



1-1-2010

# Judicial Selection, Judicial Disqualification, and the Role of Money in Judicial Campaigns

Charles Gardner Geyh  
*Indiana University Maurer School of Law*

Follow this and additional works at: <http://digitalcommons.mcgeorge.edu/mlr>

 Part of the [Judges Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

## Recommended Citation

Charles G. Geyh, *Judicial Selection, Judicial Disqualification, and the Role of Money in Judicial Campaigns*, 42 McGeorge L. Rev. (2016).  
Available at: <http://digitalcommons.mcgeorge.edu/mlr/vol42/iss1/6>

This Article is brought to you for free and open access by the Law Reviews at Pacific McGeorge Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized administrator of Pacific McGeorge Scholarly Commons. For more information, please contact [msharum@pacific.edu](mailto:msharum@pacific.edu).

# Judicial Selection, Judicial Disqualification, and the Role of Money in Judicial Campaigns

Charles Gardner Geyh\*

In recent years, the judicial selection debate has focused with greater frequency and intensity on the role that money plays in judicial campaigns. Within the legal establishment, which tends to be less skeptical of judicial motives, lawyers, judges, and law professors express their concern in terms of the “perception” that campaign dollars influence judicial decision-making.<sup>1</sup> Outsiders, in contrast, who are often more suspicious, speak of money buying influence or justice being for sale.<sup>2</sup> Polling data supports the proposition that a significant majority of the American public thinks money influences judicial decisions, and this perception in turn damages the courts’ legitimacy.<sup>3</sup> The problem concerns campaign contributions made directly to a judge’s campaign and indirect support independently expended on the judge’s behalf. The problem also concerns contributors and supporters who are pending and future litigants or lawyers, and groups with a particular interest in the outcomes of cases that the judicial candidates are likely to decide. The proposed remedies have run the gamut from imposing dollar limits on campaign contributions, requiring the public disclosure of campaign contributors, and publicly financing judicial campaigns<sup>4</sup> to the engaging and thoughtful proposals presented in this Symposium: one by Meryl Chertoff, to end judicial elections altogether; and the other by Dmitry Bam, to reform applicable rules for judicial disqualification.<sup>5</sup>

Professor Chertoff argues that the best way to reduce the corrosive impact of money in judicial selection is to end contested judicial elections. She contends that by moving toward a system commonly known as “merit selection”—in which the governor appoints a judge from a pool of candidates prescreened by an independent commission, and who later goes before the voters unopposed in a

---

\* Associate Dean of Research and John F. Kimberling Professor of Law, Indiana University Maurer School of Law. I would like to thank Mark Plantan for his research assistance.

1. COMM’N ON PUB. FIN. OF JUD. CAMPAIGNS, *Public Financing of Judicial Campaigns*, 2002 A.B.A. STANDING COMMITTEE ON JUD. INDEPENDENCE 4 [hereinafter *Commission Report*].

2. See, e.g., *Bill Moyers Journal* (PBS television broadcast Feb. 19, 2010), available at <http://www.pbs.org/moyers/journal/02192010/transcript4.html?print> (on file with the *McGeorge Law Review*); Matthew Mosk, *Study Shows Money Flooding into Campaigns for State Judgeships*, ABC NEWS, Mar. 17, 2010, <http://abcnews.go.com/Blotter/study-shows-money-flooding-campaigns-state-judgeships/story?id=10120048> (on file with the *McGeorge Law Review*).

3. James Gibson, *Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and “New Style” Judicial Campaigns*, 102 AM. POL. SCI. REV. 59, 67-69 (2008).

