision which produces an incorrect outcome constitutes a denial of those rights and the link between procedures and outcomes is established. The purpose of procedures is to guarantee not only that the legal standards are properly applied but that people will be treated "in accordance with their normative expectations [a principle which] is at the very foundation of fair treatment and procedural fairness."

On this analysis, procedural norms such as the rules relating to judicial neutrality and the right to a hearing, whilst they may have a value that is expressive of the respect owed to individuals in a liberal democracy, are primarily instrumental in character because they are immediately directed towards the production of good outcomes:

- Bias on the part of the decision-maker is condemned because of the threat it poses to an accurate outcome, while a hearing is important because it is likely to provide relevant and often vital information and to reveal a side of the story which would otherwise remain untold. The combined effect of such procedural standards is the likelihood of their leading to a more accurate outcome.

An appearance of bias test however is consistently defended on the basis of the asserted need to maintain public

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188. On "dignitary values" see JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).
189. GALLIGAN, supra note 22, at 52.
190. Id. at 42.
191. Id. at 92.
confidence in the integrity of legal process; but here again, as Professor Galligan points out, confidence in procedures and confidence in their outcomes go hand in hand: “confidence that the law has been properly applied . . . depends to a significant degree on confidence in the procedures as a means to those outcomes”192 and “confidence in the result is bolstered by employing procedures which reduce as far as possible the risks of error.”193 On this logic and in relation to the technical advisor at least, the conclusion would then be that rules relating to bias should not be interpreted so as to put obstacles in the way of a judge who seeks expert help as a means of maximizing the accuracy of her decision-making. In this respect, the U.S. courts would seem to have it right, and the appearance jurisprudence of the European Court as presently interpreted within the U.K. rests on shaky foundations.

It should also follow that an expansive interpretation of the rules in such a way as to prioritize the appearance of justice as a good per se, irrespective of the effect this might have on the production of outcomes, would be oversimplistic:194

Something is seriously wrong with an account of procedural fairness which emphasizes the inherent value of procedural rules about hearing and bias to the almost total neglect of their instrumental role in upholding normative expectations relating to outcomes. This is not to deny that the hearing and bias rules may have value independently of outcomes; but it is to insist that whatever non-instrumental value they have is subsidiary to their instrumental role.195

This then forms the basis of Professor Galligan’s criticism of Professor Tyler’s conclusions with which we began this paper.196 To the extent that his studies purport to show empirically that people value procedures independently of outcomes, the link he seeks to make between the appearance of fairness and legitimacy rests on flawed theoretical

192. Id. at 66.
193. Id. at 68.
194. See id. at 55.
195. GALLIGAN, supra note 22, at 93.
196. See supra notes 1–2 and accompanying text.
assumptions. Professor Tyler's study *Why People Obey the Law* was based on the results of interviews conducted in Chicago 1984 in which people were asked about their views of police and the courts. It articulates a conception of the relationship between authority and citizen in which the legitimacy of the former derives from popular consent, which in turn stems from the citizen's experience and is shaped by the perception that the treatment received has been procedurally fair. In this analysis, what is important is not outcomes but rather psychological factors reflecting what are termed “relational criteria” because they “provide people with feedback about the quality of their relationship with authorities and institutions.” These criteria, claimed to be non-instrumental in character because they arise independently of concern with the quality of outcomes include:

- assessments of the quality of interpersonal treatments, (are people treated with dignity and respect? are their rights respected?) and evaluations of the trustworthiness of authorities, as well as judgments about the neutrality of decision making and the degree to which opportunities to participate are provided.

What is missing, however, is Galligan's insight that satisfaction of these criteria alone is unlikely to produce a confidence vote where the respondent considers that the ultimate outcome was incorrect. Rather than praise for the fairness of the procedures, the suggestion is that he is more likely to conclude that “the procedures failed in their primary purpose and, therefore, despite appearances, are inadequate and defective.”

