

MAGICAL THINKING AND APPEARANCE-BASED RECUSAL

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ABSTRACT

This article is a critical analysis of a fundamental judicial ethic, the appearance of impartiality, an increasingly important public issue that is poorly understood and woefully underexamined in jurisprudence and academic literature. The ethic is pivotal to the determination of judicial disqualification, a/k/a recusal, and the public's fragile trust in the rule of law.

The article explains how a mysterious metaphorical device, the "reasonable observer" (a descendant of the common law's "reasonable man") has been subjectively applied in a confusing and inconsistent manner in judicial disqualification cases. The unexamined approach has unwittingly undermined the plain text and the mandatory ethical obligation of recusal (i.e., a judge must disqualify when his or her impartiality might reasonably be questioned).

The discussion: (a) analyzes the theoretical underpinnings of the reasonable person-observer analytical tool ("heuristic"); (b) explains how American jurisprudence has glibly transmogrified the appearance-recusal precept; (c) provides a unique and starkly contrasting analytical perspective demonstrating how select common law-based jurisdictions (Australia, Canada, Singapore, South Africa, United Kingdom) have painstakingly examined and applied the widely-recognized norm of appearance-based impartiality; and (d) synthesizes the preceding theoretical and jurisprudential information to support a proposal for a recalibrated metric and a pragmatic, clarifying heuristic. The article concludes with a model provision, in the form of a guiding "commentary," that summarizes the essential aspects of the appearance of bias precept. The article provides an interpretative approach that attempts to be faithful to the letter and spirit of the foundational judicial ethic.

KEYWORDS

recusal, judicial disqualification, judicial ethics, appearance of impartiality, reasonable person, reasonable observer, common law

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INTRODUCTION

In a world of uncertainty, humanity has demonstrated an insatiable desire and quest for boundless knowledge to anticipate and resolve the problems of reality. Early in Goethe's *Faust*,¹ there is a dialogue between the devil (Mephisto, momentarily disguised as Dr. Heinrich Faust) and a bewildered student seeking direction in his life and studies. In the following passage, Mephisto provides cynical advice that many judges and lawyers would likely (and disapprovingly) appreciate.²

Mephisto: As a general rule, put your trust in *words*,
They'll guide you safely past doubt and dubiety
Into the Temple of Absolute Certainty.

Student: But shouldn't words convey ideas, a meaning?

Mephisto. Of course they should! But why overdo it?
It's exactly when ideas are wanting,
Words come in so handy as a substitute.
With words we argue pro and con,
With words invent a whole system.
Believe in words! Have faith in them!
No jot or tittle shall pass from them.³

Goethe portrays Dr. Faust as a despondent scholar on the point of suicide stemming from his overwhelming sense of intellectual emptiness and futility. In his despair Faust turns to magic and conjures a world of spirits, eventually bartering his soul with Mephisto in return for the prospect of unlimited knowledge and sensual pleasure. Goethe's story begins with Faust at his desk when Mephisto suddenly appears.⁴ In the tragedy, Mephisto, who personifies both supreme intelligence and cynical wit, serves as Goethe's literary device, providing a supernatural element into Faust's dark scholarly world.

Reason and rationality often appear to represent a line of demarcation between the worlds of reality and make-believe. Our legal profession basks in the comfortable conceit that law embodies eminent reason and rationality, far removed from fantasy or fiction. As Owen Fiss once observed in his reflections about the presence of passion in the law, "[T]he judicial decision may be seen as the paragon of all rational decisions, especially public ones."⁵ Magical devices, however, are

¹ JOHANN WOLFGANG VON GOETHE, *FAUST* (2014) [hereinafter *FAUST*]

² Charles Geyh, in the context of discussing procedural reforms for recusal, once remarked that "able lawyers (and judges) can conjure plausible reasons for varying outcomes in every case that is not so frivolous as to warrant sanctions." See Charles Gardner Geyh, *Why Disqualification Matters, Again*, 30 *REV. OF LITIGATION* 671, 715 (2011).

³ *FAUST*, *supra* note 1, at 69 (emphasis in original). Goethe's *Faust* was a work in progress for over 60 years. The work has been an inspiration to many artists and creators over the years. A variation of the tale, for example, was the subject of a parody in the animated series, *The Simpsons* ("*The Devil and Homer Simpson*") in which Homer Simpson barter his soul for a donut. See "Treehouse of Horror" episode qt http://www.the-simpsons.com/#!/recaps/season-5_episode-5 at www.TheSimpsons.com.

⁴ Mephisto initially appears to Faust as a black poodle.

⁵ See Owen M. Fiss, *Reason in All Its Splendor*, 56 *BROOK. L. REV.* 789, 790 (1990). Fiss notes that Justice Brennan commented on Justice Cardozo's doubt about judges as vessels of pure reason. *Id.* at 796.

not limited to the world of fiction. Commenting on “imagination’s rationality,” American philosopher Robert Nozick remarked that imagination plays an important role in the rationality of belief.⁶

Faust’s story serves as a reminder that rationality is not impervious to the forces of imaginative reasoning. H. L. A. Hart said that Justice Oliver Wendell Holmes represented a “heroic figure in jurisprudence” for Englishmen because of Holmes’ imaginative power and clarity.⁷ Language is law’s vehicle for imaginatively expressing and manifesting rationality.⁸ To be frank, judges are pre-eminent alchemists of language – semantic sorcerers who will, at times, engage in a divination-like process and resort to a fictional literary device akin to “magical realism.”⁹ It is through this magical process that fiction paradoxically provides the jurist a portal to wisdom. In their deep-seated desire and obligation to do justice, judges naturally seek to overcome the frustrating limitations of knowledge, uncertainty, and cognitive capacity.¹⁰ Like Faust, judicial decision-makers will sometimes resort to the metaphysical and find themselves in a magical or mystical kingdom, one that is inhabited by a spectral presence we affectionately call “the reasonable person.”¹¹ This reasonable person has lived with us for many years.¹² Judges (and juries) have engaged in séance-like encounters with this faceless and voiceless apparition to intuit guidance and direction in problem-solving. In trying to discern reality and provide justice, the decision-maker engages in a creative, imaginative reasoning process, asking: What does this reasonable person see, think, advise?

⁶ See ROBERT NOZICK, *THE NATURE OF RATIONALITY* 172 (1993) (rationality is not simply applying mechanical rules).

⁷ See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593 (1958).

⁸ See NOZICK, *supra* note 6, at 179.

⁹ See, e.g., Thomas Halper, *Logic in Judicial Reasoning*, 44 IND. L. J. 33, 38 (1968), noting, in reference to the element of “judicial hunch” in legal reasoning, that “The judge, then, emerges as a magician, and the law turns out to be a box of tricks.” Magical realism is a literary genre that has roots in the worlds of both reality and fantasy. Generally, magical realism relies on supernatural devices, such as apparitions, to reveal and explain reality. A prime example is GABRIEL GARCIA MARQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (1967). An extended examination of the literary device can be found in *MAGICAL REALISM: THEORY, HISTORY, COMMUNITY* (Lois Parkins Zamora & Wendy B. Faris, eds., 1995) [hereinafter Zamora].

¹⁰ See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 157-62 (2006). Vermeule discusses the “institutionalist dilemma” regarding interpretive choices and the constraint of “bounded rationality.” See also Halper, *supra* note 9, at 47 (acknowledging the “corona of uncertainty” in the law).

¹¹ The objective reasonable person has originally been referred to, in common law (in the context of torts and contracts), as the “reasonable man.” See Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233 (2010) (exploring the many facets of “common law’s most enduring fiction” in private and public law); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S. C. L. REV. 293-94 (1997); John Gardner, *The Many Faces of the Reasonable Person* (2015), <https://johngardnerathome.info/pdfs/reasonableperson2013.pdf>; and PROSSER AND KEETON ON TORTS, § 32-33 (5th ed. 1984) [hereinafter PROSSER & KEETON].

¹² See DiMatteo, *id.* at 305-07 (identifying the religious, philosophical, and psychological roots of the reasonable person).

Lois Parkinson Zamora provided a perspective as to the significance of such metaphoric devices: “Ghosts embody the fundamental magical realist sense that reality always exceeds our capacities to describe or understand or prove...Magical realist [devices] ask us to look beyond the limits of the knowable and ghosts are often our guides.”¹³ The pronouncements of this fictitious reasonable person have been integral to the law’s decision-making.¹⁴ Like the symbol of Mephisto, the ghost-like reasonable person has served as law’s muse, a wisdom whisperer, a metaphorical¹⁵ fabrication of the understanding (that we lack) and an adaptive heuristic (that we need)¹⁶ to help us respond to perplexing circumstances and uncertainty.¹⁷ The paradox is that out of a need for objectivity and rationality in decision-making, the law has had to imagine and rely on its own form of magical realism—*magical legalism*.¹⁸ The conjured reasonable person in law is more than an imaginative and magical hypothetical construct. The hypothetical understandings of the artificially constructed reasonable person become a touchstone of legal rationality and interpretation.¹⁹

Impartiality, in substance and appearance, is a foundational principle of fair judicial decision-making. Appearance-based recusal has become an increasingly controversial and inadequately understood concept.²⁰ In today’s legal world,

¹³ See Zamora, *supra* note 9, at 498.

¹⁴ Consider, Ida Petretta, *The Question of Comparisons*, 68 AM. J. OF COMP. L. 893, 898-99 (2020) (rhetoric has always been integral to judicial disputes and analogical legal decision-making).

¹⁵ On the many uses and meanings of metaphor in everyday life, see the essays in ON METAPHOR (Sheldon Sacks, ed. 1978).

¹⁶ See Richard Re, *Clarity Doctrines*, 86 U. CHI. L. REV. 1497, 1513-14 (2019).

¹⁷ See NOZICK, *supra* note 6, at 93 (organisms need adaptive mechanisms to respond to local circumstances).

¹⁸ Others have appropriated the term “magical legalism”. See Jeffrey Miller, *Magical Legalism of Marcel Ayme: Charming Rogues and the Suspension of Physical, Natural, and Positive Law*, 53 CAHIERS DE DROIT 649 (2012); and Javier Trevino-Rangel, *Magical Legalism: Human Rights Practitioners and Undocumented Migrants in Mexico*, 23 THE INT’L J. OF HUMAN RIGHTS 843 (2019).

¹⁹ William Baude & Stephen Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1117 (2017) (advocating an approach, a law of interpretation, that would identify and apply interpretive rules governing a particular text or written instrument). Cf. Re, *supra* note 16 at 1507 (linguistic ambiguity could be resolved by way of an interpretive canon, yielding legal clarity).

²⁰ Consider, for example, Jane Mayer, *Legal Scholars Are Shocked by Ginni Thomas’s “Stop the Steal” Texts*, THE NEW YORKER (Mar. 25, 2022), <https://www.newyorker.com/news-desk/legal-scholars-are-shocked-by-ginni-thomass-stop-the-steal-texts>; Kara Voght & Tim Dickinson, *SCOTUS Justices “Prayed With” Her—Then Cited Her Bosses to End Roe*, ROLLING STONE (July 6, 2022) (quoting constitutional law and ethical experts regarding the problem of the appearance of judicial impartiality, the reasonable observer, and the lack of an objective mechanism to resolve judicial ethical concerns), <https://www.rollingstone.com/politics/politics-features/roe-supreme-court-justices-1378046/>; Michael J. Solender, *Must Justice Clarence Thomas Recuse Himself*, WALL ST. J. (Apr. 1, 2022) (noting that Ginni Thomas’s texts create, at minimum, the appearance of impropriety for Justice Thomas), <https://www.wsj.com/articles/justice-clarence-thomas-supreme-court-recuse-ginni-texts-11648828232>; and *infra* note 168 (Supreme Court’s public approval ratings). In the international common law context, see Matthew Chuks Okpaluba & Tumo Charles Maloka, *The Fundamental Principles of Recusal of a Judge at*

as evidenced by the thousands of state and federal cases addressing judicial disqualification, there are incalculable ways for a judge to simply express, often through a detailed narrative of facts, “I refuse to recuse.” or, less often, “I recuse.”²¹ Whether a judge is ethically qualified to adjudicate a case is governed by specific standards for disqualification, more commonly referred to as “recusal.”²² A judge’s decision-making must be impartial in both substance and appearance. The over-arching recusal standard or rule,²³ applicable to state and federal jurists in the United States,²⁴ is an exemplar of lexical simplicity. The ethical mandate to recuse is expressed in just five little words—a jurist must recuse when his or her “*impartiality might reasonably be questioned.*”²⁵ The ethical mandate for judges is built on a metaphor. Viewed as the “reasonable observer” standard of impartiality, the ethical precept incorporates and is a variant of its venerable common law ancestor the “reasonable person.”²⁶ The precept’s focus is not on the reasonableness of the jurist’s conduct but how that conduct *appears* to the fictional *reasonable observer*. Like other applications of “reasonableness,”²⁷ the reasonable observer is not a static concept. Context becomes all-important. The reasonable observer’s ethical mandate attempts to address the appearance—not actuality—of impartiality and bias in light of particular facts and circumstances. Moreover, the ethical standard imposes an extraordinary challenge upon a jurist who is the subject of a recusal challenge -- it requires the jurist to become, in

Common Law: Recent Developments, 43(2) OBITER 88, 90 (2022) (noting that “[d]espite the already-existing avalanche of case law on this important subject [recusal], there is no slow-down in the frequency with which cases raising the issue of bias, apprehended bias or the requirement of judicial impartiality are canvassed in common-law courts.”); and Anne Richardson Oakes & Haydn Davies, *Process, Outcomes, and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 581-86 (2011) (noting the increased sensitivity to and acceptance of the appearance concept in the European Court of Human Rights). [hereinafter Oakes & Davies].

- ²¹ RICHARD E. FLAMM, *JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES* (3rd ed. 2017), is a valuable treatise regarding judicial disqualification. The resource provides comprehensive exposition, with commentary, of relevant U.S. caselaw. *See id.* § 1.5 n. 5, ¶15 (statistically, refusals to recuse predominate).
- ²² The terms *recusal* and *disqualification* are often used interchangeably. *See, e.g.*, In re School Asbestos Litigation, 977 F.2d 764, 769 (3d Cir. 1992); and MODEL CODE OF JUDICIAL CONDUCT (AM. BAR. ASS’N 1990) CANON 2, r. 2.11, cmt. [1] [hereinafter MODEL CODE].
- ²³ Some academics have noted a distinction in terminology regarding *rules* vs. *standards*. *Standards* are viewed as promoting abstract ideals and are less determinative than rules. *Rules* are more conduct-specific and easier to enforce. *See* Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perception of Lawyer Codes of Conduct, by U.S. and Foreign Lawyers*, 32 VAND. J. TRANS. L. 1117, 1123 (1999); Joseph R. Grodin, *Are Rules Really Better than Standards*, 45 HASTINGS L. J. 569 (1994).
- ²⁴ *See* LOUIS J. VIRELLI, *DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION* 165-210 (2016) (discussing recusal at the state and federal court levels).
- ²⁵ MODEL CODE, CANON, 2, r. 2.11(A), *supra* note 22.
- ²⁶ *See* PROSSER & KEETON, *supra* note 11.
- ²⁷ *See* text in *infra* § 1(A) and accompanying notes.

effect, a clairvoyant in perceiving and interpreting the imaginary perceptions of an imaginary person. Magical Legalism indeed.

The deceptive simplicity of the five-word ethical mandate of recusal reminds one of what a philosopher once warned about the challenges of interpretation: “Language is a labyrinth of paths. You approach from one side and know your way about; you approach the same place from another side and no longer know your way about.”²⁸ Like the approach in common law countries, the appearance-based recusal standard in the United States embodies the elusive notion of *reasonableness*—reasonableness of the *observer* and reasonableness of the *perception*. Integral and critical to the ethical standard’s notion of reasonableness is the modal expression,²⁹ “*might*,” which acts as the vital verbal fulcrum for the standard’s implementation. As this article will explain, the meaning of “reasonableness” (of both the reasonable observer and the reasonable observation) and the spectrum of belief (exemplified by the verb “might”) in the over-arching ethical mandate pose formidable epistemic challenges regarding interpretation. How do we assess appearance-based recusal? Who is the reasonable observer? What is “reasonable”? What is (or should be) our analytical yardstick or metric? Regrettably, there is little clarity or guidance in American caselaw.

Clarity of language is essential for interpretation and rational decision-making. Clarity’s goal is to approximate a modicum of certainty or, at least, predictability in decision-making.³⁰ Sometimes the wisdom and experience of others can provide guidance. As Justice Stephen Breyer and other legal commentators have noted, a key component of legal reasoning is comparison.³¹ When it comes to the rule of law, the best way to identify and preserve American values may well be to take account of what happens elsewhere. Justice Breyer explained:

In the last several decades, more and more nations throughout the world have adopted documents that increasingly resemble our own Constitution and protect democracy and human rights. More and more, they look to independent judges to apply those documents. So if I have a legal problem

²⁸ See Petretta, *supra* note 14, at 909 (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (1998)). See also, Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 915 (1986) stating “Words help us understand and escape the tyrannies of the past...Used eloquently, however, words may help us to seek change rather than continuity and to struggle for our aspirations rather than to accept that whatever seems to be is good enough.”

²⁹ See *infra* §. IV(B)(1).

³⁰ See Re, *supra* note 16, at 1513-14 (discussing “clarity thresholds” and “accuracy promoting heuristics” to avoid or minimize risks of judicial error and harmful effects).

³¹ See Stephen Breyer, *American Courts Can’t Ignore the World*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/stephen-breyer-supreme-court-world/568360/>. Justice Breyer has been a forceful proponent of learning from foreign jurisdictions. Even the late Justice Scalia was known to be receptive to examining and considering comparative law, except in constitutional matters. See Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue*, 12 TULSA J. COMP. & INT’L L. 149 (2004) (discussing an emerging “transnational judicial dialogue” and interest among Supreme Court justices in foreign law); see also *Olympic Airways v Husain*, 540 U.S. 644, 658 (2004) (Scalia J., dissenting) (urging courts to take foreign judicial decisions more seriously in the context of treaty interpretation).

similar to a problem that a person like me with a job like mine has already faced and decided, why shouldn't I read what he said? I don't have to agree. It does not bind me. I don't have to follow it.³²

The comparative approach makes eminent sense especially when we consider universal fundamental values such as judicial impartiality and the appearance of justice. A legal commentator has observed that there are no pure identities or traditions -- we live in legal families that represent hybrids, constantly bleeding into one another and in constant contact with one another.³³ Despite the understandable exceptional pride of Americans in their legal system, our jurisprudential roots are in the Magna Carta and English common law.³⁴ From the beginning of our Republic, we have relied on common law, which is the most widespread legal system in the world.³⁵ In recognition of these legal realities, scholars have urged that there should be a transnational judicial dialogue and "intellectual cross-fertilization of ideas,"³⁶ a "dialogue of recognition"³⁷ so to speak, with others who see things differently than we do.