4. See *Commission Report*, *supra* note 1, at 35-6.

5. See generally Meryl J. Chertoff, *Trends in Judicial Elections in the States*, 42 MCGEORGE L. REV. 47 (2010); Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65 (2010).

retention election—the problematic influence of campaign contributions and support will be diminished, if not eliminated.<sup>6</sup>

Were I hostile to Professor Chertoff's basic argument, I could trot out the usual counterarguments: elections are democracy-enhancing; they promote judicial accountability; they curb the excesses of judges predisposed to act upon their ideological predilections; the merit selection system would deprive citizens of their right to vote; merit selection would delegate the task of judicial selection to an elitist cabal of experts; that it would move the politics of judicial selection from the ballot box to the backroom; and that it would produce judges who are no better than their elected counterparts.<sup>7</sup> However, I am not hostile to her argument; moreover, even if I were, opponents of judicial elections have made the basic arguments for and against judicial elections so many times that to repeat those arguments yet again would be law's answer to an "I Love Lucy" rerun.

Those who share Professor Chertoff's skepticism of judicial elections (like myself), are unlikely to be moved by the above-listed arguments. The true conversation stopper for advocates of appointive systems is political reality. We can debate the relative merits of elective and appointive systems in the vacuum of law review symposia, but at the end of the day, sizable majorities of the American public support judicial elections and are loath to abandon them.<sup>8</sup> That point has been made before too, and Professor Chertoff has an answer: through public education and the leadership of figures such as Justice Sandra Day O'Connor, the public's support for elections may soften and the willingness of more legislatures to make merit selection seriously may grow.<sup>9</sup> Professor Chertoff may be right. Then again, I likewise had an answer when I confronted this issue nearly a decade ago—that the anti-election movement would capitalize upon embarrassing "bellwether events" that exposed judicial elections as undesirable—and am still waiting for such events to occur.<sup>10</sup>

Arguments over the prospects for success of merit selection and arguments over the virtues of merit selection share one thing in common: their propensity toward categorical pronouncements. Professor Stephen Burbank has long warned against treating judicial independence as monolithic, and the time has come to say the same about judicial selection.<sup>11</sup> We argue as though what is good for

---

6. Chertoff, *supra* note 5, at 58

7. See Chris W. BONNEAU & MELINDA GANN HALL, IN DEFENSE OF JUDICIAL ELECTIONS 2 (2009); Julius Uehlein & David H. Wilderman, Opinion, *Why Merit Selection Is Inconsistent with Democracy*, 106 DICK. L. REV. 769, 769-71 (2002) (examining organized labor's opposition to merit selection); Michael DeBow, *The Debate Over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1372, 1379-80 (2008) (transcript of Panel 2; *Judicial Elections, Speech During Campaigns: Republican Party of Minnesota v. White and its Consequences And Campaign Finance*); Michael DeBow et al., *The Case for Partisan Judicial Elections*, 33 U. TOL. REV. 393, 396 (2002).

8. Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 52-53 (2003).

9. Chertoff, *supra* note 5, at 9, 51.

10. Geyh, *supra* note 8, at 74.

11. Stephen B. Burbank, *What Do We Mean by "Judicial Independence"?*, 64 OHIO ST. L.J. 323, 325-26 (2003).

California must be good for North Dakota—that judicial elections are categorically good or bad without regard to the unique constitutional culture and political landscape of particular jurisdictions. And we make comparably categorical statements about the prospects for success of merit selection initiatives, as if attitudes toward judicial elections and the public’s receptivity to change are necessarily the same in Minnesota as in Mississippi. The reason is obvious enough: we dress our arguments in one-size-fits-all muumuus, to cover intellectual obesity. Going state by state takes exercise and work. However, for those of us who see this not as an academic diversion but as a law reform campaign, refining the focus is critical.

Merit selection systems are appealing in jurisdictions where the public trusts its judges and their expertise enough to let them make decisions with only limited electoral accountability (in the form of retention elections). In such jurisdictions, the price of contested elections, expressed in terms of the corrupting influence of money and special interests, may be too dear and cause the rank and file to give appointive systems a more serious look. Conversely, in jurisdictions that are suspicious of their judges, relinquishing the franchise right is a non-starter. To the extent that voters in such jurisdictions exhibit relatively high levels of confidence in their courts, such confidence may be due to electoral accountability itself. These voters may be troubled by the influence of money on judicial elections, but not to the extent of shaking their confidence in judicial elections. In such jurisdictions, the answer to concerns over the influence of campaign contributions may lie in more incremental reforms, such as public financing.