Nevertheless, as Professor Galligan has also observed, “each generation argues anew about where the line between rectitude and competing values should be drawn.” In the following section we consider the suggestion that notwithstanding the logic of the position that we have

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197. See Galligan, supra note 22, at 89–95.
199. Id. at 272–78.
200. Id. at 276 (internal reference omitted).
201. Id.
203. Id. at 35.
outlined, the majority decision in *Caperton* represents a commitment to the view that the significance of appearances in public life is a matter that the court should take cognizance of, that this is so irrespective of whether the suspicions that have generated the appearance of impropriety are justifiable, i.e. borne out by the underlying facts, and as such is best seen as an addition to what may be a developing and complex "jurisprudence of appearance."\(^{204}\)

SECTION III: THE INCREASING IMPORTANCE OF APPEARANCES IN PUBLIC LIFE

1. The Court of Public Opinion

The refusal of Justice Benjamin to step down in *Caperton* was not the first time a recusal decision had attracted widespread publicity. In 2004, Justice Scalia took the unusual step of issuing a statement to explain his refusal to recuse himself in a case brought by the Sierra Club challenging the secrecy surrounding an energy task force headed by Vice President Cheney in circumstances in which his refusal had attracted considerable public attention and widespread criticism in the national press.\(^{205}\) This was the third in a series of high profile "recusal dilemmas" involving members of the Supreme Court.\(^{206}\) In *Laird v. Tatum*,\(^{207}\) Justice Rehnquist's rejection of a recusal motion that was based on his professional experience at the Department of Justice has been described as "one of the most serious ethical lapses in the Court's history."\(^{208}\) Similarly, Justice Black's

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205. *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004). Justice Scalia together with members of his family had joined the Vice President in a duck-hunting expedition and shared his travel arrangements on a government plane though the overall cost of travel was not thereby reduced. *Id.* at 928.


Respondents are substantially correct in characterizing my appearance before [a Congressional sub-committee] as an 'expert witness for the Justice Department' on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the
decision to participate in a case where the litigant twenty years before had been Black's law partner triggered a thinly-veiled criticism from Justice Jackson and newspaper reports of a feud in the court.\textsuperscript{209} Justice Scalia’s “angry”\textsuperscript{210} Cheney memorandum noted the Sierra Club’s argument that public opinion “as reflected in the nation’s newspaper editorials, [had] unanimously concluded that there [was] an appearance of favoritism,” with “8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest” calling him to step aside, but rejected robustly the conclusion that from the perspective of the objective observer his neutrality had thereby been compromised.\textsuperscript{211} The implications of the argument that he should bow to the demands of the press claiming to represent the American public were, he wrote, “staggering”\textsuperscript{212} but as Justice Breyer—who voted with the Caperton majority—observed extra-judicially in 2008, “the judicial system, in a sense, floats on a sea of public opinion.”\textsuperscript{213} The Justice’s remarks were prompted by poll results indicating an “alarming” decline between 2001 and 2005 in public confidence in judicial impartiality.\textsuperscript{214} Polled in 2001 two-thirds of the respondents indicated their support for the view that judges decided cases impartially. By 2005 approximately half the respondents appeared to believe that judicial decision-making reflects the personal predilections of the judge. This apparently “skeptical view of judging,” wrote Justice Breyer:

> is not shared by the judges. We believe when we decide a

\textsuperscript{209} Laird, 409 U.S. at 825–26 (Rehnquist, J., denying motion to recuse).
\textsuperscript{209} Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897, 897 (1945) (Jackson, J., concurring). See Frank, supra note 40, at 605–6 n.2.
\textsuperscript{212} Id.
\textsuperscript{213} Stephen Breyer, Serving America's Best Interests, 4 DAEDALUS 137, 139 (2008).
\textsuperscript{214} Id.
case that we exercise not subjective preference but our judgment based on law . . . . A serious discrepancy between our own view of our own efforts and the view of a large segment of the public is cause for concern in a democracy.\textsuperscript{215}