This article regarding appearance-based recusal will expand the traditional analytical aperture. We will examine the wisdom and experience of our legal relatives from various common law-based countries (Australia, Canada, Singapore, South Africa, United Kingdom). It is important to note that these countries have tackled the difficult issue of appearance-based recusal in a manner that has been thought-provoking and enlightening. An examination of caselaw and legal commentaries from those countries will reveal a remarkable similarity of fundamental ethical values, as well as related jurisprudential challenges. Regardless of our geographical separation or cultural differences, the common problem has *not* been with similar ethical principles but with their interpretation and implementation. As we shall see, however, Anglo-American recusal jurisprudence exposes differences that are stark and perplexing. Whereas the selected common law countries have painstakingly

³² Breyer *id.* See also STEPHEN BREYER, *THE COURT AND THE WORLD* 241 (2015) (noting a well-established American legal tradition of learning from foreign sources, consisting predominantly but not entirely of common law materials). Consider also *Lawrence v Texas*, 539 U.S. 558, 576 (2003) (foreign legislation considered, including European Commission of Human Rights).

³³ Petretta, *supra* note 14, at 914. See also Damiane Canale, *Comparative Reasoning in Legal Adjudication*, 28 CANADIAN J. OF L. & JURIS. 5 (2015) (while foreign law is not authoritative, it can provide content-independent reasons for adjudication).

³⁴ *Id.* at 894-96. See also Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUMBIA—VLA J. L. & ARTS 229 (1994) (noting that the U.S. common law has a rich independent legal history, but many of its principles in contract and tort and other relevant law are not dissimilar to the principles found and applied in common law countries); and H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1 (1917).

³⁵ See SWEET & MAXWELL, *ENGLISH COMMON LAW IS THE MOST WIDESPREAD LEGAL SYSTEM IN THE WORLD* (2008), <https://sweetandmaxwell.co.uk/about-us/press-releases/061108.pdf>; and Cyrus Das, *Recusal of Judges: A Commonwealth Survey of the Applicable Tests*, 280 in CYRUS DAS, *THE CULTURE OF JUDICIAL INDEPENDENCE* (2014) ("English law, in some form or another, is applied in about 55 countries around the world which house about one-third of the world's population") *id.* at 280.

³⁶ See Waters, *supra* note 31, at 150.

³⁷ See Petretta *supra* note 14, at 913.

analyzed the concept of appearance-based recusal, U.S. caselaw is, to put it mildly, analytically opaque, embodying an approach that can undermine the animating values of recusal. Such an approach effectively tips the decisional scales in the challenged jurist's favor. The selected common law countries demonstrate an analytical approach in their caselaw that is arguably more supportive and value-enhancing of the appearance standard and its underlying values, promoting greater analytical clarity, jurisprudential understanding, and public confidence-inducing accountability. It appears that, in our respective individual encounters with the mystical reasonable observer, our common law relatives imagine and perceive in substantially different ways.

If, as Nozick contends, principles symbolize and express our rational nature, we need to be alert to how we reason and interpret, ever-alert to our cognitive weaknesses as we engage in the process of creating ethical beliefs and action from a mysterious alchemy of words.³⁸ As Nozick emphasizes, a belief is rational if it is arrived at through a process that reliably and predictably achieves certain goals.³⁹ In the recusal context, the goal is both symbolic and practical—to protect the appearance of impartiality, which is essential to the public's trust and confidence in our legal system and the rule of law; and, through interpretation, to attain a serviceable—not perfect or precise—theoretical framework (heuristic) that aids judges in serving justice through fair recusal decision-making.⁴⁰ Contrary to Mephisto's advice, the Temple of Absolute Certainty⁴¹ is a delusion. This article will assess appearance-based recusal from multiple perspectives in the hope of identifying essential analytical considerations and principles. The recommended approach attempts to reveal and fill the jurisprudential void by providing greater conceptual clarity. It is an approach that strives to be faithful to both the letter and spirit of the appearance principle of judicial impartiality.

The article will proceed in the following manner. *Part I* is theoretically foundational to the article's concluding formulation of a recommended understanding and approach to appearance-based recusal. It discusses the relevance of heuristics in the decision-making process. The focus is on the "reasonable observer" heuristic, a descendant of the common law's "reasonable man," a metaphorical, fictionalized construct that was also adapted to apply in U.S. constitutional Establishment Clause cases. Relevant to the analysis of recusal and the task of interpretation is a brief discussion of fundamental jurisprudential and philosophical concepts such as: reasonableness and the reasonable man, the tension between the statistical and normative approaches to reasonableness, the paradox of objectivity in decision-making, and the influence of factors, including morality and context, in the quest for jurisprudential clarity. Particular attention is given to Justice Sandra Day O'Connor's seminal and imaginative adaptation of the common law's reasonable man standard, the "reasonable observer" heuristic, in Establishment Clause caselaw, an approach that focused on whether governmental

³⁸ See NOZICK, *supra* note 6, at 40, 71-74.

³⁹ *Id.* at 67.

⁴⁰ *Id.* at 68.

⁴¹ See FAUST *supra* note 1 at line 3. Consistent with Mephisto's cynicism, Mephisto also says "...law is no delight. / What's jurisprudence? – a stupid rite/ That's handed down, a kind of contagion, / From generation to generation,/ From people to people,/ region to region." *Id.* at 68.

action conveys a public message of religious endorsement. Justice O'Connor's approach (as well as scholarly and judicial criticisms of the heuristic) will provide a relevant reference point in later identifying the reasonable observer's attributes and the importance of clear interpretive criteria. O'Connor's reasonable observer's status was always perilous and its ultimate (but not unexpected) demise in 2022 in Establishment caselaw will serve as a cautionary lesson regarding clarity and context in the creation and application of the metaphorical heuristic in the ethic of judicially-mandated recusal.

Part II analyzes the recusal standard and the appearance of impartiality concept in U.S. caselaw. This section explains how U.S. courts have used the metaphorical reasonable observer heuristic to interpret, amplify, and eventually transform the clear and simple ethical mandate in a way that undermines its values and plain text. This transmogrification is exemplified through the semantical glibness in which the critically important modal verbs "might" and "would" (signifying *possibility vs probability*) are applied. It is not clear whether this subtle modal verb shift in caselaw reflects an intentional or subconscious mind-set (groupthink) or simply lexical insouciance. In any event, judicial reformulation of the general appearance standard, fortified by the common law's protective presumption of judicial impartiality, demonstrates that recusal interpretation in U.S. jurisprudence has employed a more stringent metric that can effectively tip the scales of recusal decision-making in the challenged jurist's favor.

Part III provides a stark contrast to the U.S. approach to appearance-based recusal by focusing on how various common law-based jurisdictions (Australia, Canada, Singapore, South Africa, and the United Kingdom) have struggled to achieve a common understanding and approach (theoretical and practical) in the interpretation of appearance-based disqualification. This section attempts to engage in an international discussion about Anglo-American ethical principles regarding recusal. It is a comparative approach that has been advocated by Justice Breyer. Particularly striking is the fact that the common law countries, in contrast to their American counterpart, have engaged in extensive analyses about the appearance of judicial impartiality. Their remarkable, and sometimes head-spinning, epistemic jurisprudential struggles can provide guidance. This comparative common law experience serves as an important backdrop to the next section.

Part IV culminates in a synthesis of the preceding sections regarding the reasonable observer heuristic in appearance-based recusal. The section identifies jurisprudential guideposts, especially the outcome-determinative/standard-of-scrutiny metric, that can assist judges in applying the inherently enigmatic metaphor in a more principled way. It is an analytical approach that attempts to be more faithful to the plain language, the spirit, and values of the American ethical mandate. The article concludes with an exhortation that the current jurisprudential and analytical void in appearance-based recusal needs to be acknowledged. The current U.S. approach regarding such an important and increasingly controversial public issue about judicial ethics⁴² should then be re-considered and refined to promote analytical clarity and rationality. The article concludes with a specific pragmatic proposal, in the form of a model commentary, to accompany the over-

⁴² See, e.g., *supra* note 20, regarding press coverage of recusal controversies involving the Supreme Court.

arching, foundational precept of appearance-based impartiality. While the proposal cannot provide “absolute certainty” in a Faustian sense, it can assist the judiciary in the quest for conceptual clarity and, ultimately, fairness and ethical accountability.

I. THE REASONABLE PERSON AND THE REASONABLE OBSERVER: HEURISTICS IN DEONTIC REASONING

Decision-making is a complex process. Humans are equipped with logic in their search for truth.⁴³ Judges, of course, are human;⁴⁴ they operate through the process of reasoning and various mechanisms (concepts, tests, principles, standards), to facilitate and channel “rational” judgment.⁴⁵ The reasoning process operates on two levels: the intuitional (referred to as “System 1”) and deliberative (“System 2”).⁴⁶ Contrary to the “beautiful fiction” of “unbounded rationality,”⁴⁷ logical thinking is not central to human reasoning.⁴⁸ The brain is efficient but cognitively limited.⁴⁹

Although the ideal of attaining perfect rationality may be an enticing illusion, humans have developed ways to compensate for the perils of fallibility inherent in the complex process of decision-making. Heuristics operate as aids or efficient mental shortcuts for decision-making.⁵⁰ Gerd Gigerenzer offers the example of an outfielder catching a fly ball and simultaneously trying to solve a series of differential equations. The outfielder’s task is formidable. In employing a “gaze heuristic,” the catcher assesses the speed, height, distance, and trajectory of the fly ball to achieve a simple objective.⁵¹ Gigerenzer explains that humans have an arsenal of similar cognitive aides in their “adaptive tool kit” of heuristics. For example, taking the best option, following the majority, selecting on the basis of representative familiarity (e.g., similar circumstances or name/cultural/ political affiliations) are heuristics that promote “fast and frugal” decision-making.⁵² Some heuristics are psychologically innate or intuitive, like using oneself as a frame of reference (“anchoring”) or even trying (and often failing to achieve) a course-correction (“adjusting”) to the egocentric bias anchor.⁵³

⁴³ See Gerd Gigerenzer, *Bounded and Rational* in CONTEMPORARY DEBATES IN COGNITIVE SCIENCE 117 (R. J. Stainton ed. 2006).

⁴⁴ See Jerome Frank, *Are Judges Human?* 80 U. PA. L. REV. 17 (1931); and Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations of Judges*, 61 SO. CAL. L. REV. 1877, 1905 and 1910 (1988).

⁴⁵ See Elizabeth Thornburg, *(Un)Conscious Judging*, 76 WM. & MARY L. REV. 1567, 1608 (2019).
⁴⁶ *Id.* at 1608-09.

⁴⁷ See Gigerenzer, *supra* note 43, at 128.

⁴⁸ *Id.* at 123.

⁴⁹ See Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?* 76 OR. L. REV. 61, 93 (2000).

⁵⁰ Amos Tversky and Daniel Kahneman have been pioneers in the study of heuristics and biases. See, e.g., Amos Twersky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974), <https://www.science.org/doi/10.1126/science.185.4157.1124> [hereinafter Twersky & Kahneman].

⁵¹ See Gigerenzer, *supra* note 43, at 119-20.

⁵² *Id.* at 119-127.

⁵³ See Thornburg, *supra* note 45, at 1612-13; Twersky & Kahneman, *supra* note 50, at 20-21; Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors*

Heuristics can serve as quick and efficient short-cuts for judges to streamline and channel their decision-making in the face of uncertainty and other pressures (such as time, efficiency, limited resources, and political conditions). Although judges may believe that they are not susceptible to systematic errors of judgment, studies show judges are subject to a range of cognitive illusions.⁵⁴ While helpful and necessary, heuristics can lead to systematically erroneous judgments inasmuch as judges tend to favor intuitive (System 1) rather than deliberative (System 2) faculties.⁵⁵ Bias and error, for example, can be the consequence of ignoring important information, relying on stereotypes, using one's beliefs and values as a metric, and resorting to quick "common sense" rationales or impressionistic reasoning.⁵⁶ In the difficult search for predictive accuracy, it is laziness or ignorance, a failure in System 2's deliberative function, that may lead to faulty and overconfident judgments.⁵⁷

Heuristic devices support decision-making. The legal world depends on them. For judges, who are viewed as relying on logic and reasoning, the concept of "reasonableness" plays a critical role. The reasonable man (or reasonable person)⁵⁸ standard is an example of a heuristic reasoning device, based on an idealized and abstract construct, ubiquitous in the world of torts and contracts.⁵⁹ A related heuristic, "the reasonable observer,"⁶⁰ has come into play, for example, in two instances: when a determination must be made whether a judge's "impartiality might reasonably be questioned," requiring disqualification/recusal; or when a court must constitutionally interpret the public's perception of a religious symbol that is

in Judgments of Belief and Values, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE THOUGHT* 120-38 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds. 2002); DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 119-28 (2011).

⁵⁴ See Rachlinski, *supra* note 47 at 100-101; Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913 (2013); Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 COURT REV. 114 (2013); Adebola Olaborede & Lirieka Meintjes-vander Walt, *Cognitive Bias Affecting Decision-Making in the Legal Process*, OBITER 806 (2020) (identifying seven common cognitive biases); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605 (1996); cf. L. Song Richardson & Phillip Atiba Goff, *Self-Defense and the Suspicion Heuristic*, 98 IOWA L. REV. 293 (2012) (analyzing the reasonableness of an officer's snap judgment to shoot a suspect).

⁵⁵ See Thornburg, *supra* note 51, at 1608-09, 1615-20; KAHNEMAN, *supra* note 51, at 99-114.

⁵⁶ See Rachlinski, *supra* note 49, at 74-81 and 90-93 (illustrating the "representative heuristic" in criticizing the "badly flawed" doctrine of *res ipsa loquitur*, which ignores the base rate of negligence; also analyzing the adequacy of the "prudent investor" standard, which implicates bias in assessing a trustee's liability).

⁵⁷ See KAHNEMAN, *supra* note 53, at 106, 114, and 152-53.

⁵⁸ The concept was originally masculine, implying male attributes, but was eventually de-gendered to become a "person." See Alan D. Miller & Rosen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 361-62 (2012). The authors also discuss the impact of the feminist backlash to the male-based nomenclature and standards. *Id.* at 362-66.

⁵⁹ See DiMatteo, *supra* note 11.

⁶⁰ See, e.g., Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 517-18 (2005) (discussing Justice O'Connor's heuristic of the reasonable observer in religious endorsement cases); and Haydn Davies & Anne Richardson Oakes, *Problems of Perception in the European Court of Human Rights*, 3 ST. JOHN'S J. INT'L & COMP. L. 120, 121, 131 (2013) (the observer is a fiction, a generically conceived representation) [hereinafter Davies & Oakes].

associated, directly or indirectly, with the government. Such an open-ended and ambiguous fictional construct presents significant questions: Who is this reasonable observer? What does the reasonable observer see? How does the reasonable observer think? And, most importantly, what do we mean by “reasonable?” The following considerations provide some foundational elements and concepts that will be relevant to the development of a heuristic to guide the recusal process.

A. REASONABLENESS

“Reasonable” is a quality that permeates the domain of law, including the judicial ethic of recusal. The appearance-based recusal standard of reasonableness is both adjectival and adverbial: operating implicitly (*viz.*, the observer must be a reasonable person) and explicitly (*viz.*, the questioning of a jurist’s impartiality must be grounded in reason). But what do we mean by “reasonable”?

A dictionary definition of “reasonable” provides limited guidance. If one analogizes “reasonable” to a navigational device, it is more akin to a compass than a GPS.⁶¹ It can provide direction in a general sense, but it cannot identify the precise location. For example, reasonable is definitionally identified in varying terms: right-thinking judgment, not absurd or ridiculous, within bounds of reason, sensible.⁶² Justice O’Connor approached the term from another Wittgenstein-like⁶³ angle when she described the meaning of “unreasonable.” She said: “[T]he term ‘unreasonable’ is no doubt difficult to define but it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning.”⁶⁴ One can, therefore, appreciate a law professor’s lament when he acknowledged in an article that he pities the municipal lawyer who must explain to others the meaning of “reasonable” in an ordinance.⁶⁵ Scottish law professor, Neil MacCormick, said he found reasonableness to be a puzzling and fascinating, a context-driven concept.⁶⁶

In analyzing the kaleidoscopic-like concept of “reasonable,” scholars have generally noted its complexity and ubiquity in philosophy, economics, and in many areas of Anglo-American law (torts, contracts, criminal, administrative, constitutional, trusts).⁶⁷ On the positive side, commentators have expressed

⁶¹ Global Positioning System. See www.gps.gov.

⁶² “Reasonableness” has been defined as: right thinking, right judgment, not absurd or ridiculous, not extreme, within bounds of reason, and rational. See WEBSTER’S THIRD INTERNATIONAL DICTIONARY 1892 (1981).

⁶³ See text accompanying *supra* note 28.

⁶⁴ See *Williams v Taylor*, 529 U.S. 362, 410 (2000).

⁶⁵ See Brandon Garrett, *Constitutional Reasonableness*, 102 MINN. L. REV. 61, 124-25 (2017); see also Christopher Brett Jaeger, *The Empirical Reasonable Person*, 72 ALA. L. REV. 887, 887 (2021) (no consensus on the definition of reasonableness). See also *infra* note 120 regarding Professor Hill’s similar lament.

⁶⁶ See Neil MacCormick, *Reasonableness and Objectivity*, 74 NOTRE DAME L. REV. 1575, 1576-77 (1998).

⁶⁷ See, e.g., Benjamin Zipursky, *Reasonableness in and out of Negligence Law*, 163 U. PA. L. REV. 2131, 2132-33 (2015); Kevin P. Tobia, *How People Judge What is Reasonable*, 70 ALA. L. REV. 293, 298 (reasonableness sits at the core of various legal standards) (2018); and David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 527 (reasonableness works all over the legal system). See also Silvia Zorzetto, *Reasonableness*, 1 ITALIAN L. J. 107 (2015) (explaining the porous concept of reasonableness from multiple perspectives and contexts).

reasonableness as “law’s conscience,” one that embraces two seemingly inconsistent ideals (justice/equity and conformity);⁶⁸ a higher order value;⁶⁹ a normative term that should embody the ethic of care and concern for others;⁷⁰ in tort law, reasonable signifies prudence, care, a community ideal, combining both subjective and objective ingredients;⁷¹ and, in contract law, it is a “metaphorical solvent” that promotes the goal of “objectivity” in decision-making.⁷²

Nevertheless, there are negative assessments to explain why there is considerable frustration and confusion about the multivalent legal standard of reasonableness. Benjamin Zipursky noted that reasonable and its cognates are often used as a vague Goldilocks’ “just right” qualifier in law.⁷³ To use another analogy, reasonableness is like another societal icon, *Jell-O*—hard to grasp and easily modifiable in shape and content, depending on one’s preferences.⁷⁴ Others have described reasonableness as a vague paradigmatic legal standard that suffers from multiple ambiguity and lack of clarity;⁷⁵ an object for “intellectual jousting;”⁷⁶ a legal fiction that fosters pseudo-certainty;⁷⁷ a magnet for legal theory;⁷⁸ and, fundamentally, a self-referential term that acts as a disguise for the lack of objective criteria.⁷⁹ Thus, it is not surprising to appreciate the claim that the vast domain of “reasonable” represents a “deregulated zone” in the law.⁸⁰

Consequently, various commentaries lead one to the conclusion that there is no practical or principled consensus about the meaning of reasonable. Notwithstanding the term’s enigmatic nature, while it embodies a broad zone of discretionary freedom, it may also function as a laudable gravitational force to constrain decision-making, albeit in vague indecipherable ways, somewhat like a canine invisible fence.⁸¹

⁶⁸ See Alan Calman, *The Nature of Reasonableness*, 105 CORNELL L. REV. ONLINE 81 (2020) (the concept dominates Anglo-American law).