Moving away from a monolithic perspective on judicial selection means more than respecting differences between jurisdictions; it also means recognizing that different times call for different approaches. During times of high political anxiety over judges and courts, when judges are under attack and the legal establishment has circled the wagons, it is tempting for court defenders to seek refuge in merit selection. When judicial independence is put at risk by massive infusions of cash into judicial campaigns—cash aimed at rewarding or removing judges for one of their decisions—proposing an end to judicial elections may seem like a timely remedy. But that is also the point when interest in judicial elections is greatest and the perceived need to hold judges accountable to the electorate is highest. It bears note that merit selection was conceived amid the anti-court agitation of the Progressive Era in the early twentieth century, but states did not begin to adopt merit selection systems in earnest until calmer times, in the aftermath of the New Deal.<sup>12</sup> My point is simply to reiterate an inevitable irony hinted at in the preceding paragraph: when the electorate is put into a lather over its judges by the media, campaign advertising bankrolled by interested observers, or unpopular decisions made by the judges themselves, the perceived

---

12. Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why it Matters for Judicial Independence*, 21 *GEO. J. LEGAL ETHICS* 1259, 1262 (2008) (noting that a merit selection system was devised in 1913, and that Missouri adopted the first merit selection system in 1940).

need to protect judicial independence and the rule of law by moving away from contested elections may seem greatest. But it is also then when the perceived need for electoral accountability is greatest, and when, in the public's mind, the continued legitimacy of the courts may depend on voters retaining control over judicial selection.

My point is not that we should resign ourselves to contested judicial elections and get on with our lives. My point is to underscore the need for reformers to be more opportunistic, to pick their battles with greater care, and when necessary, to bide their time. In the meantime, we can look to make a bad situation better by more incremental means, such as disqualification reform.

For Professor Chertoff, the case of *Caperton v. A.T. Massey Energy Company*,<sup>13</sup> with its extraordinary, independent campaign waged by the defendant's CEO to replace a justice on the West Virginia Supreme Court while the defendant's appeal was pending, underscores the need to end contested judicial elections.<sup>14</sup> For Dmitry Bam, in contrast, *Caperton* signals the need to reform disqualification rules and procedure. Mr. Bam first explains that disqualification under state and federal law is based on whether the judge at issue has created an appearance of partiality.<sup>15</sup> Second, he tells us that in *Caperton* the Court moved away from an appearance-based standard and toward a probability-of-actual-bias standard for disqualification.<sup>16</sup> Third, he posits that this is a good thing because an appearance-based regime logically requires over-recusal insofar as "relatively minor contributions—even those that are rejected—may produce an appearance of bias . . . ."<sup>17</sup> Finally, he concludes that the move toward a standard of probable bias in disqualification should accompany procedural reform in which one judge is assigned the task of assessing the likelihood of another judge's actual bias, because judges cannot be counted upon to assess the extent of their own bias.<sup>18</sup>

I agree with Mr. Bam's conclusion that procedural reform of the sort he proposes is desirable, but take a different path to that end. His first claim, that the current disqualification regime is appearance-based, is true to a point but overstated. Nowhere does the term "appearance" occur in the disqualification rule itself, but it can be inferred: a judge's "impartiality might reasonably be questioned,"<sup>19</sup> within the meaning of the rule, if the judge appears partial. His point is overstated, however, insofar as this appearance-based approach to disqualification is in the nature of a catch-all, the application of which is limited to situations not otherwise addressed by more specific sections of the

---

13. 129 S.Ct. 2252 (2009).

14. Chertoff, *supra* note 5, at 48.

15. Bam, *supra* note 5, at 67.

16. *Id.* at 66.