Sir Jack Jacob—commenting on the transformation that took place in English civil procedure in the years following 1800—has observed that whilst the intellectual trigger was Jeremy Bentham and the influence of new ideas driven by rapidly developing social and economic forces had prepared the ground, the legal profession and judiciary, complacent in a Blackstone-engendered “euphoria,” generally defended the status quo.\textsuperscript{216} Change when it came owed much to the “force of public opinion” expressed then as now through the columns of the press:

the striking characteristic of the British revolt against the apotheosis of legal formalism was its popular origin and support . . . . One is amazed by the violence of the attack which the public directed and maintained for at least two generations through the press. It was not only a war against legal abuses, but a class struggle against a profession which was believed to be responsible for them.\textsuperscript{217}

It has been argued that a “fully informed, fair-minded, and knowledgeable observer” would understand the distinction between suits against officials in their official capacity and suits against government employees as private individuals and thus would agree with Justice Scalia’s decision that his neutrality in the Cheney case was not compromised.\textsuperscript{218} This may be so, but to pose the question in these terms is to fail to engage with the requirement for the connection between legal formulations of ethical principles

\textsuperscript{215} Id.

\textsuperscript{216} SIR JACK I.H. JACOB, THE REFORM OF CIVIL PROCEDURE LAW AND OTHER ESSAYS IN CIVIL PROCEDURE 204–08 (1982) (“[T]he Bench and Bar . . . basked in the euphoria engendered by Blackstone’s extravagant eulogies of the prevailing system and his resounding phrases extolling ‘its solid foundations . . . its extensive plan . . . the harmonious concurrence of its several parts . . . the elegant proportions of the whole.’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *443, and citing 3 WILLIAM BLACKSTONE, COMMENTARIES *265)).

\textsuperscript{217} Id. at 208 (quoting Edson R. Sunderland, The English Struggle for Procedural Reform, 39 HARV. L. REV. 725, 729, 731 (1925–26)).

\textsuperscript{218} Pearson, supra note 206, at 1839.
and a "common sense understanding of fairness" which may not directly engage with the connection between procedures and outcomes as Professor Galligan might wish, but which nevertheless recognizes and responds intuitively to the unacceptable when it sees it. 219

Similar arguments may be made about the recent U.K. furor surrounding the issue of the expenses of Members of Parliament. An Ipsos- MORI poll carried out for the BBC and published in June 2009 revealed that 76% do not trust Members of Parliament in general to tell the truth, 68% believe that half or more MPs use power for their own personal gain, 68% think that most MPs make a lot of money by using public office improperly (46% thought this in 1985, and 64% in 1994), and only 37% believe that most MPs have a high moral code (and 58% disagree that they do). 220 The report concluded that "[t]his is nevertheless more positive than in 1994, when 28% felt that most MPs have a high moral code." 221 The point is, and here the parallel lies, that from a strictly legal point of view it is doubtful whether many of the MPs who have been vilified in the national press in respect of their expenses claims have actually "done anything wrong." From the standpoint of popular perception, however, the issue of legal niceties was of no concern. What mattered was the judgment of the "court of public opinion."

2. Prejudice, Bias and a "More Recent Humility"

In 1947, John P. Frank—reviewing then current judicial disqualification practices—commented on Justice Jackson's criticism of Justice Black's refusal to recuse in the Jewell Ridge case, 222 and asserted that whereas disqualification for bias represented "a complete departure from common law principles," nevertheless despite Blackstone's denial, "a more recent humility has prompted recognition" of the possibility

221. Id.
222. Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897 (1945). Mr. Frank, a former law clerk to Justice Hugo L. Black in the October 1942 term, acknowledged the potential for author disqualification: "That relationship bred affections which may be reflected in this article." Frank, supra note 40, at 605 n.1.
that “human judges” may succumb to “less tangible prejudices” and thereby deny justice. In the classic model of judicial neutrality as envisaged by Justice Cardozo, the issue of objectivity is not problematic. A judge must simply “disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