⁶⁹ See MacCormick, *supra* note 65 (providing an extended exposition of reasonableness).

⁷⁰ See Joanna Grace Tinus, *The Reasonable Person in Criminal Law* 48 (2017) (Canadian thesis advocating that courts should embrace a more normative approach to reasonableness), https://qspace.library.queensu.ca/bitstream/handle/1974/15374/Tinus_Joanna_G_201702_MA.pdf.

⁷¹ See PROSSER & KEETON, *supra* note 11, at § 32.

⁷² See DiMatteo, *supra* note 11, at 297; see also Garrett, *supra* note 64, at 69-84 (exploring three dimensions of constitutional reasonableness).

⁷³ See Zipursky, *supra* note 66, at 2139 (noting also, at 2137-38 the adjectival and adverbial aspects of reasonable).

⁷⁴ See Susan Grove Hall, *The Protean Character of Jello, Icon of Food and Identity*, 31 STUD. IN POPULAR CULTURE 69, 76 (2008) (noting that *Jell-o* has become a metaphorical icon that defies categorization). Cf. Silvia Zorzetto, *Rational, Reasonable and Nudged Man*, 73, 80 (2019) (judicial uses of reasonableness continues to be so broad and undetermined as to be impossible to grasp) [Univ. of Milan thesis available at www.academia.edu].

⁷⁵ See Zipursky, *supra* note 66, at 2133.

⁷⁶ See Calman, *supra* note 68, at 16. The comment is peculiar given the article’s heavily analytical neuro-scientific approach.

⁷⁷ See Soifer, *supra* note 28, at 882.

⁷⁸ See Zipursky, *supra* note 66, at 2132.

⁷⁹ See Garrett, *supra* note 64, at 107.

⁸⁰ See John Gardner, *The Many Faces of the Reasonable Person* 1, 17 (2015), <https://johngardnerathome.info/pdfs/reasonableperson2013.pdf>.

⁸¹ Consider Zaring, *supra* note 67, at 552-554 (viewing the term as a potentially positive force in administrative law).

B. THE REASONABLE MAN (A/K/A THE REASONABLE PERSON)

Within the deregulated zone of reasonableness one can find perhaps the most visible fictional icon of the law, “the reasonable man” (a/k/a the reasonable person) called upon as an all-purpose construct when a legal problem must be solved objectively.⁸² Caution, however, is necessary. As noted by Alan Miller and Ronen Perry: “Any judge or juror who claims to understand the nature of the reasonable person from his or her familiarity with society is mistaken. Such a task is not merely difficult or impractical—it is impossible.”⁸³ Generalities often become a substitute for analysis.

As with the reasonableness concept, the reasonable man has appeared in many areas of the law, predominantly in torts and contracts.⁸⁴ The personification of the reasonable man in torts concerns the reasonableness of one’s conduct, whereas the focus in contracts is on intent in the formation and interpretation of a contract. The reasonable man fiction⁸⁵ has been the subject of considerable commentary and criticism. Many cases often treat the reasonable man and reasonableness synonymously given their shared history.⁸⁶ Today’s popular conception of the reasonable man associates him with English common law, described often in common law countries as “The Man on the Clapham Omnibus.”⁸⁷

Given the ubiquity of this metaphorical creation in the law, modern courts and commentators have struggled to understand him. In a treatise on torts, the reasonable man was described as an “excellent but odious character,” a fictitious person “who never has existed on land or sea.”⁸⁸ Others have portrayed the reasonable man in varying, somewhat demeaning terms such as America’s “sacred

⁸² See Gardner, *supra* note 80, at 27.

⁸³ See Miller & Perry, *supra* note 58, at 328.

⁸⁴ See Gardner, *supra* note 80, at 2-3; and Moran, *supra* note 11. The reasonable man/person metaphor has proven to be elastic. See, e.g., *Brief of The Onion as Amicus Curiae in Support of Petitioner, Novak v. City of Parma* (Petition for Writ of Certiorari, Supreme Court of the United States, No.22-293) (advocating the importance of constitutionally protected parody and the “reasonable reader’s” perspective) available at www.supremecourt.gov.

⁸⁵ Regarding the role of fictions in the law, see Peter J. Smith, *New Legal Fictions*, 95 GEO. L. J. 1435 (2007); and Soifer, *supra* note 28.

⁸⁶ See Tobia, *supra* note 67, at 333, 335.

⁸⁷ See Zorzetto, *supra* note 74, at 82; and Gardner, *supra* note 80, at 18; Tobia, *supra* note 67, at 333-39. Clapham is a suburb of London. As these articles indicate, the reasonable man’s origins were statistical via a Belgian statistician, Adolpe Quetelet, who used the term *l’homme moyen* to analyze the physical characteristics of the average man. As explained by Lord Reed, the reasonable Clapham Omnibus Man exemplified a passenger belonging to an intelligent tradition of defining a legal standard by reference to a hypothetical person, stretching back to the creation by Roman jurists of the figure *bonus pater familias*. See *Healthcare Services at Home, Ltd v Common Servs. Agency* [2014] UKSC 49, ¶ 1-3, 4 All ER 210 (appeal taken from Scotland). It is not clear whether the first jurisprudential appearance of the reasonable man in England was in *Vaughn v. Menlove* [1837] 132 Eng. Rep. 490, 3 Bing (N.C.) 468, or *R. v Jones* [1703] 87 Eng. Rep. 863. See Tinus, *supra* note 70, at 6-10. See also DiMatteo, *supra* note 11, at 294-297 and 303 (reasonable man concept in contracts rooted in the need for objectivity and impartial interpretation, similar to the objective theory of contracts).

⁸⁸ See PROSSER & KEETON, *supra* note 11, at § 32, ¶ 174.

cow” and a privileged White Anglo-Saxon Protestant (“WASP”) male who suffers from a thought disorder, obsessed with imposing order and control to the injury of justice;⁸⁹ a preconceived bundle of beliefs and rationales;⁹⁰ a legal fiction to foster pseudo-certainty;⁹¹ and, more charitably, an “average Joe” or an all-purpose vanilla-like personification.⁹² Not surprisingly, the reasonable man concept has been the object of critical feminist commentary⁹³ perhaps explaining why the “reasonable man” is often referred to as the “reasonable person” (a moniker that will be adopted hereinafter).

Beyond the mixed metaphors and the benign (or slanderous) labels, “[i]t is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.”⁹⁴ Christopher Jackson has observed that the reasonable person is so commonplace that it has not received sufficient attention or analysis.⁹⁵ Aside from oft-repeated generalizations and platitudes about the reasonable person’s attributes (e.g., basic intelligence, common sense, prudence, informed, not perfect, not individualized but representing a community ideal, not hyper-sensitive or possessing extremist views etc.)⁹⁶ and being the embodiment of community values and the collective consciousness,⁹⁷ the reasonable person concept has generated understandable concerns, many of which will be relevant to the discussion herein and to a consideration of an appropriate recusal heuristic. Specifically, one may plausibly ask: Does the reasonable person embody a majoritarian view that is insensitive

⁸⁹ See Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder*, 54 WAKE FOREST L. REV. 1049, 1051, 1060, and 1073-85 (1989). The author views the reasonable man as an anthropomorphic metaphor for legal reasoning and reason itself, one who has contributed to a disregard for the rights, experiences, and dreams of people who do not fit his paradigm.

⁹⁰ See DiMatteo, *supra* note 11, at 315-16.

⁹¹ See Soifer, *supra* note 28, at 882.

⁹² See Gardner, *supra* note 80, at 18, 27.

⁹³ See Miller & Perry, *supra* note 58 at 361-64; Tinus, *supra* note 70, at 15-22; Mayo Moran, *Rethinking the Reasonable Person: Custom, Equality and the Objective Standard*, (1999) (treatment of various groups under the objective standard viewed as raising profound concerns about equality and ultimately about the rule of law; author focuses primarily on feminist efforts to reform the reasonableness standard) (unpublished thesis, Univ. of Toronto, available at www.tspace.library.utoronto.ca); and Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspectives*, 14 LEWIS & CLARK L. REV. 1233, 1234 (2010) (noting that, as law’s most enduring, complex, ubiquitous, and controversial legal fiction, the reasonable person may be a vehicle that allows discretion to import prejudice into the law). The feminist critique bears similarities to the majoritarian critique of the reasonable observer heuristic. See § IV(A) *infra*.

⁹⁴ See *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting); and Moran, *supra* note 93, at 205-10 (noting, from a feminist perspective, that the reasonable person has been so generalized to the point of ambiguity).

⁹⁵ See Christopher Jackson, *Reasonable Persons, Reasonable Circumstances*, 50 SAN DIEGO L. REV. 651, 651-52 (2013) (echoing Mayo Moran).

⁹⁶ Attributes, however, may be heightened for one who possesses particular skills or a higher level of knowledge. See PROSSER & KEETON, *supra* note 11 at §32, ¶¶ 182-93; *cf.* DiMatteo, *supra* note 11 at 318-19 (reasonable person personification in contracts in comparison to the torts context).

⁹⁷ See DiMatteo, *id.* at 317 and 343; Zorzetto, *supra* note 74, at 80.

and non-responsive to the viewpoints of a non-majoritarian culture?⁹⁸ Whom does the reasonable person realistically represent? Is it a clever subterfuge for hiding a decision-maker's controlling preferences and biases? Have we saddled the metaphorical reasonable person with unrealistic expectations in terms of knowledge and information? In addition to the absence of conceptual clarity in the reasonable person standard, these questions have assumed increasing relevance when one considers the "Reasonable Observer," who has appeared on the modern constitutional stage as a doppelganger descendant of the common law's illusory reasonable person.

C. THE REASONABLE OBSERVER

Adam Soifer has observed that "Our great judges are those who most effectively use the fabric of fiction to camouflage their creativity."⁹⁹ From the fertile imagination of Justice Sandra Day O'Connor, who assessed whether government-related actions or symbols represented an unconstitutional endorsement of religion, the fiction of the Reasonable Observer developed. The reasonable observer heuristic developed as an off-shoot of the so-called tripartite "*Lemon* test," an analytical construct that sought to assess religious establishment claims of unconstitutionality in terms of purpose, effects, and potential governmental entanglement with religion.¹⁰⁰ Justice O'Connor's metaphorical reasonable observer heuristic arguably served as a convenient analytical tool, like the common law reasonable person, to enable a jurist to *appear* to be impartial and objective in the interpretation of the views or perceptions of a fictionalized common person who might perceive and interpret governmental action as an unconstitutional "endorsement" of religion under the Establishment Clause.¹⁰¹ Nevertheless, as with the common law concept, the reasonable observer heuristic invited speculation and confusion because it did not clarify how one goes about deciphering the imaginary being's imaginary perceptions. Subsequent caselaw has attempted to elucidate the jurisprudential inquiry.

In a case pertaining to the display of a cross on government property, Justice O'Connor expressed the contours of her vision of the reasonable observer analytic by stating: "The endorsement inquiry is not about the perceptions of particular

⁹⁸ Cf. and consider the relevance of the feminist controversy, *supra* note 56. See also Tinus, *supra* note 68, at 15-22 (discussing the feminist critique); PROSSER & KEETON, *supra* note 11, at § 32 n.5. Moran, *supra* note 11, notes the challenging relationship of the amorphous reasonable person metaphor with egalitarian values and the paradoxical danger of prejudicial discretion.

⁹⁹ See Soifer, *supra* note 28, at 885.

¹⁰⁰ *Lemon v. Kurtzman*, 403 U.S. 604, 612-13 (1971).

¹⁰¹ U.S. CONST. amend. I, which provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .". Application of the endorsement test under the Establishment Clause often involved challenges to religious displays on government property. The endorsement aspect of the Establishment Clause question is whether such a government-related display represents a constitutionally impermissible government endorsement of religion. Justice Ginsburg noted that the endorsement inquiry has been described as the "reasonable observer standard." *American Legion v. American Humanist Assn.*, *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067, 2106 n. 4 (2019) (Ginsburg, J., dissenting).

individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe.”¹⁰² She then noted:

I therefore disagree that the endorsement test should focus on the actual perception of individual observers, who naturally have differing degrees of knowledge... In my view, however, the endorsement test creates a more collective standard to gauge the ‘objective’ meaning of the [government’s] statement in the community... In this respect, the applicable observer is similar to the “reasonable person” in tort law, who “is not to be identified with any ordinary individual... but is rather a personification of a community ideal of reasonable behavior, determined by the [collective] social judgment”... [The endorsement inquiry] simply recognizes the fundamental difficulty inherent in focusing on actual people: There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion.¹⁰³

At a pivotal point, Justice O’Connor stated: “[T]he reasonable observer must be deemed aware of the history and context of the community and forum in which the religious display appears... This approach does not require us to assume the ‘ultrareasonable observer’ who understands the vagaries of this Court’s First Amendment jurisprudence...”¹⁰⁴ In O’Connor’s legal universe, the views of the reasonable observer ultimately presented an abstract question of law.¹⁰⁵ On reflection, one had to question how precisely the message from this mystical observer could be discerned in the challenging constitutional balancing process. Does a jurist rely on gut instinct about the collective community’s hypothetical perception of the government’s intent? Does the jurist rely on a vague reasoning process that travels through a legally unregulated zone, a process that a common law lawyer has described as impressionistic?¹⁰⁶

Justice O’Connor’s formulation provoked criticism from her colleagues. Justice Scalia’s lead opinion took issue with how one identifies the hypothetical beholder (*i.e.*, the observer). Justice Scalia asked: is it any beholder (no matter how unknowledgeable), or the average beholder, or Stevens’ “ultrareasonable”

¹⁰² *Capital Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 779 (1995).

¹⁰³ *Id.* at 779-80 (internal citations omitted, italics in original) (O’Connor, J., concurring in part and concurring in the judgment). See also Justice O’Connor’s earlier views regarding her endorsement interpretive approach in *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O’Connor, J., concurring) and *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O’Connor, J., concurring in the judgment).

¹⁰⁴ *Capital Square*, 515 U.S. at 780-781.

¹⁰⁵ See *Lynch*, 465 U.S. at 694 (stating that the analytical question of the reasonable observer’s observations is largely a question to be answered based on judicial interpretation of social facts). See also Jessie Hill, *Anatomy of the Reasonable Observer*, 79 BROOK. L. REV. 1407, 1440 (2014).

¹⁰⁶ See Simon Atrill, *Who Is the Fair-Minded and Informed Observer? Bias after Magill*, 62 CAMBRIDGE L.J. 279, 283 (2003). Professor Hill states that the interpretive methodology is not an empirical or statistical one. *Id.* at 1440. See also William P. Marshall, *We Know It When We See It: The Supreme Court and Establishment*, 59 CAL. L. REV. 495 (1986). Regarding the issue of empirical evidence, see *infra* notes 231 and 370.

beholder?¹⁰⁷ Justice Stevens also chimed in. Critical of O'Connor's formulation and favoring a strong presumption against religious displays on public property, Justice Stevens viewed Justice O'Connor's fictional construct as coming "off as a well-schooled jurist, a being finer than the tort law model," noting further that "it strips constitutional protection from every reasonable person whose knowledge happens to fall below some ideal standard."¹⁰⁸ In Justice Paul Stevens' vision, he would have extended protection to the universe of reasonable persons to ask whether some viewers of the religious display would perceive government endorsement. Addressing Justice O'Connor's concerns about hyper-sensitive individual views, he noted that her ideal observer test ignores the requirement that the apprehension be objectively reasonable.¹⁰⁹

There has been considerable scholarly and judicial criticism of the reasonable observer heuristic that was grafted onto religious endorsement cases. In her critical assessment of the reasonable observer approach, Jessie Hill viewed it as a heuristic mechanism to reconstruct intent, based on an evaluation of the context of the perceived message and all relevant information, the objective being an interpretation of the social meaning and effect of a religious message associated with the government's message.¹¹⁰ Hill proffered that the heuristic should be re-interpreted and strengthened by procedural mechanisms (such as evidential flexibility, burden-shifting rules, presumptions, as well as a recognition that there are other reasonable non-majoritarian perspectives).¹¹¹ She questioned how one can decipher consensus or whether it is even achievable.¹¹² Echoing similar concerns, Jessie Choper contended that the O'Connor heuristic was too nebulous and subjective, allowing too much legislative-like discretion, thus facilitating the imposition of a judge's values at the expense of a needed sensitivity to reasonable non-majoritarian points of view.¹¹³ Richard Fallon, for example, urged a wide-angle re-appraisal of Establishment Clause doctrine, which he said was "notoriously confused and disarrayed—a farrago of unstable rules, tests, standards, principles, and exceptions."¹¹⁴ Particularly, for our analytical purposes, Fallon claimed that

¹⁰⁷ See *Capital Square*, 515 U.S. at 769.

¹⁰⁸ *Id.* at 800 n. 5.

¹⁰⁹ *Id.* Stevens notes therein that a person who views an exotic cow as a symbol of the government's approval of the Hindu religion could not survive O'Connor's test, which is predicated on the view that there is always someone who will feel excluded by a government's particular action.

¹¹⁰ See Hill, *supra* note 60, at 503-07; and Hill, *supra* note 105, at 1409-10. Hill's criticism is that Justice O'Connor's heuristic is over-idealized, fails to capture reality, is unconstrained and unguided, risking the danger that the over-idealized observer becomes a stand-in for the judge who may embody a majoritarian point of view.

¹¹¹ See Hill, *supra* note 105, at 1449-52.

¹¹² See Hill, *supra* note 60, at 517-22.

¹¹³ See Jessie Choper, *The Endorsement Test: Its Status and Desirability*, 18 J. L. & POL. 499, 512, 516-20 (2002). See also Benjamin I. Sachs, *Whose Reasonableness Counts*, 107 YALE L.J. 1523 (1998) (critically analyzing the approaches of Justices O'Connor and Souter); and Mark Strassen, *The Endorsement Test is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273 (2013).

¹¹⁴ See Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 60, 119, 223 (2017), citing PAUL HORWITZ, *THE AGNOSTIC AGE* 223 (2011). See also B. Jessie Hill, *supra* note 60, at 492 (describing the unpredictability of Establishment Clause challenges).

Establishment Clause cases failed to employ an “analytically sequenced tiered framework for judicial review” that is necessary for clarity and rationality.¹¹⁵

Such criticisms had placed the Establishment Clause’s reasonable observer heuristic on life support. Scholars like Professor Hill speculated that the Supreme Court might eventually pull the plug.¹¹⁶ The critics ultimately proved to be correct when, in 2022, a Supreme Court majority in *Kennedy v. Bremerton School District* definitively jettisoned *Lemon* and its implementing reasonable observer standard in favor of a “history-and-tradition” test.¹¹⁷ Justice Gorsuch criticized *Lemon* and the endorsement test as an attempt to create a “grand unified theory” for assessing Establishment Clause claims, which inevitably invited chaos that led to differing results.¹¹⁸

In retrospect, the repeated criticisms from members of the Court about *Lemon* and the endorsement test presaged the reasonable observer’s demise.¹¹⁹ One might say that Professor Hill’s note of concern in 2014 (“Pity the reasonable observer”)¹²⁰ became a prescient lamentation in 2022. Notwithstanding the demise of the reasonable observer heuristic in Establishment caselaw, O’Connor’s heuristic and its subsequent doctrinal challenges provide a useful backdrop to the later discussion of a similar heuristic in appearance-based recusal—one with a significant contextual difference. Whereas the reasonable observer heuristic represented a judicial invention in Establishment Clause jurisprudence, the reasonable observer heuristic in judicial ethics is explicitly incorporated in a precept that focuses on the important secular virtue of judicial impartiality and the public’s viewpoint. The saga of the

¹¹⁵ See Fallon, *id.* at 60-62.