17. *Id.* at 76.

18. *Id.* at 82.

19. MODEL CODE OF JUD. CONDUCT R. 2.11(A) (2007); 28 U.S.C. § 455(a) (2001).

disqualification rule. Indeed, the disqualification rule employs three distinct approaches simultaneously: one calls for disqualification for perceived or apparent bias (when “impartiality might reasonably be questioned”); the second calls for disqualification for actual bias;<sup>20</sup> and the third calls for disqualification for specifically enumerated conflicts of interest (e.g., when the judge has a financial interest in the case or when a close relative is a party).<sup>21</sup>

It is true that the Model Code employs the catch-all “appearance” part of the rule as an organizing principle with the other two pieces as subsets, and that the most controversial disqualification cases concern an application of the catch-all. The rule’s “conflicts” section is worthy of particular note here, however, because it offers a potential remedy to the underlying disqualification problem that animates *Caperton* and Mr. Bam’s argument: drafting a specific rule requiring judges to disqualify themselves when they have received X amount of financial support for their campaigns, during Y period of time, from Z individuals or organizations. The American Bar Association has already drafted a disqualification rule for direct contributions to judicial campaigns that jurisdictions may broaden to address independent expenditures.<sup>22</sup> One may ultimately conclude that the complexities of drafting such a rule would make it unworkable, but it is certainly a remedy worth discussing. A multi-state study conducted by the American Judicature Society in the 1990s found that judges were less ambivalent about disqualification for specifically enumerated conflicts of interest than for real or perceived bias.<sup>23</sup> Such a finding is intuitive: clearly articulated rules are easier to understand and apply than amorphous standards.

Mr. Bam’s second point, that in *Caperton*, the Court adopted a probability standard for disqualification in lieu of an appearances standard, may overstate what the Court actually did.<sup>24</sup> He rightly notes that the Court took pains to distinguish the due process standard for disqualification it was applying in *Caperton* from the more exacting standards of state disqualification rules, which, in the words of the Court, “provide more protection than due process requires.”<sup>25</sup> The Court’s objective here is sensible both substantively and strategically. Substantively, it is important to distinguish between conduct that warrants disqualification as a matter of sound public policy under state law, and conduct so egregious that it requires disqualification to protect the basic due process rights to which litigants are entitled under the United States Constitution. Strategically, it is important for the Court to keep the floodgates closed by

---

20. MODEL CODE OF JUD. CONDUCT R. 2.11(A)(1) (2007); 28 U.S.C. § 455 (b)(1) (2001).

21. MODEL CODE OF JUD. CONDUCT R. 2.11(A)(2)-(6) (2007); 28 U.S.C. § 455(b)(2)-(5) (2001).

22. MODEL CODE OF JUD. CONDUCT R. 2.11(A)(4) (2007).

23. See JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 1-2 (1995) (noting that almost one-half of judges had an inclination towards disqualification for conflicts of interest while only one-third were inclined to disqualify for real or perceived bias or prejudice).

24. Bam, *supra* note 5, at 78.

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

creating a buffer zone between ordinary disqualification questions that are within the exclusive province of state courts, and extraordinary disqualification questions that implicate due process concerns and confer jurisdiction on the United States Supreme Court.

Without disputing that the Court articulated a probability of bias standard in lieu of an appearances standard as a way to differentiate between the requirements of the U.S. Constitution and state law, I see no way to apply the Court's probability standard without a resort to appearances. To reiterate, the term "appearance" does not occur in the disqualification rule but is inferred from the objective standard that the rule creates. By asking whether a judge's impartiality "might reasonably be questioned," we are asking how the judge's conduct would appear to a reasonable person.<sup>26</sup> In *Caperton*, the Court likewise imposed what it called an "objective" standard,<sup>27</sup> which by its nature requires us to examine the judge's conduct from the perspective of an objective or reasonable person. The Court tells us that we should not undertake to crawl inside the head of the judge to determine if he is actually biased, but should ask whether a reasonable person in the judge's position would probably be biased.<sup>28</sup> But that is simply another way of asking whether such a judge appears biased. This is not a game of blackjack, where an objective observer or participant can count cards and calculate probabilities with mathematical certainty. Rather, "probabilities" can only be divined from appearances. If a judge receives significant campaign support from the CEO of a corporate defendant while the case is pending and that support constitutes a high percentage of the monetary support the judge received, he is probably biased—because that is the way it appears.