In this formulation, elimination of conscious prejudice is a *sine qua non* of neutrality, but this is seen as something that is within the power of the judge to recognize and control. Recusal jurisprudence generally reflects these assumptions but the model is undermined by developments in social psychology, specifically the rise of social cognition theory which sees unconscious or innate bias as an aspect of cognitive development, arising in response to social mechanisms of which individual actors are themselves largely unaware. The distinction we attempted in our introduction between “bias” (impermissible) and “partiality” (innate) draws on these insights, but the extent to which the law should or indeed can take cognizance of them is difficult to assess. Linda Hamilton Krieger’s work on unconscious bias in employment discrimination represents an attempt to find a legal forum for this research as does a recent study into the way judges and jurors remember the facts of cases, which argues that the effect of unconscious or implicit racial bias on case outcomes “raises concerns about the legal system’s ability to achieve social justice.”

In cases involving judicial recusal, actual bias or


conscious prejudice is rarely the issue. We suggest that the negative response to Justice Scalia's refusal to recuse in *Cheney*, 227 reflected an acceptance of something much more sophisticated, namely an intuitive understanding of the connection between association and influence on the part of a public that has become accustomed to modern advertising industry attempts to manipulate its consumer spending with techniques including those of celebrity endorsement aimed at tapping into or shaping the unconscious values and desires which will influence the desire for the advertised product. Writing in 1957, Vance Packard described the growth of a new manipulative approach to advertising which instead of providing information about the product attempted “to channel our unthinking habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences.” 228 Packard called these efforts at persuasion “hidden” because, typically, they “take place beneath our level of awareness.” 229 Yet fifty years on when it is widely known that the moral peccadillos of celebrities such as Tiger Woods or Kate Moss threaten their product sponsorship contracts, it is reasonable to assume that the public now has a reasonably sophisticated awareness of the reflexive potential of subliminal influence or “influence by association,” as we now term it. 230

In the context of judicial decision-making, the recent work on “panel effect[s],” suggesting that the composition of the court can have an effect on outcomes, bears out these intuitions, 231 and indeed the terminology of recusal jurisprudence in its appearance formulations has begun to recognize the complexities of human motivation and

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228. VANCE PACKARD, THE HIDDEN PERSUADERS 3 (1957).
229. Id.
230. Id. See also Rudman, supra note 225, at 138 (asserting that one of the conclusions of the research into cognitive causes of implicit bias is that “it is an axiom that proximity leads to attraction”).
behavior. In *Lawal v. Northern Spirit Ltd*, the U.K. Privy Council’s decision that an advocate who was a part-time member of the Employment Appeal Tribunal could not act as counsel in a case where the tribunal included lay members with whom he had previously sat tackled the issue head-on. A fair-minded and informed observer, the court held, would conclude there was a real possibility of subconscious bias on the part of the lay member or lay members.

In the context of judicial advisors, as we have suggested, U.S. courts have so far failed to make the connection and the jurisprudence of the European Court is ahead in this respect. In *Caperton*, however, the Court addressed the issue of influence directly, not just in terms of causation, but also in terms of psychology; Justice Benjamin would “feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected” and might in consequence succumb to temptation, which is “strong and inherent in human nature.” We suggest that from a political perspective the majority were right to do so. As has been observed and we now consider: “ours is a more venal age.”

3. Appearance and Tradition in a Normative Universe

Justice Scalia justified his refusal to recuse by reference...
to precedent, citing in particular Justice Byron White’s friendship with Robert Kennedy and his family (which included ski vacations) and Justice Robert Jackson’s social relationship with President Franklin D. Roosevelt. In response to the argument that “times have changed” and that for example Justice Marshall, judged by modern standards, could not have sat in *Marbury v. Madison*, the justice was only partially persuaded. But as John P MacKenzie, making a plea for the judiciary to “look more deeply into the interests of the consumers of justice as perceived by them,” has argued:

In an age when images—televised or conjured up by molders of public opinion and taste—often blend so confusingly with reality, does not the appearance of justice have something to do with the reality of justice? If justices and judges would pay more attention to appearances, would there not be more hope that they are performing their tasks justly? If the “consumers” of the judicial system perceive it as just, on the basis of fair disclosure of its actual operations, what more can they ask of the system? . . . [T]he appearance of justice is an indispensable element of justice itself.