¹¹⁶ See Hill, *supra* note 105, at 1408-10.

¹¹⁷ See *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022). The case involved a high school football coach’s post-game prayers on the football field. The Court viewed the prayers as private and non-coercive. Justice Sotomayor stated that the Court had overruled *Lemon* “entirely and in all respects.” *Id.* at 2449 (Sotomayor, J., dissenting opinion in which Breyer and Kagan, JJ., joined). J. Sotomayor’s dissent questioned whether the new history-and-tradition test provided any guidance to school administrators and wondered how such a test would be implemented. *Id.* at 27-30. It is interesting to note that Professor Hill opined in 2014, *supra* note 105, at 1408-09, that the reasonable observer test might survive the death of endorsement if social meaning remained a relevant factor, for example, when it is necessary to determine if government speech is coercive or proselytizing.

¹¹⁸ *Kennedy*, 142 S. Ct. at 2427.

¹¹⁹ See *American Legion*, 139 S. Ct. 2067, a case involving the erection of a 30-foot World War I memorial (a Christian cross) in 1925. The plurality opinion generated seven opinions and noted that the Court had many times expressly declined to apply or ignored application of *Lemon*. See *id.* at 2080. The plurality opinion by Justice Alito cited lower federal court cases demonstrating that the *Lemon* test resulted in chaotic jurisprudence, produced unpredictable results, and was difficult to apply. 139 S. Ct. at 2080-81. Growing judicial frustration or confusion about the governing jurisprudential standard is exemplified by *Kennedy*, 142 S. Ct. 2407, in which 11 judges of the 11th Circuit had dissented from that court’s denial of a petition for reconsideration, 4 F.4th 910, 911, noting *Lemon*’s “ahistorical, atextual” approach in Establishment Clause cases. *Id.* at 911, and n.3. In both *American Legion* and *Kennedy*, the Court found the government’s actions did not violate the Establishment Clause.

¹²⁰ See Hill, *supra* note 105, at 1407. See also Davies & Oakes, *supra* note 60, at 131 (acknowledging the inherent difficulty in describing the fictional public observer).

reasonable observer heuristic in Establishment jurisprudence, however, provides a cautionary message about the perils of interpretation and the need for some basic analytical clarity.

D. OTHER CONSIDERATIONS

Relevant to the assessment and development of an analytical framework for appearance-based recusal decision-making are additional considerations that should not be over-looked. While these observations will not provide specific content to a proposed recusal heuristic, they are philosophically directional and will guide the process.

1. Philosophical Polarity – the “average” vs. the “ideal”

There have been two competing philosophical perspectives relevant to the legal idea(l) of reasonableness. One approach advocates a standard that is normative, one generally influenced by ethical values. The normative approach, which is predominant in the legal world, recognizes that the standard cannot be proven empirically or logically. This approach looks to reasonableness as reflecting a community’s ideals and values, one that expresses the collective conscience of a community.¹²¹

The competing view (labeled as positivist, empirical, or statistical) posits that the reasonable person is an ordinary “vanilla-type” creature, an all-purpose being reflecting the average citizen (“the average Joe”) and embodying an aggregation of beliefs and behaviors of the individuals in a community.¹²² Such a composite approach is historically associated with its origins in statistics. As others have cautiously observed, the “average” approach, strictly applied, can implicate uncomfortable consequences.¹²³

Straddling the fence between these two camps is a legal philosophy that portrays the reasonable person as a hybrid in theory and practice.¹²⁴ In the prior discussion about the contrasting views of Justices O’Connor and Stevens in *Capital Square* regarding the identity of the reasonable observer,¹²⁵ there is a lurking issue whether the approach should be an idealized normative one, based on aspirational

¹²¹ See Tobia, *supra* note 67, at 302; Miller & Perry, *supra* note 568 at 370-71 and 380 n.285; and DiMatteo, *supra* note 11, at 307 (noting the religious and philosophical foundations). Prudence, for example, is a qualitative attribute of the reasonable person in torts. See PROSSER & KEETON, *supra* note 68, § 32, at ¶¶ 174-175.

¹²² See Gardner, *supra* note 80, at 18 and 27.

¹²³ See Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1269 (2018); and Tobia, *supra* note 67, at 300-301 (reasoning that there is no such thing as an “average accident” or “average racism.”) There is a related philosophical paradox. If the reasonable person represents the community average, does the concept acknowledge the possibility that the reasonable person can also act unreasonably? See Matt King, *Against Personifying the Reasonable Person?* 11 CRIM. L. & PHILOS. 725, 728-29 (2017). Dean Prosser points out that, in the world of tort law, the reasonable person is not to be identified as an ordinary individual who might do unreasonable things. See PROSSER & KEETON, *supra* note 11, § 32 at 175.

¹²⁴ See generally Tobia, *supra* note 67; and Jaeger, *supra* note 65.

¹²⁵ See *supra* § 1(C).

principles, or one that is more receptive to incorporating, at least in part, the empirical realities of a given community.¹²⁶ The normative-statistical dilemma will take on added significance with respect to reconceptualizing and customizing, to a degree, the reasonable observer heuristic in judicial ethics.¹²⁷

Such philosophical musings, sometimes abstruse, may be intellectually interesting. But they provide questionable practical guidance to the judicial decision-maker who must resolve disputes with clarity, practicality, and efficiency.¹²⁸ Nevertheless, these competing philosophical perspectives are worthy of consideration because they may assist the decision-maker in identifying the appropriate values, points of view, sources of knowledge, and jurisprudential objectives in constructing and construing a context-and-fact dependent heuristic.

2. *The Paradox of Objectivity*

Objectivity in the law can be an overly romanticized aspirational concept. There are frequent references in caselaw that judicial reasoning is “objective.” Such a viewpoint is both idealistic and practical because it comforts the litigants and the public about the importance of judicial impartiality and the fair administration of justice, namely, that a jurist’s personal preferences, values, or biases will/should not dictate the reasoning process. The reasonable person or reasonable observer becomes a valuable filtering mechanism for providing the *appearance* of objectivity and impartiality. At the same time, it provides an important reminder (to a jurist and the public) that personal values or views should not control the adjudicatory process.

But the concept of judicial objectivity requires a more nuanced assessment, as jurists and scholars acknowledge. Alan Calman has observed that what is missing from discussions of reasonableness is a basic understanding of human nature.¹²⁹ Prosser’s analysis of the reasonable man concept admits that it implicates both the subjective and the objective.¹³⁰ Christopher Jaeger’s analysis of the “empirical reasonable person” posits that the reasonable person’s roots are empirical; but reasonableness is also intuitive and aspirational¹³¹ In a legal zone that provides

¹²⁶ See Jackson, *supra* note 95, at 658-63 (advocating that the relevant circumstances of a litigant’s situation should be incorporated into the reasonable person test). See Tobia, *supra* note 67, at 311-12 and 340-41 (observing that recent experimental research demonstrates that what is considered “normal” judgment and reasonableness is a hybrid blend of the statistical and prescriptive). Cf. Miller & Perry, *supra* note 56 (concluding that reasonableness, considered in normative terms, is the only logical way to view the reasonable person).

¹²⁷ See text accompanying *infra* notes 365-70 regarding various considerations relevant to the external assessment approach; consider also *supra* § I(D)(1) regarding the philosophical polarity between the average and the ideal.

¹²⁸ A word of caution is appropriate. Philosophical concerns can implicate significant practical consequences. Consider Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness*, 100 B. U. L. REV. 951, 963-65 (2020) (regarding the “split second syndrome” and the issue of adopting an average approach in the constitutional assessment of an officer’s split-second decision to shoot a suspect).

¹²⁹ See Calman, *supra* note 68, at 3.

¹³⁰ See PROSSER & KEETON, *supra* note 11, at § 32, ¶ 175 n.14.

¹³¹ See Jaeger, *supra* note 65, at 901-03, 947.

considerable unguided discretion, it is understandable that others have concluded that the use of reasonableness can disguise the lack of objective criteria and can operate as a disguise or a tool for judicial control that *appears* to defer to community standards.¹³² The judicial task is especially challenging as Judge Kozinski noted in *In re Bernard*.¹³³ He has described the judge’s philosophical dilemma as “this objective-subjective conundrum” wherein the jurist becomes both the interpreter and the object of interpretation.¹³⁴ As noted in *In re United States*, asking a judge to step outside himself and take the view of an objective outsider is a task that is “difficult even for a saint to do.”¹³⁵

Regardless of the context in which the reasonable person/observer standard is applied—torts, contracts, constitutional endorsement, or judicial disqualification—there remains an underlying concern about the ever-present danger of a judge’s beliefs, values, predispositions, or bias imperceptibly compromising the apparent objectivity of decision-making, especially in circumstances when discretion is legally unguided.¹³⁶

3. Morality

The relationship between law and morality is a topic that has fascinated philosophical and legal scholars. H. L. A. Hart’s classic exposition of the separation of law and morals explained that historically there has been a recognition that “the development of legal systems had been powerfully influenced by moral opinion, and, conversely, that moral standards had been profoundly influenced by law, so that the content of many legal rules mirrored moral rules or principles,” an historical causal connection that is not easy to trace.¹³⁷

¹³² See Garrett, *supra* note 64, at 107, 110, 125; Mayo Moran, *supra* note 93, at 1233, 1234 (suggesting that the reasonable person may inject prejudice into the law).

¹³³ *In re Bernard*, 31 F.3d 842, 844 (9th Cir. 1994).

¹³⁴ *Id.* See also Resnick, *supra* note 44, at 1905, 1910 (noting the “inevitability of perspective” in that there is no one objective stance or neutrality given that judges are human who are embedded in society; there is a series of perspectives). The troublesome dilemma of objectivity in recusal self-assessments can be alleviated somewhat by asking a neutral jurist to assess and decide the recusal challenge lodged against another jurist. Such a process is eminently preferable to the self-serving and subjective self-assessment of impartiality. See Zygmunt A. Pines, *Mirror, Mirror, On the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform*, 125 DICK. L. REV. 69 (2020) (discussing the problem of “biased impartiality” while proposing fair and procedurally specific procedures that require an independent assessment of a recusal challenge by another jurist).

¹³⁵ *In re United States*, 441 F.3d 44, 67 (1st Cir. 2006). In an international context, the South African Constitutional Court observed that “absolute neutrality is a chimera.” See *South African Commercial Workers Union v Irvin & Johnson Ltd.* [2000] 3 S.A. 705 (CC) at ¶ 13.

¹³⁶ See DiMatteo, *supra* note 11, at 314-17 (psychological aspects of the reasonable person and the judicial mind), noting that the reasonable person is the “inevitable prisoner of the subjective judicial mind,” *id.* at 344; and Hill, *supra* note 105, at 1449 (danger of judicial predisposition and alignment); and Warren A. Seavy, *Negligence – Subjective or Objective*, 41 HARV.L. REV. 1, 27 (1927); and see Pines, *supra* note 127, at 116-20 (identifying various forms of bias).

¹³⁷ See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 598 (1958). Regarding the practical decision-making aspects of the law-morality

The limited scope of this article precludes any extended philosophical discussion regarding the role of morality in the development of the law.¹³⁸ Suffice it to say that with respect to the reasonable person concept, others have observed a connection. In the realm of contracts, for example, Larry DiMatteo noted that the reasonable person's roots are in moral philosophy (Thomas Aquinas and Aristotle) and in a belief in virtues and right reason representing, in effect, a secularization of religious principles.¹³⁹ Given that the reasonable person is viewed as embodying the conscience of the community and is a personification of a community's ideal, it is natural that the reasonable person would assume a normative mantle.¹⁴⁰ The essential point is that the reasonable person/observer is plausibly imbued with normative, moral attributes. More importantly for our purposes, and regardless of the more general philosophical issues of law and morality, the reasonable observer in recusal matters should be recognized as a distinct construct that implicates moral/ethical considerations and aspirations. It is worth acknowledging that the essence of the reasonable observer metaphor in recusal is indeed virtue, in a secular sense, specifically, the civic morality of justice, judicial impartiality, and fairness.

4. Context

The issue of law's relation to morality raises the related and important factor of context. In his analysis of reasonableness and objectivity, professor Neil MacCormick stressed that the task of interpreting "reasonableness" is contextual, involving the identification of values, interests and the like that are relevant to the particular focus of attention, which depends on the type of situation, the relationship at issue, and the governing principles and rationales for the branch of law at issue. Reasonableness is necessarily a context-driven concept.¹⁴¹ Justice O'Connor in *Capital Square* explained that the application of her reasonable observer-endorsement test depended on a sensitivity to the unique circumstances and context of the particular challenge.¹⁴² Other commentators caution that one must be careful in applying the reasonable person concept beyond traditional legal realms.¹⁴³ One thus needs to acknowledge the special context of appearance-based

dilemma, see J.C. Oleson, *The Antigone Dilemma: When the Paths of Law and Morality Diverge*, 29 CARDOZO L. REV. 669 (2007).

¹³⁸ *Consider Commonwealth v. Howard*, 257 A.3d 1217, 1233-39 (Pa. 2021) (Wecht, J., concurring) wherein Justice Wecht critiques the "common sense of the community" standard and the application of common law-based notions of morality in a prosecution (endangering the welfare of a child), questioning what evidence is necessary in identifying the relevant community and proving the charge.

¹³⁹ See DiMatteo, *supra* note 11, at 305-07.

¹⁴⁰ See Lee, *supra* note 123, at 1267-69 (difficult to escape a normative assessment of the reasonable person; author asks whether jurors should reflect their individual values or values of the community); and Zorzetto, *supra* note 74, at 80 (noting "Whether the Anglo-American Clapham Omnibus [the reasonable person] represents a certain moral ideal that belongs to common sense, rather than a composite of society at large, is in fact unclear.")

¹⁴¹ See MacCormick, *supra* note 66, at 1577, 1593-94.

¹⁴² See *Capital Square*, 515 U.S. at 782.

¹⁴³ See Tobia, *supra* note 67, at 350-351; but see Jackson, *supra* note 95, at 653, 705 (disagreeing with the assumption that the reasonable person heuristic varies and depends on the field of law and the normative considerations that animate a given field of law).

recusal, particularly with respect to the underlying values and concerns that would be relevant to the judicial interpretation of the reasonable observer. Context—the public’s perception of judicial impartiality in the administration of justice vis à vis the particular facts and circumstances of a case—is all-important. The fact, for example, that the Supreme Court has recently abandoned the reasonable observer approach in Establishment Clause cases (in favor of a history-and-tradition test)¹⁴⁴ does not dictate a similar result in appearance-based recusal jurisprudence given the fact we are faced with the unavoidable task of carefully explaining and applying a paramount ethical standard that textually incorporates the metaphorical reasonable observer.

II. APPEARANCE-BASED RECUSAL IN U.S. JURISPRUDENCE

A. THE APPEARANCE STANDARD OF RECUSAL

Justice and impartiality are abstract concepts. Yet there is an inevitable human impulse to imaginatively envision such concepts through literary devices – metaphors, symbols, aphorisms. The “Man on the Clapham Bus,” the classic metaphorical symbol for the reasonable person in Anglo jurisprudence,¹⁴⁵ stirs the legal imagination more than the cold concept of objective reasonableness. Bryan Oberle examined the many archetypal characters and symbols of justice in world mythology and identified 68 symbols of justice and 27 words associated with justice (including fairness, impartiality, prudence, reason, and truth).¹⁴⁶ The “appearance of justice” concept has become, like the reasonable person, an imaginative envisioning of a vague aspect of our justice system, particularly relevant in the context of judicial recusal and disqualification. But beyond metaphor and symbolism, how does one interpret the “appearance” of justice? There is little practical guidance.

Impartiality¹⁴⁷ constitutes the core of “appearance of justice,” the foundation of U.S. and, as will be discussed, international jurisprudence. The Supreme Court, on more than one occasion, has emphasized that “justice must satisfy the appearance of justice.”¹⁴⁸ In *Liljeberg v Health Services Acquisition Corp.*, the Court noted that, even if a jurist is pure of heart and incorruptible, a judge’s actual knowledge or intent is not a relevant consideration to the appearance of justice in the analysis of the recusal ethic.¹⁴⁹ The Court explained:

¹⁴⁴ See *Kennedy*, 142 S. Ct. 2407, *supra* note 117.

¹⁴⁵ See *supra* note 87.

¹⁴⁶ See Bryan Oberle, *Comparing the Archetypal Characters and Symbols of Justice in World Mythology*, 1 *ILIOS* 60, 62-63 (Apr. 2011). See also Dennis Curtis & Judith Resnick, *Images of Justice*, 96 *YALE L.J.* 1727 (1987); and JUDITH RESNICK & DENNIS CURTIS, *REPRESENTING JUSTICE* (2011).

¹⁴⁷ MODEL CODE, *supra* note 22. The terminology section of the Code defines “impartial,” “impartiality,” and “impartially” as the “...absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.”

¹⁴⁸ See *Offutt v. United States*, 348 U.S. 11, 13 (1954); *Aetna Life Ins. Co. v. Lavoie*, 474 U.S. 813, 825 (1986); and *In re Murchison*, 349 U.S. 133, 136 (1955).

¹⁴⁹ *Liljeberg*, 486 U.S. 847 (1988).

The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicion and doubts concerning the integrity of the judges. The very purpose of sec. 455(a) [the federal recusal statute] is to provide confidence in the judiciary by even avoiding the appearance of impropriety whenever possible.¹⁵⁰

A modern example of the manifestation of this aspirational appearance principle (perhaps viewed as excessive by some) involved a Virginia trial judge who decided, pursuant to a motion by the local public defender, that the portraits of jurists (overwhelmingly white), peering down (as the judge noted) on African American defendants, should be removed from the courtroom. The judge decided that such a gesture was important to emphasize in his courtroom the appearance of justice and fairness.¹⁵¹

The appearance of justice principle was incorporated in the American Bar Association's first model judicial code in 1924.¹⁵² The phrase "justice must satisfy the appearance of justice," came from the pen of an English jurist, Lord Gordon Hewart. Described as "the worst chief justice ever," Lord Hewart stated that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."¹⁵³ There is a certain cross-Atlantic irony in the provenance of the foundational concept of the appearance of justice. The U.S. version of the ethical appearance standard is tied to another controversial figure, Judge Landis who, while still a jurist, was chosen to clean up the sport of baseball after the so-called Chicago Black Sox baseball scandal in the 1920's. The controversy over Judge Landis's dual compensation eventually prompted the ABA to promulgate an ethical code that addressed the appearance of impropriety.¹⁵⁴

¹⁵⁰ *Id.* at 864-65. *See also* *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) (noting "... the judge does not have to be subjectively biased or prejudiced, so long as he appears to be so.").