My point is not to conflate the two tests that the Court seeks to distinguish. They are different, but not because one implicates appearances and the other does not. Whereas the disqualification rule and statute ask whether a judge's impartiality *might* reasonably be questioned, the newly minted due process standard asks, in effect, whether the judge's impartiality *would* reasonably be questioned.

Mr. Bam's third claim—that appearance-based disqualification rules promote over-recusal<sup>29</sup>—is exaggerated. He cites survey data for the proposition that the public thinks campaign contributions, even relatively modest ones, influence judicial decision-making.<sup>30</sup> From this finding, he concludes that campaign contributions necessarily create an appearance of partiality, triggering the need for recusal under an appearance-based disqualification rule—an outcome he

---

26. See MODEL CODE OF JUD. CONDUCT R. 2.11(A) (2007); 28 U.S.C. § 455(a) (2001).

27. *Caperton*, 129 S. Ct. at 2262.

28. *Id.*

29. Bam, *supra* note 5, at 78.

30. *Id.*

regards as excessive and undesirable.<sup>31</sup> I agree that such a result would be absurd, but I do not think that the existing rule dictates absurd results. The applicable rule speaks in terms of whether impartiality “might reasonably be questioned,” with “reasonably” being the operative word.<sup>32</sup> Courts and commentators explain that we must therefore ask whether an objective observer who is fully informed of the relevant facts might question the judge’s impartiality.<sup>33</sup> Public surveys are not limited to the well informed. Mr. Bam and I agree that mass disqualification is unnecessary for judges who receive campaign support from litigants or lawyers because, as relatively well-informed observers of judicial campaigns, we find it unreasonable to suspect that modest contributions to major campaigns influence judges in material ways. That explains, at least in part, why judges rarely disqualify themselves from cases in which lawyers or litigants have contributed to their campaigns.<sup>34</sup>

There are undoubtedly judges who, as Mr. Bam speculates, either exploit the softness of appearance-based disqualification rules and step aside unnecessarily to avoid unpleasant or politically sensitive cases, or out of an over-abundance of caution. Such a strategy, however, runs afoul of the Code of Judicial Conduct, which provides that “[a] judge shall hear and decide matters assigned to the judge, except when disqualification is required . . . .”<sup>35</sup> Commentary accompanying this rule explains:

Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.<sup>36</sup>

The more serious problem, and the one that brings Professor Chertoff and Mr. Bam together in this forum, is that there are judges who hear cases after receiving substantial campaign support from lawyers or litigants—support so

---

31. *Id.*

32. MODEL CODE OF JUD. CONDUCT R. 2.11(A) (2007); 28 U.S.C. § 455(a) (2001).

33. JAMES J. ALFINI, STEVEN LUBET, JEFFREY SHAMAN, & CHARLES GARDNER GEYH, JUDICIAL CONDUCT AND ETHICS, § 4.04 (4th ed. 2007) (citing cases that explain the test is an objective standard).

34. Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court’s Rulings*, N.Y. TIMES, Oct. 1, 2006, at A1 (“In the 215 cases with the most direct potential conflicts of interest” arising from campaign contributions, “justices recused themselves just 9 times.”). I am more troubled by the possibility that judges are not disqualifying themselves when they should; my point for purposes here, however, is that there is no real foundation for the concern that an amorphous appearance standard is leading judges to over-disqualify themselves from cases in which their supporters appear as lawyers or litigants.