Justice Scalia himself has recognized that notions of disqualification have evolved over time, but in *Cheney* he drew the wrong conclusion and did damage not only to his reputation but to the reputation of the Court. Just as recusal jurisprudence is no longer limited by the practical difficulties of finding substitute judges prevailing in the time of Blackstone so now, we argue, the jurisprudence of contemporary courts should not detach itself from, but must engage with, the uneasy relationship between appearance and reality, arguably the defining problem of the modern age.

For Justice Benjamin in *Caperton*, the “fundamental

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240. *Marbury v. Madison*, 5 U.S. 137 (1803) (Chief Justice Marshall wrote the opinion of the Court although he had been personally involved as the Secretary of State who had failed to deliver the warrants in issue).
question” was “whether, in a free society, we should value ‘apparent or political justice’ more than ‘actual justice.’”244 The former is “subject to the manipulation of information and opinion via innuendo, half-truths, suggestive claims, and so on.”245 Public confidence in the judicial system, however, depends upon the latter measured not by reference to the acceptability of outcomes to “partisan constituencies”246 or those with vested interests in specific outcomes in given cases, but by reference to “the accuracy of justice.”247 In so far as the judge means here the accuracy of judicial outcomes, then as we have argued, we have some sympathy with this view. An account of the relationship between procedures and appearances, which fails to take account of the connection with accurate outcomes rests, as we have explained, upon thin theoretical ground, but the relationship between trust and appearances is not so easily disposed of. Trust, as Onora O’Neill has noted, is “valuable social capital,” “hard earned,” “easily dissipated” and “not to be squandered.”248 An appearance test which stigmatizes where there is no impropriety may be counter-productive: “[d]ecisions . . . that reinforce subjective standards of adjudication on matters of judicial impartiality simply squander the remaining vestiges of the social capital of trust, and fan the flames of suspicion.”249

However, as Justice Benjamin himself recognized, the judicial system does not exist in a vacuum and in the United States, where courts at both state and federal level are already seen as highly politicized, the balance of considerations changes.250 We consider that it is one of the ironies of our discussion that in the United Kingdom, where the distrust of politicians has not yet transmuted into a perception of a politicized judiciary, the high priority accorded to appearance principles rules out the use of technical advisors and with them the potential for enhanced accuracy of judicial outcomes, but in the United States, where judges

245. Id. at 285 n.1.
246. Id.
247. Id. at 293 n.14.
248. O’NEILL, supra note 18, at 6–7.
249. Olowofoyeku, supra note 37, at 34.
250. Caperton, 679 S.E.2d at 293 (Benjamin, J., concurring).
are with some justification seen as political actors, the opposite conclusion prevails.251 Be that as it may, what then is or should be the significance of a doctrine of appearances in modern jurisprudence?

The actions of public officials send important messages about the values that govern the relationship between the government and the governed. In Shaw v. Reno the Supreme Court recognized this when it refused to sanction a reapportionment plan which grouped sections of the electorate on the basis of race.252 The plan was objectionable because it sent the message that race was an acceptable basis of classification.253 In Crawford v. Marion County Board of Elections the Court’s decision upholding a requirement of voter ID irrespective of evidence that such requirements actually prevented voter fraud showed its understanding of the importance that appearances can play in the popular perception of what constitutes procedural fairness.254 The reason that the outcry that followed the refusals to recuse of Judge Benjamin, and before him Justice Scalia, was not confined to “partisan communities,” as the judge asserted, is largely because the messages that they sent to the general public offended precisely that “common sense” or popular understanding of “fairness” which, when invoked to justify retaining jury verdicts, is hailed as illuminating “the lamp that shows that freedom lives.”255 However, this is something that judges asked to recuse themselves have struggled to recognize.256