¹⁵¹ *See* *Commonwealth v. Shipp*, Case No. FE-2020-8 (Va. Cir. Ct., Dec. 20, 2020). The local court system had previously adopted a "Plan of Action" to address racism within the justice system, including public displays and symbols. *See also* Hans Bader, *You Can't Make This Stuff Up*, FAIRFAX COURTS EDITION (Dec.29, 2020) (criticizing the court's action), <https://www.baconsrebellion.com/wp/you-cant-make-this-stuff-up-fairfax-courts-edition/>.

¹⁵² *See* Pines, *supra* note 134, at 81-89 (discussing the history and development of the appearance precept). For further background information, *see* Melinda Marbes, *Reforming Recusal Rules: Reassessing the Presumption of Judicial Impartiality in Light of the Realities of Judging and Changing the Substance of Disqualification Standards to Eliminate Cognitive Errors*, 7 ST. MARY'S J. LEGAL MALP. & ETHICS 238, 257- 72 (2017).

¹⁵³ *See* *R. v. Sussex Justices, ex parte McCarthy* [1924] 1 K.B. 256, 259, discussed in Raymond J. McKoski, *The Overarching Legal Fiction: "Justice Must Satisfy the Appearance of Justice"*, 4 SAVANNAH L. REV. 51, 51-52 nn. 1,2,3, and 7 (2017). The case involved the ethical dilemma of a court clerk who had an association with the law firm in the civil suit. The magistrates in the case declared that they had not, in fact, consulted with the clerk, giving rise to Lord Hewart's memorable phrase. *See also* Anne Richardson Oakes & Haydn Davies, *Justice Must Be Seen To Be Done: A Contextual Appraisal*, 37 ADELAIDE L. REV. 461 (2016) (discussing the genesis and modern application of Lord Hewart's appearance concept).

¹⁵⁴ Although Judge Landis was successful in rescuing and restoring the reputation of American baseball, he was eventually censured by the American Bar Association for

Thus, notwithstanding the associational taints, the appearance concept may have been a serendipitous Anglo-American cross-pollination of ideas.¹⁵⁵

Over the years the “appearance of justice” has become a fundamental, overarching ethical principle in statutes and codes of judicial conduct, far-removed from the common law Blackstonian view that presumed judicial integrity and restricted judicial disqualification to financial interests.¹⁵⁶ The appearance concept is essential to promoting and preserving the public’s trust and confidence in the judicial system and the rule of law,¹⁵⁷ in recognition of the reality that the public’s perception of bias can be as damaging as actual bias.¹⁵⁸

The roots of the appearance concept can also be traced to antiquity—in Roman law, for example, suspicion (of partiality) provided a basis for judicial disqualification.¹⁵⁹ Since 1924, through the persistent efforts of the American Bar Association (ABA) in drafting various versions of the Model Code of Judicial Conduct, the appearance standard has been integral to American law, developing from an aspirational concept to a mandatory ethical responsibility. In tandem with the ABA, Congress enacted various statutes to govern judicial recusal based on the ABA model. In 1972, Congress adopted the Model Code’s appearance standard.¹⁶⁰ The ABA drafter’s notes to the revised standards, however, never explained the appearance standard¹⁶¹ except to say:

having received a monetary commission while also serving as a federal judge. Landis left the federal bench and served for many years as baseball commissioner until his death. See Pines, *supra* note 134, at 75-77 regarding the Judge Landis controversy.

¹⁵⁵ See text accompanying *supra* notes 30-36 regarding the importance of an international legal dialogue.

¹⁵⁶ See, for example, *Dr. Bonham’s Case*, 77 Eng. Rep. 638 (K.B. 1610) (Coke, L.C.J.).

¹⁵⁷ MODEL CODE, CANON 1, r. 1.2 cmt. [1], *supra* note 22, which states, “Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety...” Cmt. [3], *id.*, states that “Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary...”.

¹⁵⁸ See *David v. City & County of Denver*, 837 F. Supp. 1094, 1095 (U.S.D.C. Colo. 1993); Frank, *supra* note 44, at 34-35 (1931); and Raymond McKoski, *Living with Judicial Elections*, 39 U. ARK. LITTLE ROCK L. REV. 491, 516 (2017) (noting that partiality destroys the foundation of the judicial process and can have enormous destructive impact on the public’s trust and confidence in the judicial system); and Pines, *supra* note 134, at 113-16.

¹⁵⁹ See Geyh, *supra* note 2, at 667-68; and Marbes, *supra* note 152, at 257-58 (citing the 530 A.D. Codex of Justinian).

¹⁶⁰ See 28 U.S.C. §. 47, 144, and 455(a) (2018). Section 144, which provides for the automatic disqualification of a jurist by an affidavit process, has been viewed as a failed experiment. See Geyh, *supra* note 2 at 685. Section 455(a) incorporates the ABA’s appearance standard. When section 455 was amended, it ended the so-called “duty to sit,” which was often used by jurists to support the refusal to recuse. Today, the duty to sit is subordinate to the ethical precept of recusal. See Marbes, *supra* note 152, at 86 nn. 66, 93; and Pines, *supra* note 134, at 86 n66.

¹⁶¹ Regarding the theoretical and practical differences between a “rule” and “standard,” see *supra* note 23. The ABA reporter’s notes, see *infra* note 155, at 43, 45, and 47, refer to the provisions as enforceable standards of conduct. The “appearance” mandate or precept is considered herein as a standard rather than a rule, although such nomenclature is largely irrelevant to this article’s analyses.

The general standard is followed by a series of four specific [*per se*]¹⁶² disqualification standards [bias or prejudice, prior connection with proceeding, financial interests, familial relationships regarding party, lawyer, economic impact on a relative and witness] that the Committee determined to be of sufficient importance to be set forth in detail. Although the specific standards cover most of the situations in which the disqualification issue will arise, the general standard should not be overlooked.¹⁶³

As noted by the Supreme Court, most states subscribe to the general over-arching appearance of impartiality standard,¹⁶⁴ which has not escaped criticism.¹⁶⁵ In a prominent case involving a West Virginia state supreme court justice's receipt of substantial campaign contributions, Justice Benjamin fiercely fought attempts for his disqualification in the state proceeding. Selectively quoting Roscoe Pound and Justice Stephen Breyer (luminaries in American law), Benjamin defensively stated: "The very notion of appearance driven disqualifying conflicts, with shifting definitional standards subject to the whims, caprices and manipulations of those more interested in outcomes than in the application of the law, is antithetical to due process."¹⁶⁶ The Supreme Court later concluded that Benjamin's failure to

¹⁶² The Code identifies categorical (*per se*) conditions that require automatic disqualification: personal bias or prejudice; judge's (or other designated persons') relationship or financial interest regarding a party, lawyer, or witness in the proceeding; economic interest (of the judge or other designated persons) in the subject matter; campaign contributions; public (unofficial) statements of the judge (or as a judicial candidate) in the nature of an actual or apparent commitment relevant to the proceeding; and judge's professional or personal involvement with respect to the matter in controversy. See MODEL CODE, r. 2.1(b), *supra* note 22. See also Leslie Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality Might Reasonably Be Questioned*, 14 GEO. J. L. ETHICS 55, 76-102 (2000) (providing examples of potential appearance of impropriety scenarios, including: judicial remarks, prior involvement in a matter, presiding in a case of a former client or client's opponent, professional relationships, claims filed by or against a judge, a judge's personal connection to the proceeding, family relationships, social or business relationships, and campaign contributions).

¹⁶³ See E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 60 (1973). See also *United States v. Pepper & Potter, Inc.* 677 F. Supp. 123, 125 (E.D.N.Y. 1988); and *United States v. Herrera-Valdez*, 826 F.2d 912, 918 (7th Cir. 2016) (section 455(a) is generally understood to encompass the *per se* disqualification categories but also encompasses a broader range of situations where appearance is compromised). The current version of the appearance standard can now be found as a mandatory black-letter rule in rule 2.11 of the MODEL CODE, *supra* note 21.

¹⁶⁴ See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) ("Almost every State... has adopted the ABA's objective [appearance of impropriety] standard.").

¹⁶⁵ See Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411 (2014) (critique by a former state jurist); but cf. M. Margaret McKeown, *Don't Shoot the Canons: Maintaining the Appearance of Propriety Standard*, 7 J. APP. PRAC. & PROCESS 45 (2005) (a strong defense and explanation of the appearance standard by a federal judge).

¹⁶⁶ See *Caperton v. A.T. Massey Coal Co.*, 223 W.Va. 624, 694 (2008).

recuse was a violation of due process.¹⁶⁷ It should be noted, however, that the general appearance standard of recusal in federal and state laws (statutes and codes) represents a more stringent ethical precept than the infrequently applied constitutional (due process) probability-of-bias standard.¹⁶⁸

It is also important to realize that the focus of the ethical standard is on the appearance, not the actuality, of a judge's bias or intent.¹⁶⁹ Citing the reporter Thode's notes¹⁷⁰ about the model code, one judge stressed: "Judicial ethics reinforced by statute exact more than virtuous behavior, they command impeccable appearance. Purity of heart is not enough. Judges' robes must be as spotless as their actual conduct."¹⁷¹ The objective appearance assessment is undertaken, not from the challenged or reviewing jurist's perspective or values, but through the external lens of an imaginary third person, the reasonable observer. Thus, the reasonable observer in judicial disqualification is metaphorically similar to the reasonable observer that was applied in religious endorsement caselaw—a fictitious, jurisprudential creation, employed in an abductive reasoning process to interpret (objectively) external evidence regarding the public's perception (subjective) of the government's words or conduct.¹⁷² As Thode's notes make clear: "Any conduct that would lead a reasonable

¹⁶⁷ *Caperton*, 556 U.S. 868.

¹⁶⁸ See Melinda Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 824 (2015) (constitutionally based recusal is of lesser practical importance); and *Caperton*, 556 U.S. at 887-888 (due process demarks only the outer boundaries of judicial disqualification; states are free to employ more rigorous standards). In *Caperton*, *supra* note 164, the Court applied a probability of actual bias standard. The application of mandatory ethical standards to the Supreme Court has provoked much controversy, debate, and uncertainty. See, e.g., Marbes, *supra* note 152, at 288 n.228; and VIRELLI, *supra* note 24, at 16 ("...federal recusal law has adopted a Bractonian view of recusal as a bulwark against suspicious judging, rather than the common law approach of deference to judicial integrity and professional judgment. But the Supreme Court has not embraced this view of recusal with regard to its own members. The justices have a long history of involvement in controversial situations implicating recusal-related issues."). In response to significant media coverage regarding alleged ethical lapses concerning Justices Thomas and Alito, as well as the Court's prolonged and unexplained failure to adopt a binding code of conduct for the Court, the Senate Judiciary Committee voted (along party lines) for a statutory code of conduct that would govern the ethical conduct of the Court's justices. See Carle Hulse, *Senate Panel Approves Supreme Court Ethics Bill With Dim Prospects* N.Y. TIMES (July 20, 2023) <https://www.nytimes.com/2023/07/20/us/politics/senate-supreme-court-ethics-rules.html>; see also *supra* note 20; and Devin Dwyer, *Supreme Court pivots to abortion, guns, and death penalty as public approval slides*, ABC NEWS (Oct. 3, 2021) (noting 40% approval rating in Sept. 2021, down precipitously from a ten-year high of 58% in 2020), <https://abcnews.go.com/Politics/supreme-court-pivots-abortion-guns-death-penalty-public/story?id=80156687>; and Donald Ayer, *The Supreme Court has gone off the rails*, N. Y. TIMES, Oct. 4, 2021, <https://www.nytimes.com/2021/10/04/opinion/supreme-court-conservatives.html>.

¹⁶⁹ Justice Markman, for example, noted the confusion regarding the distinct actual bias and appearance standards. See *People v. Aceval*, 782 N.W. 2d 204, 205-206, 486 Mich. 955, (2010) (Markman, J., concurring). Justice Markman asserted that the appearance of impropriety standard was vague and formless. See also *infra* notes 205 and 206.

¹⁷⁰ See THODE, *supra* note 163.

¹⁷¹ See *Hall v. Small Business Adm'n*, 695 F.2d 175, 176 (5th Cir. 1983).

¹⁷² Cf. Hill, *supra* note 105, at 1410. Hill's reasonable observer heuristic provides that the judge does not put herself in the hypothetical reasonable person's shoes. The judge

man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification."¹⁷³ Often overlooked or under-appreciated in recusal cases¹⁷⁴ is the fact that the objective appearance test is not, nor should be, interpreted as a reflection of a jurist's actual integrity, intent, or competency. Appearance-based recusal is not a personalized assessment. For example, in appellate proceedings, when recusal review results in the reassignment of a matter to a different judge, there is commonly a concluding comment of assurance that the decision is not meant to be viewed as impugning the integrity or competency of the challenged jurist.¹⁷⁵

B. THE APPEARANCE STANDARD OF RECUSAL IN PRACTICE

A leading treatise's survey of judicial disqualification in the United States concludes that disqualification jurisprudence is replete with inconsistencies.¹⁷⁶ Foreign commentators have expressed similar concerns about the difficulties encountered in consistently applying their apparent bias standard, particularly in analytically close or marginal cases.¹⁷⁷ The U.S. appearance recusal standard, however, is distinct from its Anglo counterparts in two particular respects. First, there is an analytical opaqueness of U.S. appearance-based recusal decisions. A random examination of many opinions from federal and state courts¹⁷⁸ reveals a remarkable jurisprudential similarity—an analytically vanilla-like, *pro forma* incantation of stock terms and phrases often preceding a detailed factual narrative and a generalized conclusion. In examining the structure and content of these disqualification decisions, one is reminded of the sociologist Emil Durkheim's observation about a "collective consciousness" that is manifested by elite problem-solving groups.¹⁷⁹ The shared feelings, beliefs, and attitudes of such societies reflect shared cognitive patterns. This groupthink phenomenon facilitates the transmission of knowledge, principles, and norms of the collective group.¹⁸⁰ One should be mindful that the shared (perhaps

considers as much information as possible to reconstruct intent or purpose, namely, the social meaning of the government's message. Hill's reasonable observer is interpreted as a "reader of social meaning." The distinction is a subtle one.

¹⁷³ See THODE, *supra* note 163, at 60.

¹⁷⁴ This perspective contrasts with the reasonable man test, for example, in negligence cases, where the focus is on the reasonableness of the actor's conduct.

¹⁷⁵ See, e.g., *In re Bernard*, 31 F.3d 842; *In re School Asbestos Litigation*, 977 F.2d 764, 782 (3d Cir. 1992); Hall, *supra* note 163, at 180. See also Pines, *supra* note 134, at 120-24 (stressing the public, not personal, aspect of the standard).

¹⁷⁶ See FLAMM, *supra* note 21, at § 1.5, ¶ 16 (inconsistencies suggest the absence of a sound theoretical base and raise troubling questions for a litigant).

¹⁷⁷ See Julia Hughes & Dean Phillips Bryden, *Refining the Reasonable Apprehension of Bias Test: Providing Judges Better Tools for Addressing Judicial Disqualification*, 36 DALHOUSIE L.J. 171, 173 (2013) (a Canadian perspective).

¹⁷⁸ FLAMM, *supra* note 21, a treatise that provides a panoramic topical exposition of U.S. recusal caselaw.

¹⁷⁹ See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 41-43 and 397 (1947).

¹⁸⁰ See EMILE DURKHEIM, *ON MORALITY AND SOCIETY* (Robert H. Bellak ed. 1973), quoting Durkheim on concepts: "Concepts...are always common to a plurality of men. They are constituted by means of words, and neither the vocabulary nor the grammar of language is the work or product of one particular person. They are the result of a collective elaboration, and they express the anonymous collectivity that employs them." *Id.* at 15.

unreflectively habitual) jurisprudential cognitive patterns may serve to promote an institutional solidarity, defensively (unintentionally) maintaining a collective value system and influencing others about what is good for the system. Naturally, this sociological viewpoint is speculative, but it deserves some consideration when evaluating the American recusal process, especially given the reality that, as has been noted, recusal can be perceived (wrongly) as an attack on judicial integrity and ethics (institutional and individual), which may prompt a self-defensive survival reflex.¹⁸¹

Relevant to the analytical opaqueness aspect is the existence of what one commentator has identified as an obsession with factual recitation, that is, an “allure of factiness.” In U.S. judicial decisions, this approach serves a strategy of appearing judicially neutral and modest through a reliance on heavily-steeped factual narrations that reach a seemingly logical normative conclusion.¹⁸² Another commentator posits that using facts may be a risk-averse smokescreen to reject recusal requests.¹⁸³ As noted, many recusal opinions, after a recitation of the standard stock recusal principles, engage in an extensive recitation of facts to analyze the hypothesized perceptions of an ill-defined metaphorical reasonable observer, thus providing some plausibility to the “facy” theory.¹⁸⁴ This approach is comparable to the quondam reasonable observer-endorsement test in religious establishment-endorsement cases, which was also highly fact-specific.¹⁸⁵ In such circumstances, factual details and the recitation of stock legal principles often fail to provide analytical clarity. It is as if one cannot see the forest from the trees. Additionally, the excessive focus on facts can be viewed as implicating a cognitive bias -- the conjunctive fallacy -- in which a decision-maker’s deliberative System 2 process¹⁸⁶ uses abundant details of an event or circumstance to provide support for a higher probability assessment (for example, the denial of a recusal motion).¹⁸⁷ While disqualification cases are factually unique and understandably require careful factual elucidation, the allure of excessive fact-finding should not divert attention from the fundamental concerns of analytical clarity and transparent reasoning.

The more significant concern about the application of the U.S. appearance standard of recusal is the transmogrification of the pivotal verbal metric (“might”), undermining both the letter and spirit of the recusal standard. There appears to be a lexical insouciance about the subtle semantic shifting in appearance-based

¹⁸¹ See text accompanying *supra* notes 174 and 175 (ethical appearance standard is not personal and is not meant to connote actual bias).

¹⁸² See Allison Orr Larsen, *Judging Under Fire and the Retreat to Facts*, 61 WM. & MARY L. REV. 1083, 1089-92, and 1105-06 (2020).

¹⁸³ See Hughes & Bryden, *supra* note 177, at 179.

¹⁸⁴ *Consider*; e.g., *United States v. Saleme*, 164 F. Supp. 2d 49, 84-85 (D. Ct. Mass. 1998) (lengthy recitation of facts in support of judge’s decision not to recuse even though the opinion indicates that the government informed the judge that it believed a reasonable person would, in the circumstances, question the judge’s impartiality; judge admits that it may be debatable that a reasonable person would question his impartiality); *People v. Grieppe*, 17-CV—3706 (CBA0(JO) (E.D.N.Y. Jan. 8, 2018) (extensive recitation of facts regarding conflicting accounts of a settlement conference).

¹⁸⁵ See, e.g., *Elewski v. City of Scranton*, 123 F.3d 51 (2d Cir. 1997), discussed in Sachs, *supra* note 113.

¹⁸⁶ See Thornburg, *supra* note 45.

¹⁸⁷ *Consider* Peer & Gamliel, *supra* note 54, at 115-16 (discussing decisional biases).

disqualification caselaw that is hard to explain.¹⁸⁸ For the present purposes, it is sufficient to note that a leading commentator on judicial recusal identified an important semantic quandary when he asked whether the standard (“impartiality might reasonably be questioned”) embodies *possibility* or *probability*.¹⁸⁹ That distinction, focusing on the modal verbs “*might*” and “*would*,” is a critical one. It presents a jurisprudential dilemma about semantics that has been addressed in greater analytical detail by various common law countries. Their epistemological discussions will provide guidance in the reconceptualization of the recusal heuristic.¹⁹⁰

To understand how U.S. appearance-based disqualification manifests in practice, it is helpful to identify preliminarily the major aspects, procedural and substantive, involved in disqualification adjudications.