35. MODEL CODE OF JUD. CONDUCT R. 2.7 (2007).

36. *Id.*



substantial that their impartiality is put in doubt.<sup>37</sup> The appearance standard embedded in the disqualification rule may have been designed to provide judges with what Mr. Bam calls a “fig leaf,”<sup>38</sup> enabling them to withdraw from cases by conceding that they created an appearance of partiality without admitting actual bias. Ironically, however, the Code of Judicial Conduct as a whole transforms that fig leaf into a stinging nettle.

The Model Code of Judicial Conduct situates impartiality at the heart of the judicial role with the very first sentence of its preamble: “[a]n independent, fair[,] and impartial judiciary is indispensable to our system of justice.”<sup>39</sup> The first words of Canon 1 declare “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary . . . [.]” while the first words of Canon 2 state, “[a] judge shall perform the duties of judicial office impartially . . . .”<sup>40</sup> Against this backdrop, when a party moves to disqualify a judge for actual bias, it amounts to an accusation that the judge has failed to live up to the expectations of the Code—an accusation the truth of which judges understandably loath to concede. The appearance standard softens that accusation by downgrading an actual bias problem to an apparent bias problem, but the Code looks askance at judges who create appearance problems too. Rule 1.2 states that “[a] judge shall act at all times in a manner that promotes public confidence in the . . . impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”<sup>41</sup> An accompanying comment explains that “[c]onduct that compromises or appears to compromise the . . . impartiality of a judge undermines public confidence in the judiciary.”<sup>42</sup> In other words, like the judge who concedes actual bias, the judge who admits to creating apparent bias has, at least implicitly, conducted himself sub-optimally, a concession many judges will be reluctant to make.

Moreover, judges are not stupid. To the extent disqualification for an appearance of partiality is widely recognized as a “fig leaf,” which allows biased judges to step aside without conceding actual bias, judges understand that challenges to their perceived impartiality are, in reality, candy-coated challenges to their actual impartiality. In *Caperton*, Chief Justice Roberts, writing on behalf of the four dissenters, defended a muscular presumption of impartiality in terms that reflect the insult he saw embedded in disqualification motions generally. “There is a ‘presumption of honesty and integrity in those serving as adjudicators[,]’” he declared.<sup>43</sup> “All judges take an oath to uphold the

---

37. One such judge would be West Virginia Justice Brent Benjamin, whose refusal to disqualify himself gave rise to the Supreme Court’s decision in *Caperton*. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

38. Bam, *supra* note 5, at 79 n.91.

39. MODEL CODE OF JUD. CONDUCT Preamble (2007).

40. MODEL CODE OF JUD. CONDUCT Canons 1, 2 (2007).

41. *Id.* at R. 1.2.

42. *Id.* at Comment to R. 1.2.

43. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (quoting *Withrow v. Larkin* 421

Constitution and apply the law impartially, and we trust that they will live up to this promise.”<sup>44</sup> By negative implication, for the Chief Justice, a motion to disqualify impugns the target judge’s honesty and integrity.<sup>45</sup> My point is a simple one: the concern that an appearance standard contributes to over-disqualification is misplaced; the negative implications underlying an accusation of perceived bias are such that under-disqualification remains the far more serious problem. That conclusion is corroborated by the results of a multi-state study of judicial disqualification conducted in the 1990s, which found that judges were ambivalent about disqualification generally.<sup>46</sup>

My reaction to Mr. Bam’s final point—that we should move toward a standard of probable bias in disqualification accompanied by procedural reform, in which a different judge is assigned the task of assessing the likelihood of a judge’s actual bias<sup>47</sup>—is mixed. I am at peace with resolving due process questions with reference to the so-called “probability of bias standard” that the *Caperton* majority created.<sup>48</sup> Although I share the dissenters’ concern that such a standard is vague to the point of being unmanageable,<sup>49</sup> one may say the same of the Due Process Clause itself. Because the majority took pains to marginalize its probability of bias standard by limiting it to rare and extreme cases,<sup>50</sup> the difficulty and confusion that such a standard will create strikes me as limited. Underlying Mr. Bam’s proposal, however, is skepticism of the appearances standard that I do not share, for reasons elaborated upon above. At least as far as the substantive bases for disqualification are concerned, I find myself defending the post-*Caperton* status quo: retain an appearance regime (coupled with disqualification for actual bias and specifically enumerated conflicts of interest) as the basis for disqualification in state court and confine due process/probability of bias analysis to those rare days when the weather in hell calls for a sweater, and a probability of bias can be established.