251. See Trust in Doctors 2009, IPSOS (Oct. 5, 2009), http://www.ipsos-mori.com/researchpublications/publications/publication.aspx?oltemld=1305 (survey on trust in the professions finding that judges’ ratings for telling the truth have fallen below 70% on only one occasion since 1983); cf. Trust in Our Community, READER’S DIGEST http://www.rdglobaladvertising.com/trusted-brands/results/tables/community.shtml (last visited Sept. 29, 2010) (a Reader’s Digest survey of trusted brands covering 16 European countries (including the U.K.) found that levels of confidence in all professions had declined since 2005 and between 2007–2009 trust in judges was down about 3%. The survey put the level of trust in U.K. judges at around 10% lower than the Ipsos Mori findings but this may reflect differences in the formulation of questions and categorization of responses).


253. Id. at 647–48.


255. SIR PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

256. See Editorial, supra note 210.
CONCLUSION

In the introduction to this paper we referred to the doctrine of appearances as a creation of an invented tradition, but reinvention or reformulation might be a more appropriate term. Professor Robert M. Cover has observed that:

We inhabit a *nomos*—a normative universe. * We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. . . . No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.  

The point about a narrative of tradition is that it both shapes and limits our thinking and in so doing generates a legitimizing force. Lawyers need authority, and the ability to position that authority within a historical narrative is an important aspect of the way in which they can use tradition as the basis of successful legal argument. Tradition indicates "quality and endurance" but it is commonplace that the form may outlive the substance or even, as Hobsbawm reminds us in the passage that we cited earlier, impose itself de novo in a way that bears little resemblance to the historical fact upon which it claims to draw.  

Ultimately, however, appeals to tradition are about continuity and change; they offer a way of thinking about the concerns of the past in relation to the needs of the present and in so doing provide a framework of parameters within which change can take place.  

In the Privy Council decision of Lawal, Lord Steyn commented that "[w]hat the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards than was the case even a decade or two ago.  

Higher standards or different standards? We suggest that the modern sensitivity to the importance of appearances represents more than a loss of innocence concerning the limits of neutrality. It represents an acknowledgement of the importance now generally accorded to attempts to explain the relationship between government and the governed in terms of a

258. Hobsbawm, supra, note 13, at 1.
commitment of respect for the value of individual human dignity and equality. From the perspective of Western political history these commitments are relatively new, hence the importance of formulations emphasizing the continuity of a tradition within which what are, in effect, new rights and new doctrines can claim to be born and now find legal expression.\textsuperscript{261} Seen in these terms, the emergence of a jurisprudence of appearances represents not so much the invention of a new tradition, as we initially suggested, but rather a reformulation, an attempt to refashion the jurisprudence of the past as common law method has always permitted in such a way as to respond to and reach accommodation with the needs of the present.

In conclusion we are reminded of the words of Sir Jack Jacob which we think sum up our current theme:

Let no one underestimate the deep and abiding sense of justice which permeates and inspires the ordinary people of the land. In all countries, in all cultures, in all ages, men have striven to find the pathway to justice on the basis of their own social order, and it must not be thought that we in our time have reached the end of the road. The search for justice, as the social ideal which mankind should seek to obtain, remains as elusive and controversial as it has ever been . . . \textsuperscript{262}

\textsuperscript{261}. See generally MASHAW, supra note 188, at 158--221, 162, 169 (arguing that the attraction of a dignitary theory of due process which emphasizes "values inherent in or intrinsic to our common humanity" is not merely a matter of intuitive appeal but enables both "a conversation about public values that is both relevant to our real concerns and consistent with our constitutional traditions" and "a theoretical and historical grounding for the articulation of due process values, and a methodology of adjudication that can address the crucial issues of legitimacy in the administrative state.").

\textsuperscript{262}. JACOB, supra note 216, at 2.