1. Procedural Preliminaries: Allocation of Benefit and Burden

Inasmuch as impartiality is a foundational value in our justice system, a disqualification challenge represents a weighty and an emotionally precarious challenge to the judicial system and the judge. Given the gravity of the matter, strict guardrails have been established to prevent frivolous claims or tactical manipulation of the judicial process. These procedures impose a burden (on the petitioner) and a benefit (on the jurist).

A petitioner who claims actual or apparent bias must present a claim with factual specificity. Vague, conclusory, unverified, or unsupported allegations or feelings are insufficient to satisfy the petitioner’s evidentiary hurdle. Thus, general allegations of animus, as well as speculation or innuendo, cannot satisfy the evidentiary burden. Courts will reject recusal challenges when they are based on “mere” conjecture or suspicion.¹⁹¹ As one court has noted: “...disqualification should not be allowed on the bases of rumors, innuendos, unsupported allegations, or claims that like blind moths, flutter aimlessly to oblivion when placed under the harsh light of full facts.”¹⁹²

¹⁸⁸ See *infra* §§ II(B)(3) and IV(B)(1).

¹⁸⁹ See FLAMM, *supra* note 21, at §§ 11.4 and 11.5.

¹⁹⁰ See *infra* § IV(B).

¹⁹¹ See, e.g., *Com. ex rel. Armor v. Armor*, 398 A.2d 173, 174 (Pa. Super. 1978) (bias allegation, without supporting evidence, will inevitably result in an unsuccessful recusal challenge); *Tracey v. Tracey*, 903 A. 2d 679 (Conn. 2006) (vague, unverified assertions of opinion, conjecture or speculation insufficient). When rejecting mere conjecture or suspicion, courts are fond of using another metaphorical expression, “Caesar’s wife.” Such a comment can be a simplistic response in avoiding a more penetrating analysis of a bias claim, which requires proof of a reasonable basis. There is a distinction between a claim that is based on “mere” suspicion as opposed to “reasonable” suspicion. See, e.g., *United States v. Nixon*, 267 F. Supp. 3d 140 (D.D.C. 2017); *In re United States*, 666 F. 2d 690 (1st Cir. 1981); and *In re Allied Signal*, 891 F.2d 967 (1st Cir. 1989). The Caesar metaphor, however, can act as a thoughtful (albeit sexist) reminder that the judicial system must be kept, like Caesar’s wife, above reproach.

¹⁹² *Murray v. Internal Revenue Serv.*, 923 F. Supp. 1289, 1293 (D. Idaho 1996). The evidential burden is similar in religious endorsement caselaw. See *Elewski v. City of Syracuse*, 123 F. 3d 51 (2d Cir. 1997) (regarding the display of a creche, the court notes that Establishment cases required factual specificity in relation to the particular context).

The petitioner faces another burden. A challenge to a jurist's actual or apparent impartiality must meet the obstacle of a presumption that strongly benefits the challenged jurist.¹⁹³ The presumption is long-standing, recognized in the eighteenth century as vital to the common law system, which adopted a restrictive approach to disqualification.¹⁹⁴ Disqualification caselaw in the United States routinely asserts that a jurist is presumed to be competent and to possess integrity.¹⁹⁵ The burden to disqualify a judge and overcome the presumption is viewed as a heavy one.¹⁹⁶ Looking at the presumption from an angle other than competency and integrity, one court started its disqualification analysis with a "presumption against disqualification," which arguably reflects the presumption's true impact.¹⁹⁷ Similarly, another jurist has observed that great deference must be given to a trial judge facing a recusal challenge, a sentiment that permeates disqualification jurisprudence.¹⁹⁸ The presumption is a significant hurdle for the litigant.

Aside from the issue of providing a challenged jurist with a procedural advantage in a recusal challenge, the presumption generates other concerns. Judge Easterbrook noted:

Yet, drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under sec. 455(a) into a demand for proof of actual impropriety. So although the court tries to make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.¹⁹⁹

This jurisprudential concern leads to another important issue. What is the actual effect of the presumption? Does it tilt the scales of justice in the jurist's favor? For example, is it applied at the initial stages of litigation or throughout the litigation, thus providing a tactical advantage for the judge and a procedural burden on the petitioner? There is no clarity in recusal caselaw. One suspects that the presumption operates to benefit the jurist throughout the disqualification litigation. Presumptions can be conclusive or rebuttable. Presumptions are created for reasons

¹⁹³ See *FLAMM*, *supra* note 21, at § 4.5 regarding the application of the presumption in disqualification cases; and Raymond J. McKoski, *supra* note 165, at 423 (referring to the "almost impenetrable presumption of impartiality").

¹⁹⁴ See Marbes, *supra* note 152, at 259, 266-72 (noting a divergence in opinion regarding the strength of the presumption, with formalists favoring a strong one, and realists favoring a weaker one). See also Pines, *supra* note 134, at 106-09 (critical assessment of the presumption, particularly in the context of "objective" self-assessments of impartiality).

¹⁹⁵ See *In re Estate of Hayes*, 185 Wash. App. 567, 342 P.3d 1161, 1182 (Wash. App. 2015).

¹⁹⁶ See *State v. Kofoed*, 817 N.W.2d 225 (Neb. 2012).

¹⁹⁷ See *Nixon*, 267 F. Supp. 3d at 147.

¹⁹⁸ See, e.g., *Commonwealth v. White*, 589 Pa. 642, 677 (2006) (Cappy, J., dissenting). See *FLAMM*, *supra* note 21, at § 13.4 (strong deference to the judge's view).

¹⁹⁹ *Matter of Mason*, 916 F.2d 384, 386 (7th Cir. 1990). See also Pines, *supra* note 134, at 106-09 (criticizing the unreflective application of the presumption in view of the inadequacy of procedural safeguards and inherent unfairness of recusal processes; recalibration and procedural reform advocated). See also Marbes, *supra* note 152 (recommending a contextual recalibration of the presumption).

of convenience, fairness, or policy.²⁰⁰ One view is that, if evidence is produced to rebut the presumption, the presumption is utterly destroyed and disappears (the so-called “bursting bubble” theory)²⁰¹ even if the decisionmaker disbelieves the countervailing evidence.²⁰² The weight of authority is that the presumption, however, does not have any effect on the persuasion burden; it merely shifts the production burden; litigants challenging a jurist’s qualification must still prove their case.²⁰³ In the reasonable observer context, commentators have been critical of the application of the presumption, suggesting that the presumption be re-considered and re-calibrated.²⁰⁴

2. *The Reasonable Observer --The Enigmatic Wisdom Whisperer*

To understand what and how the reasonable observer perceives, it is necessary to ascertain who the reasonable observer represents. A transcribed administrative conference discussion between two justices of the Michigan Supreme Court, regarding Michigan’s then recently amended rules of disqualification,²⁰⁵ highlights a conceptual consternation:

Justice Hathaway: If there is an appearance of impropriety, then you cannot sit on the case.

Justice Young: And from what perspective is the appearance of impropriety? Is it a subjective standard? Is it an objective standard?

Justice Hathaway: I haven’t thought through all of that to be honest with you, to answer you here.²⁰⁶

The justices’ perplexity is understandable because, in assessing the appearance of impropriety, a jurist is placed in an awkward, perhaps cognitively untenable, position. As one jurist observed: “An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system.”²⁰⁷ In quoting from another case, Judge Kozinski remarked: “Because the judge must apply the disqualification standard [of section 455(a)] both as its interpreter

²⁰⁰ See Fleming James, Jr., *Burdens of Proof*, 47 U. VA. L. REV. 51, 65 (1961). See also C. Okpaluba & L. Juma, *The Problems of Proving Actual or Apparent Bias: An Analysis of Contemporary Developments in South Africa*, 14 POTCHEFSTROOMSE ELECTRONIC L.J. 13, 23-24 (2011) (identifying the rationales for the presumption).

²⁰¹ See Charles M. Yablon, *A Theory of Presumptions*, 2 LAW, PROBABILITY AND RISK 227, 229 n.7 (2003).

²⁰² See James, *supra* note 200, at 67.

²⁰³ *Id.* at 68 and 70 (noting also that once a presumption comes into play, the tendency is to send the matter to the jury and invite it to weigh it in some vague manner).

²⁰⁴ See Marbes, *supra* note 152, at 298-302; and Hill, *supra* note 105, at 1449-52.

²⁰⁵ See MCR 2.003. The amendment incorporated the new appearance standard.

²⁰⁶ See *Pellegrino v. Ampco Systems Parking*, 485 Mich. 1134, 1155 (2010). The exchange was contained in a prior formal statement by Justice Young (“Response to Justice Kelly and Justice Hathaway”), notwithstanding the fact that Justice Young stated that he was not participating in the underlying case. Justice Young’s position was that the amendment to the MCR 2.003, *id.*, was unconstitutional.

²⁰⁷ *Mason*, 916 F.2d at 386.

and object, the general standard is even more difficult to define. [There is a] philosophical dilemma created by this objective-subjective conundrum.”²⁰⁸

From the theoretical perspective at the legal baseline, however, courts have recognized that the reasonable observer should not be the judge—the reasonable observer must be a lay person.²⁰⁹ One court expanded the traditional perspective by stating that “the question of reasonableness ought to be approached from the viewpoint of the party to the action, not of that famous fictitious character, the reasonable man.”²¹⁰ Since the observer’s perspective is theoretically an objective one, it should not embody the personal values, philosophy, or viewpoint of the jurist tasked with applying the standard, especially if the jurist is the object of the ethical inquiry. This approach is consistent with Anglo jurisprudence.²¹¹ The difficulty, however, is that the reasonable observer remains an abstraction and inevitably leads to a deeper dilemma, *i.e.*, what are the attributes of the imaginary reasonable observer? Analytical clarity is problematic.²¹²

In the negligence field where the reasonable person came to maturity, Dean Prosser remarked that the level of knowledge, including minimal requirements, ascribed to the reasonable person is one of the most difficult issues to assess.²¹³ In disqualification cases, the commonplace expressions are that the reasonable observer is one who is “informed” of all the surrounding facts and circumstances; a thoughtful person, but not hypersensitive or unduly suspicious; one who is knowledgeable and objective.²¹⁴ The reasonable observer is viewed as “the average person on the street.”²¹⁵

²⁰⁸ *Bernard*, 31 F.3d at 844, quoting *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977).

²⁰⁹ *See Taylor-Boren v. Issac*, 143 N. H. 261, 268, 723 A.2d 577 (1998); *United States v. Voccola*, 99 F.3d 37, 42-43 (1st Cir. 1996).

²¹⁰ *See Roberts v. Ace Hardware, Inc.* 515 F. Supp. 29, 31 (N.D. Oh. 1981). *See also Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1984) (“It is not a question of how the judge feels; it is a question of what feeling resides in the affiant’s mind and the basis for such feeling.”). *Cf. Matter of Demjanuk*, 584 F. Supp. 1321, 1329 (N.D. Oh. 1984) (disagreeing with the approach in *Roberts, id.*, and urging that a strict construction approach to recusal is essential to prevent abuse and to assure the orderly functioning of the judicial system); and *Eastside Baptist Church v. Vicinanza*, 269 Ga. App. 239, 241, 603 S.E. 2d 681 (Ga. App. 2004) (reasonable perception is not based upon the perception of either the interested parties or their lawyer-advocates seeking to judge-shop and obtain a trial advantage); and *Davies & Oakes, infra* note 351 (suggesting a more nuanced broader perspective to include the subjects of the judicial process).

²¹¹ *See infra* section III regarding the “double reasonableness” heuristic in the common law countries identified herein.

²¹² *See Choper, supra* note 113, at 510-11 (criticizing the subjectivity and lack of analytical clarity in Justice O’Connor’s then-prevailing endorsement test and highlighting the lack of definitional clarity of the reasonable observer heuristic that results in *ad hoc*, inconsistent, fact-laden rulings).

²¹³ *See PROSSER & KEETON, supra* note 11 at §32, ¶¶ 182-85.

²¹⁴ *See, e.g., Mathis v. Huff & Puff Trucking, Inc.* 787 F.2d 1297, 1310 (10th Cir. 2015) (reasonable person as a well-informed, thoughtful, objective observer, rather than hypersensitive, cynical, and suspicious). Caselaw reveals gradations of the “informed” attribute: *Mason*, 916 F.2d at 386 (informed and thoughtful); *Atkins v. United States*, 2018 U.S. Dist. LEXIS 63728 (Ill. D. Ct. 2018) (well-informed); and *In re United States*, 441 F.3d 44, 57 (1st Cir. 2006) (fully informed). *See also FLAMM, supra* note 21, §§ 15.1 to 15.3 and 18.1-18.6 and cases cited therein.

²¹⁵ *See, e.g., Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980); *Tyler v. Purkett*, 413 F.2d 696, 704 (8th Cir. 2005).

Difficulties arise when the “knowledge” and “fully informed” aspects of the reasonable observer are examined more closely. The definitional quandary brings to mind the differing views between Justices O’Connor and Stevens in *Capital Square* about how much knowledge (of the history and context of the community) should be imputed to the reasonable observer.²¹⁶ Notwithstanding the moniker of the reasonable observer as an “average Joe,” the observer has been identified in disqualification cases as someone who is outside the judicial system or even unfamiliar with it, one less inclined than the judiciary itself to credit a judge’s impartiality.²¹⁷ These characterizations may reflect an attempt to emphasize a more visible, confidence-inspiring, wall of separation between the observer and the jurist/judicial system. Clearly, black-letter law repeatedly states that the reasonable observer is informed, not uninformed, knowledgeable of and understands the facts and circumstances of the matter.²¹⁸ But what do these attributes mean? Some cases have imposed a responsibility on the hypothesized observer to examine the facts, the record, even the law and judicial practices,²¹⁹ going so far as to impose a quasi-legalistic perspective onto the reasonable observer.²²⁰

Other issues about the knowledge and point of view of the “fully informed and objective” observer arise. Often, such facts may be hidden from public view and are not readily ascertainable—for example, the association of a judge’s law clerk with one of the parties or counsel, the potential economic interest or civic activities of a judge’s spouse, an *ex parte* conversation, a financial gift or contribution, or a troubling past social media post. Such “private” facts may indeed be relevant to an appearance-based challenge. Although caselaw states that the recusal inquiry is tied to knowledge of facts in the public domain,²²¹ appearance-based recusal

²¹⁶ See *Capital Square*, 515 U.S. 753, and generally §1(C) *supra*.

²¹⁷ See *Mathis*, 787 F.3d at 1310, citing *United States v. DeTemple*, 162 F.3d 279, 287 (3rd Cir. 1998); and *Herrera-Valdez*, 826 F.2d at 918-919.

²¹⁸ *Hayes*, 185 Wash. App. at 607 (reasonable person is assumed to know and understand all the relevant facts).

²¹⁹ See *In re Sherwin-Williams*, 607 F. 3d 474, 478 (7th Cir. 2010); *Klayman v. Judicial Watch*, 278 F. Supp.3d 252, 255 (D.D.C. 2017); *Nixon*, 267 F. Supp. 3d at 147-148.

²²⁰ See *In re Drexel Burnham Lambert*, 861 F.2d 1307, 1313 (2d Cir. 1989) (stating “We disagree with our dissenting colleague’s statement that recusal based on an appearance of impropriety under sec. 455(a) requires us to judge the situation from the viewpoint of the reasonable person and not from a purely legalistic perspective. Like all legal issues, judges determine appearance of impropriety—not by considering a straw poll of the only partly informed man-on-the-street would show – but by examining the record facts and the law, and then decides whether a reasonable person knowing and understanding all the relevant facts would recuse the judge...”.) It is not clear whether this case’s legal context (a writ of mandamus) heightened the reasonable person standard. Cf. *In re School Asbestos*, 977 F.2d 764 (writ of mandamus context without any apparent heightened standard). The ethical challenge in *Drexel-Burnham* focused on the potential financial interest of the judge’s spouse; the benefit of the doubt was accorded to the challenged jurist. The dissent gave a detailed recitation of the facts and concluded that, coupled with the heightened public awareness, the financial interest of the spouse was not remote.

²²¹ See *In re Fifty-One Gambling Devices*, 298 S.W.3d 768 (Tex. 2009); and *Smulls v. State*, 71 S.W. 3d 138 (Mo. 2002) (a reasonable person is one who knows all that has been said in the presence of a judge; recusal assessed with respect to multiple allegations of newspaper articles and trial judge’s interaction with another judge; dissent found a sufficient basis for the appearance of impropriety).

may require the examination of not readily ascertainable facts. These private facts eventually become public when they are made part of the official record.²²² A legitimate concern arises, however, when such private facts represent insider information and are used to boot-strap a refusal-to-recuse decision.²²³

Lastly, against this tableau of analytically diverse perceptions of the reasonable observer, one returns to the fundamental issue of what the reasonable observer heuristic is (or is not) capturing. Philosophically, there has always been a tension in how the reasonable person heuristic is applied. As noted previously,²²⁴ should it simply embody the “average” of a society? Or is there a normative or idealized component to the construct? The answer may be both.²²⁵

Justice O’Connor’s vision of the reasonable observer (in religious endorsement cases) had always been a challenging one. In *Capital Square*, Justice O’Connor disavowed any focus on “actualities,” preferring to base her heuristic on a “collective standard,” similar, she said, to the reasonable person in the law of torts.²²⁶ Justice O’Connor acknowledged that the fictional metaphor in tort represents a “community ideal of reasonable behavior.”²²⁷ Prosser also described the reasonable person as the “personification of a community ideal.”²²⁸ The personification, however, goes further. From Justice O’Connor’s perspective, the reasonable observer was viewed as aware of the history and context of the community and the forum in which the religious display appears.²²⁹ In disavowing consideration of “any person” or “some people,”²³⁰ Justice O’Connor applied a metaphor that relies on both an average and an idealized-normative personification of the community. The construct is

²²² See *Hall*, 695 F.2d 175 (law clerk’s participation in a conference); *State v. Bard*, 181 A.3d 187 (Me. 2018) (judge’s *ex parte* communications); see also *Liljeberg*, 486 U.S. 847 (judge’s lack of actual knowledge regarding a conflict).

²²³ *Consider*; e.g., *Leland Stanford Junior University v. Superior Court*, 173 Cal. App. 3d 403 (1985) (judge’s character and reputation for impartiality are among facts that the average person on the street would consider). Such a “fact” may be used to fortify the presumption of impartiality and integrity. *Consider also Nixon*, 267 F. Supp. 3d at 148 n.7 (judge need not accept facts from petitioner and can contradict them with facts drawn from his own personal knowledge).

²²⁴ See *supra* § I(D)(1) regarding philosophical polarities.

²²⁵ See *Miller & Perry*, *supra* note 58 (advocating a normative approach); *Jaeger*, *supra* note 65, at 934-938 (stating that lay people view the reasonable person in partially empirical terms); *Zorzetto*, *supra* note 74, at 144-45 (stating that legal norms are normative-centered, not empirical); *Tobia*, *supra* note 67 (recommending that “reasonable” be viewed as a hybrid concept).