Mr. Bam’s proposal that we assign a different judge than the one whose disqualification is sought to decide the motion<sup>51</sup> strikes me as an important part of a package of procedural reforms that are well worth considering. In a persuasive article, Professor Amanda Frost advocates a “process-oriented approach to judicial recusal,” which would normalize the disqualification procedure by infusing it with traditional procedural protections that accompany other aspects

---

U.S. 35, 47 (1975)).

44. *Id.*

45. *See id.*

46. SHAMAN & GOLDSCHMIDT, *supra* note 23, at 1-2.

47. Bam, *supra* note 5 at 77.

48. *See Caperton*, 129 S. Ct. at 2262.

49. *Id.* at 2269 (Roberts, Chief J., dissenting) (“the standard the majority articulates—“probability of bias”—fails to provide clear, workable guidance for future cases”).

50. *Id.* at 2263 (referring to *Caperton* as “an exceptional case”).

51. Bam, *supra* note 5 at 80.

of adjudication.<sup>52</sup> She proposes amending the disqualification rules to enable litigants to frame the disqualification question by making explicit the procedure parties follow when seeking disqualification, reassign disqualification motions to a different judge, encourage the challenged judge to respond to motions to disqualify, and require judges to give reasoned explanations for disqualification decisions.<sup>53</sup> It may seem puzzling that such basic procedural safeguards are not already a part of the law of disqualification, but it bears emphasis that disqualification for actual bias (and apparent bias) did not become an established fixture of the recusal landscape until the 1970s.<sup>54</sup> Now that bias-based disqualification is entering its adolescence, more scholars, like Mr. Bam and Professor Frost, have begun to take disqualification procedure more seriously—and rightly so.

My only objection to Mr. Bam’s proposal to assign disqualification motions to a different judge,<sup>55</sup> is that he limits it to “probable bias” questions. He is right to argue that judges are ill-equipped to assess whether they themselves are probably biased—a problem avoided by assigning disqualification for probable bias to a different judge. The same may be said, however, in cases where judges are accused only of apparent bias. The Code of Conduct commits judges to avoid the appearance of impropriety (which subsumes an appearance of partiality). For that reason, many judges will—quite understandably—have difficulty seeing how or acknowledging when their own conduct runs afoul of that principle. Mr. Bam rightly notes that judges apply a “reasonable person” standard in a variety of contexts.<sup>56</sup> It is one thing, however, for a judge to divine whether a “reasonable person” would construe a given statement as defamatory, and quite another for a judge to determine how a reasonable person would construe the conduct of the very judge who must decide what “reasonable” means. Studies in psychology reveal that people do poorly at assessing the extent of their own bias, and it is thus fair to suspect that they will likewise do poorly at assessing whether others would reasonably think they are biased.<sup>57</sup> Because I regard under-disqualification as the more serious problem, I favor reassigning all disqualification questions to a different judge than the one whose impartiality is in question.

---

52. Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 592-93 (2005).

53. *Id.* at 582-83, 588-89.

54. E. Wayne Thode, Reporter’s Notes to Code of Judicial Conduct 61-62 (1973) (discussing the addition of “personal bias and prejudice” as a grounds for disqualification in the 1972 Model Code of Judicial Conduct).

55. Bam, *supra* note 5, at 79.

56. *Id.* at 78.

57. See Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 49, 49-50 (Thomas Gilovich et al., eds., 2002); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001).