²²⁶ *Capital Square*, 515 U.S. at 779.

²²⁷ *Id.* at 780.

²²⁸ PROSSER & KEETON, *supra* note 11, at § 32, ¶ 175.

²²⁹ *Capital Square*, 515 U.S. 753. In a school prayer case, Justice O’Connor saddled the objective observer with an acquaintance of “the text, the legislative history, and implementation of the statute.” See *Jaffree*, 472 U.S. at 76.

²³⁰ *Capital Square*, 515 U.S. at 779-80. As noted, see *supra* notes 117-18 and accompanying text, the Supreme Court in *Kennedy*, 142 S.Ct. 2407, recently abandoned the reasonable observer approach in favor of a history-and-tradition test, an approach that is potentially less subjective and more factually oriented, as well as perhaps more philosophically compatible with the Court’s conservative majority.

fundamentally theoretical and abstract, intuitively (i.e., subjectively) based, with no apparent connection to an empirical thread.²³¹ The reasonable observer is, in effect, an abstract portrait painted with a broad brush.²³²

The application of Justice O'Connor's formulation of the metaphorical reasonable person/observer in Establishment jurisprudence revealed some underlying infirmities of the heuristic. Notwithstanding the demise of Justice O'Connor's heuristic, the critical questions asked by commentators remain relevant for our purposes: Whose perception controls?²³³ If the reasonable person represents an "average," what is it an average of?²³⁴ With respect to such concerns, the application of the heuristic in religious endorsement cases had been criticized as being both under-inclusive and over-inclusive.²³⁵ Echoing Justice Stevens' assessment in *Capital Square*,²³⁶ such commentators opined that the reasonable

²³¹ See Hill, *supra* note 105, at 1440 ("the reasonable observer's judgments are not statistical, empirical or otherwise derived from what a majority of people might do..."). The reasonable person fundamentally presents a question of law. *Id. Consider, Howard*, 257 A. 3d 1217, 1233-39 (Pa. 2021) (Wecht, J., concurring) (deploring the amorphous moralizing "common sense of the community" standard in the context of a conviction of endangering the welfare of a child, and pragmatically asking what evidence is required to demonstrate a community's norms or even how to define the relevant community). See also Davies & Oakes, *supra* note 60, at 121-23, 142-43 (noting the difficult issue regarding empirical evidence to assess the intuitive perceptions of the public regarding the legitimacy of the judicial process). Consider also Susan J. Becker, *Public Opinion Polls and Surveys as Evidence: Suggestions for Resolving Confusing and Conflicting Standards Governing Weight and Admissibility*, 70 OR. L. REV. 463 (1991) (noting that courts have been increasingly receptive to the use of survey evidence and have sought guidance on issues regarding public policy and community standards; litigants have preferred survey results when the public's belief or perception is at issue, *id.* at 472-473, citing *Zippo Manufacturing Co. v. Rogers Imports, Inc.* 216 F. Supp. 670, 683 (S.D.N.Y. 1963)); Jeffrey Bellen and Andrew Guthrie Ferguson, *Trial by Google: Judicial Notice in the Information Age*, 108 NW. U. L. REV. 1137 (2014) (addressing the rapidly emerging judicial phenomenon of courts using judicial notice rules to bring Internet data into the courtroom; authors propose a framework and process); and FLAMM, *supra* note 21, § 18.4 (polls and surveys generally disfavored in judicial disqualification cases).

²³² Consider Thornburg, *supra* note 45, at 1616 (judges tend to favor intuitive rather than deliberative faculties); and Cass R. Sunstein, *Some Effects of Moral Indignation in Law*, 33 VT. L. REV. 405, 410 (2009) (discussing theories of cognition, author observes that sometimes intuition replaces effort and analytical reasoning and may be influenced by automatic biases); and Atrill, *supra* note 103, at 283 (from a common law perspective, author criticizes the judicial application of the hypothetical observer perspective as "impressionistic" with respect to the imputation of knowledge and the failure to consider competing policy interests).

²³³ See Baude & Sachs, *supra* note 19, at 1091 (noting that sometimes a fundamental issue in interpretation is whether the author's or the readers' perspective controls).

²³⁴ See Jaeger, *supra* note 65, at 900 (asking the fundamental question regarding the identification of the empirical reasonable person).

²³⁵ In the context of religious endorsement cases, see Choper, *supra* note 113, at 533-35; and Hill, *supra* note 60, at 517-22 (regarding the identification of consensus and the dangers of generalizing).

²³⁶ See text accompanying *supra* notes 108 and 109. See also *infra* notes 351 and 352, which identify commentaries that recommend a more nuanced and flexible heuristic. Regarding the issue of a majoritarian perspective, vis-à-vis the reasonable observer heuristic, one is reminded of the Supreme Court's (plurality) opinion acknowledging the

observer heuristic often favored a majoritarian point of view; it could be insensitive to non-majoritarian or minority perspectives (cultural and individual). Another commentator, Paula Abrams, had said that the reasonable observer is a formalist characterization, devoid of real human reactions, an empty suit that lacks humanity, a standard that undermines the value of inclusion.²³⁷ It is in this respect that the reasonable observer heuristic presents a significant qualitative difference regarding its application in Establishment and disqualification cases. Establishment-endorsement cases inevitably involve the application of the heuristic in relation to particular constitutional values.²³⁸ Constitutional terrain is simply different – due process and religious liberty, for example, involve concerns and values distinct from the subject matter of litigation in which recusal is raised.²³⁹ Thus, it is important to consider the context of the recusal challenge when applying the heuristic’s requirement of reasonableness.²⁴⁰ In disqualification cases, for example, the factual context of the recusal challenge is unrestricted and can be wide-ranging. Impartiality challenges can be linked to many factual variables: religion, gender, race, sex, ethnicity, and political issues. Despite the contextual differences, as in endorsement cases, there is always the danger of an anti-majoritarian bias or insensitivity seeping into disqualification assessments. In a multi-cultural society, the reasonable observer in disqualification cases should not be considered in majoritarian or statistical terms, even if such an endeavor were possible. Disqualification cases are qualitatively distinct in context because the precept of judicial impartiality, and the appearance thereof, are values that are foundational to the rule of law and the decisionmaker’s (and judicial system’s) integrity and credibility. In short, the interpretation and application of “the reasonable observer” heuristic, integral to the text of the ethical disqualification mandate, require a cautious, customized, and contextually sensitive approach.

Metaphors (like the reasonable person or observer) are meant to assist us in thinking and reasoning.²⁴¹ They expand our perceptual horizons. In law,

need to protect “discrete and insular minorities.” See *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); and David Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251 (2010).

²³⁷ See Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1538-39, 1547 (2010). Interestingly, the Court’s recent history-and-tradition approach, see *supra* note 117, may make constitutional analysis in Establishment cases more abstract or impersonal. The unanswered question is whether contemporary observations and sensibilities will play any theoretical or evidential significance in the implementation of the new test. If so, how? Will the new history-and-tradition paradigm in Establishment cases minimize or disregard the reasonable beliefs, interests, and sensitivities of reasonable observers in a multi-cultural society? Will such views even be considered?

²³⁸ See Choper, *supra* note 113, at 519-20 (different constitutional issues may raise distinct doctrinal problems).

²³⁹ *Id.* at 523 n. 120. See also Zorzetto, *supra* note 67 (analyzing the importance of context).

²⁴⁰ See *supra* § I(D)(4), regarding context. See also Hill, *supra* note 105, at 1412 n.19 and 1418-21 (noting that the reasonable observer standard may have application outside the Establishment Clause context).

²⁴¹ Paul H. Thibadeau & Lea Boraditsky, *Metaphors We Think With: The Role of Metaphor in Reasoning*, 6(2) PLoS ONE 2011, available at <https://doi.org/10.1371/journal.pone.0016782> (published Feb. 23, 2011). Authors note that metaphors are incredibly pervasive and fundamental to everyday discourse; it is estimated that English speakers

metaphorical devices should serve to promote rationality, analytical predictability, and the appearance of adjudicatory fairness. In the analysis and application of the reasonable observer metaphor in recusal caselaw, however, the lack of the heuristic's clarity exposes a troubling uncertainty about the "wisdom whisperer".

3. *Semantics and the Spectrum of Belief*

As Mephisto advised in *Faust*: "Put your trust in words/ They'll guide you safely past doubt and dubiety."²⁴² Similarly, one finds another literary character, Alice in Wonderland, created years after *Faust*, raising a fundamental linguistic dilemma with Humpty Dumpty. In response to Humpty Dumpty's assertion that "When I use a word it means just what I choose it to mean – neither more nor less," a puzzled Alice says: "The question is whether you can make words mean so many different things."²⁴³ An examination of disqualification jurisprudence in the United States reveals the wisdom of that observation.²⁴⁴

The over-arching disqualification²⁴⁵ standard in the United States is that a jurist must disqualify when the jurist's "impartiality might reasonably be questioned." It is a specific standard, reified in federal and state statutes and judicial codes, similar in principle to, but distinct in form from, its counterpart in common law countries (which rely on general principles of apparent impartiality and the appearance of bias). In the U.S. standard, the verb "might" acts as the fulcrum of implementation. The operative word is arguably one of lexical simplicity. In common parlance, the modal verb "might" occupies a position within a spectrum of predictability and certainty; it is an expression that connotes *possibility*.²⁴⁶ For example, if the weather forecaster states that "it might rain," rather than "it would rain" tomorrow, one would interpret the former forecast as more hospitable to the planning of an outdoor event.²⁴⁷ While philosophical or lexical interpretations may engender complexity, confusion or ambiguity,²⁴⁸ the common understanding of the two modal verbs (*might* and *would*) reflects a substantial epistemological difference --- from possibility to probability.²⁴⁹ Unlike weather forecasting that relies on objective

produce one unique metaphor for every 25 words they utter. *Id.*

²⁴² See *FAUST*, *supra* notes 1 and 3, lines 1-2.

²⁴³ See Lewis Carroll, *Through the Looking Glass and What Alice Found There*, at 213, in *THE ANNOTATED ALICE* (2000).

²⁴⁴ Humpty Dumpty replied: "The question is which is to be master—that's all." *Id.*

²⁴⁵ See *supra* notes 156-63 and accompanying text regarding the scope of the precept.

²⁴⁶ See Merrick Winiharti, *The Difference Between Modal Verbs in Deontic and Epistemic Modality*, 3 *HUMANIORA* 532-39 (2012) (epistemic modality expressed in degrees of strength regarding probability and possibility).

²⁴⁷ See, e.g., *State v Marcotte*, 392 Wis. 2d 183, 195-96, 943 N.W.2d 911, 917-18 (2020) where the court noted the linguistic distinction between "could" and "would" in terms of a judge's comments which objectively reflected a prejudgment and suggested a greater certainty of sentencing.

²⁴⁸ See, e.g., Stephen Yablo, *Is Conceivability a Guide to Possibility?*, 53 *PHILOS. & PHENOMENOLOGICAL RES.* 1-42 (1993) (concluding that conceivability is no proof of or guide to logical possibility; conceivability involves the appearance of possibility). Cf. Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 *YALE L. J.* 788 (2018) (a probing analysis that advocates a linguistic approach in the interpretation of the deceptively simple legal concept of "ordinary meaning").

²⁴⁹ See *infra* § IV(B)(2)(a) regarding common English usage, and text accompanying

atmospheric criteria and mathematical calculations, however, recusal assessments present greater difficulty and risk of error because they depend on the subjective-objective²⁵⁰ analysis of the dauntingly imprecise ingredient of “reasonableness.”

The crux of this Article’s section is that U.S. recusal jurisprudence presents a perplexing example of the lack of analytical clarity regarding the meaning of the appearance recusal heuristic and the applicable evidential threshold for disqualification. Specifically, there is a disturbing divergence in disqualification jurisprudence between the specific terminology of the ethical mandate (disqualification is required when a judge’s “impartiality might reasonably be questioned”) and its application in concrete cases -- a divergence that ultimately undermines the fundamental value that justice must satisfy the appearance of justice. Remarkably, except for the occasional perceptive observation by others of the conceptual ambiguities,²⁵¹ there has been a lack of analytical attention regarding the critical issue of the evidential threshold of belief in appearance-based disqualification. What is the judicial lens? As Richard Flamm pointedly asks: Does the disqualification standard embody a notion of *conceivability* or *certainty*? Flamm identifies the linguistic and conceptual conundrum in terms of “definitely would question” or “might conceivably do so.”²⁵² A general exposition of the caselaw leads Flamm to conclude that there is a split of opinion. As he notes, courts have rarely squarely trained their attention on this issue.²⁵³ The *ad hoc* and non-analytical approach to judicial disqualification, in the absence of any authoritative guiding principles, has contributed to a perception of inconsistency and ambiguity. Nevertheless, it is beneficial to determine if there are discernable patterns emanating from the collective judicial conscience.²⁵⁴

From a wide-angle perspective, U.S. caselaw seems to slip and slide from the lower modal standard (“might”) to a higher conclusory “would” – the latter, in Faustian parlance, safely guiding the decision-maker from doubt and dubiety.²⁵⁵ To say that a reasonable observer “might” reasonably question a jurist’s impartiality is significantly different from concluding that a reasonable observer “would” (but, more often in reported cases “would not”) question the jurist’s impartiality – again, predicated on a subjective (or magical) assessment of the *hypothetical* perception of the *hypothetical* reasonable observer.

U.S. caselaw reveals an analytical approach that is less solicitous to appearance-based recusal, one that is in tension with the ordinary and clear text of the standard.

note 189, *supra* regarding the possibility-probability conundrum; and *consider* Lee & Mouritsen, *id.* at 854-56 (demonstrating the use of “might” as a distinct qualifier).

²⁵⁰ See, e.g., Prosser’s view of the reasonable man as both objective and subjective, *supra* note 130.

²⁵¹ See FLAMM, *supra* note 21, at §§ 11.4 and 11.5; and Newhouse, *infra* note 397.

²⁵² *Id.* § 11.4, at 230. *Consider also* Professor Fallon’s advocating an “analytically sequenced tiered framework for judicial review” in Establishment Clause cases, *supra* notes 114-115.

²⁵³ *Id.*

²⁵⁴ See *supra* notes 179 and 180 regarding Durkheim’s conception of the collective conscience. *Consider also*, Sunstein, *supra* note 232, at 428 (“For law, the basic lesson is that judgments made one at a time are likely to produce incoherent patterns, and hence it would be useful to systematize outcomes by seeing them as part of larger comparison sets.”).

²⁵⁵ See FAUST, *supra* note 1, line 2. Similarly, rather than focusing on the appearance of impartiality, judges are prone to slip and fall into a no-actual-prejudice analysis.

Often the modals “might” and “would” are blithely used interchangeably in opinions (and even in a single opinion). For example, in rejecting countervailing considerations of administrative inconvenience and expense of a re-trial in a convoluted multi-party diversity action (that required 33 days of trial), one court adopted a hard line approach toward the trial judge’s failure to disqualify, stressing the importance of protecting the judiciary from any hint of the appearance of bias.²⁵⁶ Nevertheless, the court’s use of words is noteworthy, when it said: “The judge should consider how his participation in a given case looks to the average person on the street. Use of the word ‘might’ in the statute was intended to indicate that disqualification should follow if the reasonable man, were s/he to know all the circumstances, *would* harbor doubts about the judge’s impartiality... [then noting that] [A] reasonable person *might very well* question the judge’s impartiality.”²⁵⁷ It’s a head-spinning analysis. Although such interchangeable use of “might” and “would” within opinions is common,²⁵⁸ occasionally one does see in other cases an analysis and result that are faithful to the precept’s modal “might.”²⁵⁹

In addition, courts will frequently couple the outcome-determinative modal verb with qualifiers that make the advocate’s burden more onerous. In the application of the relatively simple five-word recusal standard (i.e., the judge’s “impartiality might reasonably be questioned”), courts exercise considerable interpretative latitude and creativity in the assessment of the risk of perceived partiality. Courts have imposed various conditions onto the “might” appearance standard, including: “significant doubt;”²⁶⁰ “serious doubt;”²⁶¹ “significant risk;”²⁶² “substantial doubt;”²⁶³ or “substantially out of the ordinary.”²⁶⁴ Some cases will

²⁵⁶ See *Potashnik*, 609 F.2d 1101, at 1111-12.

²⁵⁷ *Id.* at 1111 (emphases supplied). The trial judge had business dealings with the plaintiff’s attorney and the judge’s father was a senior partner in the plaintiff’s law firm.

²⁵⁸ See, e.g., *Hadler v. Union Bank & Trust Co.*, 765 F. Supp. 976 (S.D. Ind. 1991); *State v. Martin*, 825 A. 2d 835 (Conn. 2003). Among the many cases examined, the American opinions (state and federal) revealed a predominant and perplexing semantical sliding between “might” and “would” terminology, with decision-making often predicated on a conclusory “would.” Such decisions often reject requests for recusals.

²⁵⁹ See *In re School Asbestos*, 977 F.2d at 782 (noting that a “reasonable person might perceive bias to exist, and this cannot be permitted”); and *Potashnik*, 609 F.2d at 1111-12 (eventually stressing the “might” aspect of the standard); and *Eastside Baptist Church*, 269 Ga. App. at 239 and 241 (applying a “might” standard in requiring recusal and reassignment).

²⁶⁰ See, e.g., *Salemme*, 164 F. Supp. 2d at 52; *United States v Kelly*, 888 F.2d 732, 744-45 (11th Cir. 1989); *Murray*, 923 F. Supp. at 1293 (reasonable or significant doubt required); *Grieppe*, 17-CV-3706 at *10; *Herrera-Valdez*, 826 F.2d at 917; *State v Smith*, 203 Ariz. 75, 80 n.4 (2002) (court nevertheless admits that better practice, especially in a capital case, would have been to assign a judge from another county; court denies recusal challenge but reserves future recusal review regarding sentencing); and *Taylor-Boren*, 143 N.H. at 268.

²⁶¹ See *In re Lucci*, 863 N.E.2d 626 (Oh. 2006); *In re Disqualification of Lewis*, 826 N.E.2d 299 (Oh. 2004).

²⁶² See *United States v. Holland*, 519 F.3d 909, 913, 914 (9th Cir. 2008).

²⁶³ See *White*, 910 A.2d 648; *Commonwealth v. Dip*, 221 A.3d 201, 206-07 (Pa. Super. 2017).

²⁶⁴ See *Hook v McDade*, 89 F.3d 350, 354 (7th Cir. 1996) (stating that the question is whether a reasonable person would be *convinced* that judge was biased; recusal requires

also identify a more burdensome evidential standard. In *United States v. Nixon*, the court, beginning with the protective presumption of impartiality, noted that the moving party must demonstrate by “clear and convincing evidence” that a judge has conducted himself in a manner supporting disqualification.²⁶⁵ Although courts may sometimes frame the standard of review in terms of reasonable doubt,²⁶⁶ one court had to specifically disavow a “beyond a reasonable doubt standard,” calling such strict language in prior caselaw a “minor oversight.”²⁶⁷

Lastly, there are instances when a disqualification challenge has been rejected despite an acknowledgment that there may indeed be merit to a reasonable person’s questioning the jurist’s impartiality.²⁶⁸ In *Parker v. Connors Steel*,²⁶⁹ a complicated labor dispute case involving allegations about the conflicting participation of the judge’s law clerk in the decisional process, the court seems to have turned the appearance-based recusal standard on its head when it rejected a disqualification challenge and found harmless error, saying:

To the extent that public confidence has already been undermined, we do not believe that granting relief in this case will change the public’s perception in any appreciable way. Such harm cannot be remedied by vacating the district court’s decision and reassigning this case to a different judge. In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees’ claims. Judicial decisions based on such *technical* arguments not relevant to the merits contribute to the public’s distrust in our system of justice.²⁷⁰

compelling evidence) (emphasis supplied).

²⁶⁵ See *Nixon*, 267 F.Supp.3d at 147. See also *State v. Marcotte*, 392 Wis.2d 183, 943 N.W.2d 911, 915-16 (burden of proof is on party asserting judicial bias to show by a preponderance of the evidence that a judge is biased or prejudiced); and *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (“...to constitute grounds for disqualification, the *probability* that a judge will decide a case on a basis other than the merits must be more than trivial) (*emphasis supplied*). And see *In re Bulger*, 710 F.3d 42, 47 (1st Cir. 2013) (recusal standard must be more demanding to prevent parties from manipulating system; in mandamus context, Souter, J. grants petition for disqualification). As to the importance of the procedural context, *Bulger*, *id.* at 45, notes that mandamus places a more exacting burden. See also *supra* notes 67, 220, and 239, regarding the importance of legal context.

²⁶⁶ See *Voccola*, 99 F.3d at 42-43; *In re Fifty-one Gambling Devices*, 298 S.W.3d at 775; *cf. In re Hill*, 152 Vt. 548, 573 n.12, 568 A.2d 361, ___ n.12 (1989) (disqualification required whenever “a doubt of impartiality would exist in the mind of a reasonable disinterested observer”).

²⁶⁷ See *Dodson v. Singing River Hosp. Sys.*, 839 So.2d 530, 533-34 (Miss. 2003).

²⁶⁸ See *Salemme*, 164 F. Supp.2d at 85 (*emphasis supplied*); and *In re Commitment of Winkle*, 434 S.W.3d 300 (Tex. App. 2014) (decision denying recusal fell within “the zone of reasonable disagreement;” court acknowledges that the trial judge’s community might infer bias from judge’s campaign signs and slogans, and facts “may raise serious questions about his fairness as a judicial officer,” *id.* at 312-13).

²⁶⁹ *Parker v. Connors Steel*, 855 F. 2d 1510 (11th Cir. 1988).

²⁷⁰ *Id.* at 1527 (*emphasis supplied*). Regarding the challenge of recusal decision-making in the context of a culture of suspicion, see *Liljeberg*, 486 U.S. 847, *supra* n. 150; *Mason*, 916 F.2d 384, *supra* n. 199; and *Oakes & Davies*, *infra* n. 451.

It is impossible to identify the impetus (psychological or jurisprudential) for the imposition of a higher standard in these appearance-recusal cases. Perhaps an aversion to the challenging and vague appearance-based standard;²⁷¹ or an unconscious preference for (or comfort in) an actual prejudice standard;²⁷¹ or, from a speculative sociological perspective,²⁷² the unexamined semantical habits or shared understandings in the judicial community's zeitgeist—these may explain the more restrictive (i.e., the higher evidential “would”) approach in appearance-based recusal cases.

In any event, such varying adjectival adhesions, increasing the procedural and evidential burdens imposed on a petitioner, effectively transmogrify the appearance-based recusal standard, create analytical confusion, and increase the risk of erroneous and unfair decision-making. The ultimate risk is that the public's perception of justice and its trust and confidence in the judicial system are jeopardized.

III. APPEARANCE-BASED RECUSAL: THE COMMON LAW APPROACH

Adjudicating a claim of apparent bias asserted by a solicitor against a disciplinary tribunal who convicted him of professional misconduct described as heinous, Commissioner (later Chief Justice of Singapore) Sundaresh Menon of the High Court of Singapore prefaced his comprehensive analysis and synthesis of common law recusal principles governing apparent bias with the following:

The applicant reaches out to that hallowed principle: justice must not only be done but it must manifestly be seen to be done. He contends that this principle has been violated in his case. What do these words really mean? Are they simply a nice-sounding tagline expressing a pious aspiration? Or do these words in fact express an uncompromising standard which serves to guarantee that those having business before judicial and quasi-judicial bodies in this country will not go away harboring any reasonably held apprehensions that they have not been fairly dealt with?²⁷³

In his examination of international recusal standards, Rex Perschbacher noted his fascination with countries that, despite their diversity, have independently adopted similar recusal standards.²⁷⁴ Among the common law-based countries (primarily

²⁷¹ See, e.g., *Salemme*, 164 F. Supp.2d at 52, citing Justice Kennedy's comments in *Liteky*, 510 U.S. at 557-558, regarding the requirement of a high threshold to satisfy the appearance standard (stating: "...a judge should be disqualified only when it appears that he or she harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute"); and Rex R. Perschbacher, *Caperton on the International Scale*, 18 LEGIS. & PUB. POL'Y 699, 705 (2015) (noting the tendency to resist recusal based on appearances or perceptions and opining that judges appear to be more comfortable with actual, demonstrable, and obvious bias situations).

²⁷² See Durkheim, *supra* notes 179-80 and accompanying text.

²⁷³ See *Re Shankar Alan s/o Anant Kulkarni* [2006] SGHC 194 (Sing.) ¶ 1 [hereinafter *Shankar*]

²⁷⁴ See Perschbacher, *supra* note 271, at 699-700 and 705; see also Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough*, 68

Australia, Canada, Singapore, South Africa, and the United Kingdom) that are the focus of this article, there is a remarkable similarity of foundational principles and values in their recusal analyses, including individual and institutional judicial independence, impartial decision-making, fair judicial processes, the appearance of justice, and the importance of public trust and confidence in the judicial system and the rule of law.²⁷⁵ In South Africa, for example, judicial recusal is considered a “constitutional matter.”²⁷⁶ In recognition of the universality of fundamental jurisprudential values, the principle of judicial impartiality is enshrined in the jurisprudence of the European Court of Human Rights.²⁷⁷ The Anglo-American consanguinity (in principles, not implementation) is sometimes manifested by specific references to American jurisprudence.²⁷⁸

CAMBRIDGE L.J. 388, 391 (2009); and DAS, *supra* note 34, at 281 (remarking on “a remarkable unity or consistency” in the common law courts regarding the tests for recusal).

- ²⁷⁵ See, e.g., Johnson v. Johnson (2000) 201 C.L.R. 488, at ¶¶11, 12 (public confidence in the judiciary and societal interests in the appearance of justice) (Australia); Canada (Ministry of Citizenship and Immigration) v. Tobiass, [1997] 3 S.C.R. 391, at §§ 67, 69, and 110 (appearance of justice and judicial independence, and impartiality) (Canada); R v. Sussex JJ *ex parte* McCarthy 1 K.B. 256, 259 (appearance of bias sufficient to overturn a judicial decision) (United Kingdom) [“Sussex Justices”]; Shankar [2006] SGHC 194, at ¶¶ 1, 43, 55, and 90 (appearance of justice and impartiality) (Singapore); and Findlay v. United Kingdom [1997] 24 E.H.R.R. 221 (judicial independence and objective impartiality) (European Court of Human Rights). *And see* Okpaluba & Maloka, *supra* note 20 (updated 2022 survey of recusal law in common law countries); Abimbola A. Olowofoyeku, *Sub-Regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice*, 20 AFR. J. INT’L & COMP. L. 365, 366 n. 5 (2012) (citing international conventions and charters affirming the common law’s appearance of justice principle; article critically examines the emerging recusal jurisprudence in the East Africa region). Other common law-based countries, beyond the scope of this article, have engaged in recusal analysis and reform. See Mudalige Chamika Gajanayaka, *Judicial Recusal in New Zealand: Looking to Procedure as the Principled Way Forward* (2014) (thesis Victoria University of Wellington) (a comprehensive procedurally detailed proposal for recusal reform) available at <https://researcharchive.vuw.ac.nz/xmlui/bitstream/handle/10063/4610/thesis.pdf?sequence=2>.
- ²⁷⁶ See President of the Republic of South Africa v. South Africa Rugby Football Union 1999 4 SA 147 (CC), at ¶ 30 (S. Afr.) [hereinafter *SARFU2*] involving “an unprecedented application for recusal” of the entire Constitutional Court,” *id.* at ¶ 7.
- ²⁷⁷ See Olowofoyeku, *supra* note 274, at 391; Porter v Magill, 2002 2 A.C. 357, at ¶¶ 102-103 (referring to Strasbourg jurisprudence); Lawal v. Northern Spirit Ltd. 2003 I.R.L.R. 538, at ¶ 2 (HL); and Findlay, 24 E.H.R.R. 221. See Article 47 of the Charter of Fundamental Rights of the European Union (2012), Title VI (Justice), [https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#:~:text=Everyone%20is%20entitled%20to%20a,being%20advised%2C%20defended%20and%20,which%20states%20](https://fra.europa.eu/en/eu-charter/article/47-right-effective-remedy-and-fair-trial#:~:text=Everyone%20is%20entitled%20to%20a,being%20advised%2C%20defended%20and%20,which%20states%20:~:text=Everyone%20is%20entitled%20to%20a,being%20advised%2C%20defended%20and%20,which%20states%20): “Everyone is entitled to a fair trial and public hearing within a reasonable time by an independent and impartial tribunal previously established by law...” The United States Supreme Court discussed at length both the European Court of Human Rights’ decisions and foreign legislation regarding intimate homosexual conduct in *Lawrence v Texas*, 539 U.S. 558 (2003). See also Davies & Oakes, *supra* n. 60, analyzing the doctrine of appearances in the European Court of Human Rights jurisprudence.
- ²⁷⁸ See, e.g., *SARFU2*, 4 SA 147, at ¶ 42 (citing Benjamin Cardozo); Johnson, 200 C.L.R. 488, at ¶ 43 (citing 28 U.S.C. § 455 and the ABA’s Model Code of Judicial Conduct). See also Olowofoyeku, *supra* note 275, at 365 (in his examination of East African recusal

Although generalities can be admittedly dangerous, a comparative review of Anglo-American recusal caselaw reflects, in one respect, a stark dissimilarity. In contrast to the American approach, which can often be factually ponderous, impressionistic and conclusory, common law countries have exhibited a deeper analytical bent, which arguably provides the parties and public with a better understanding and appreciation of how and why a decision was reached.²⁷⁹ It is this public jurisprudential dialogue in their opinions, expressed at times to the point of semantic complexity, that have promoted (or provoked) commentary and criticism. For example, one who is familiar with the various criticisms that have been leveled at Justice O'Connor's reasonable observer test in religious endorsement cases²⁸⁰ would recognize the parallel paths travelled in Anglo jurisprudence regarding general concerns about the application of jurisprudential norms governing recusal. These concerns include: the danger of ignoring public perception and thereby effectively reverting to a misplaced actual prejudice standard;²⁸¹ the unrealistic expectations imposed on the metaphorical informed observer;²⁸² the disregard or devaluation of important policy interests;²⁸³ the failure to demarcate the burden of proof required to prove adjudicative impartiality;²⁸⁴ the difficulty in applying the appearance standard;²⁸⁵ implementing the appearance standard in an impressionistic manner, including the failure to adequately explain how the appearance of bias test is applied or how the relevant factors are balanced;²⁸⁶ the failure of courts to give sufficient weight to the appearance standard;²⁸⁷ the heavy emphasis on lengthy factual narratives that can serve as a smokescreen;²⁸⁸ the potentially negative impact

jurisprudence, author begins his article with a quotation from American (Texas) caselaw about the importance of the appearance standard, citing *Sun Exploration and Production Co. v. Jackson*, 783 S.W.2d 202, 206 (Tex. 1989).

²⁷⁹ The common law cases cited herein exemplify this more analytical approach. Common law cases, however, can also be heavily factually detailed. See Okpaluba & Juma, *supra* note 200, at 261-62 notes 90, 91. Consider, e.g., Porter, 2 AC 357. A helpful list of leading recusal cases and their citations from common law countries including Australia and New Zealand, Canada, South Africa and neighboring countries, and the United Kingdom, can be found at the end of Okpaluba's article, *id.*

²⁸⁰ See *supra* § I(C).

²⁸¹ See Perschbacher, *supra* note 271, at 704; and Debra Lynn Bassett & Rex R. Perschbacher, *Perceptions of Justice: An International Perspective on Judges and Appearances*, 36 *FORDHAM INT'L L.J.* 137, 158-59 (2013).

²⁸² See Bassett & Perschbacher, *id.* at 187; Hughes & Bryden, *supra* note 177, at 181-82; and Atrill, *supra* note 106 at 280-83.

²⁸³ See Atrill, *id.* at 282-83.

²⁸⁴ See Okpaluba & Juma, *supra* note 200 (addressing the divergent approaches of courts in constructing the meaning of actual and apparent bias in South African law).

²⁸⁵ See Olowofoyeku, *supra* note 274, at 389, stating: "It is not right for any decision of the nation's apex court (or, indeed, any court) to be predicated, not on some point of principle (which can be unpacked), but entirely on whatever judges may imagine that some fictional characters would think. There must be another way..."

²⁸⁶ See Hughes & Bryden, *supra* note 177, at 178; Atrill, *supra* note 106, at 283; and Okpaluba & Juma, *supra* note 200, at 29 n. 72 and 30-31.

²⁸⁷ See Bassett & Perschbacher, *supra* note 281, at 158; and Perschbacher, *supra* note 271, at 702-03.

²⁸⁸ See Hughes & Bryden, *supra* note 177, at 179.

of inconsistent or incoherent standards especially in marginal or close cases;²⁸⁹ and the impairment of the credibility of the judicial process.²⁹⁰

Common law countries assess the appearance of bias through a double factor formula, often referred to as the “double reasonableness” test.²⁹¹ Similar to the reasonable observer standard in the United States, common law countries require that the perception of bias must be objectively reasonable in two respects: (1) the *perception* itself must be reasonable; and (2) the *person* perceiving bias must be a reasonable person, one who is knowledgeable (“informed”) of the relevant facts and circumstances.²⁹² As in U.S. jurisprudence, in applying the apparent bias standard, the common law court preliminarily requires that the allegations of apparent bias must be based on objectively ascertainable grounds, not on the idiosyncrasies, superstitions, or sensitivities of the litigants.²⁹³ Additionally, the reviewing court will preliminarily apply an “interpretative restraint”—the presumption of impartiality.²⁹⁴ The presumption has been described in Canada as a heavy one requiring convincing evidence to rebut.²⁹⁵ This fictional legal premise,²⁹⁶ a classic procedural device applied in the service of institutional credibility, has been occasionally criticized in the recusal context.²⁹⁷ In *Bernert*, the South African court explained the application of the presumption, noting:

[T]his presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.²⁹⁸

Aside from such procedural hurdles, the difficulty of the double reasonableness test lies in its implementation: how does one identify the reasonable observer and

²⁸⁹ See *id.*, at 173, 176.

²⁹⁰ See *id.*, at 174-75.

²⁹¹ See Okpaluba & Juma, *supra* note 200 and text accompanying nn. 61 and 62; and Okpaluba & Maloka, *supra* note 20, at 96.

²⁹² See, e.g., *R v S (RD)*, [1997] 3 S.C.R. 484 (Can.); *Bernert v. ABSA Bank Ltd* 2011 3 SA 92, at ¶¶ 31 and 34 (CC); *Wewaykum Indian Bank v Canada* [2003] 231 D.L.R.(4th) 1, at ¶¶ 60, 67, and 73 (Can.); and *SARFU2*, 4 SA 147, at ¶ 45.

²⁹³ See *BTR Industries South Africa (Pty) Ltd v. Metal and Allied Workers Union* 1992 3 SA 673, 695C-E [hereinafter *BTR*] (S. Afr.); *Wewaykum, id.* at ¶ 77; *Bernert, id.* at ¶ 34.

²⁹⁴ See Okpaluba & Juma, *supra* note 200, text accompanying nn. 54-60 and cases cited therein; *SARFU2*, 4 SA 147, at ¶¶ 40-41.

²⁹⁵ See *Wewaykum*, 231 D.L.R. (4th) 1, at ¶ 59 and 76; and *R v. S.*, 3 S.C.R. 484, at ¶ 32. See also Okpaluba & Maloka, *supra* note 20, at 107-11 (surveying Canadian recusal).

²⁹⁶ Consider Peter J. Smith, *New Legal Fictions* 95 GEO. L.J. 1435 (2007) (noting the various classic and new legal fictions and the purposes they serve and why judges rely on them).

²⁹⁷ See Perschbacher, *supra* note 271, at 704 (stating that the presumption operates to dilute the appearance standard).

²⁹⁸ See *Bernert*, 3 SA 92, at ¶¶ 31-33.

the reasonable perception? The devil is in the details. As the Australian court in *Johnson* noted: “As is usually the case when a fiction has been adopted, the law endeavors to avoid precision.”²⁹⁹

A. THE REASONABLE OBSERVER

In *Application by Purcell*, presenting a challenge to the impartiality of a disciplinary panel, Northern Ireland jurist, Frederick Girvan, remarked:

The reasonable man (or woman) on the Clapham omnibus has been joined on the journey by another paragon of rationality, the fair minded and informed observer. These anthropomorphic creations of the common law lend a humanizing and homely touch to the law, personalising what are, in effect, objective tests of fairness and rationality. The metaphors should not distract from a proper understanding of the objective nature of the question to be addressed in individual cases.³⁰⁰

As another jurist noted: “What matters, in the final analysis, is a practical approach that takes into account not only the possible meanings of the word and phrases in question but also the context in which they appear.”³⁰¹ As in the American recusal context, two practical questions confront the common law jurist in understanding and speaking for the reasonable observer: Whose perception controls? And what level of knowledge and information should we impute to the reasonable observer?

In the seminal case of *Regina v Gough*, Lord Goff of Chiveley made clear the perspective he was applying when he said:

Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, *because the court in cases such as these personifies the reasonable man*; and, in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time.³⁰²

²⁹⁹ See *Johnson*, 200 C.L.R. 488, at ¶ 52.

³⁰⁰ See *In the Matter of an Application for Judicial Review by Trevor Purcell* [2008] NICA 11, at ¶ 26 (Girvan, LJ) (N. Ir.) See also *Johnson*, *id.* at ¶ 48 (cautioning that the “metaphorical fiction should not be taken too far”).

³⁰¹ See *Tang Kin Hwa v. Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR (R.) 604 H.C. (Sing.) (“Tang Kin Hwa”) critically assessed in ¶¶ 45-46, 57, 61, and 74 of *Shankar*, [2006] SGHC 194; and Okpaluba & Maloka, *supra* note 20, at 96-100 (discussing the characteristics of the reasonable observer).

³⁰² See *Regina v. Gough* [1993] A.C. 646, 670, 2 All ER 724 [hereinafter *Gough*] (emphasis supplied). Similar sentiments appear on the other side of the Atlantic. See, e.g., Hill, *supra* note 105, at 1410 and 1439 (the reasonable observer in religious endorsement cases is an idealized interpreter and a stand-in for the judge); see also *In re Bernard*, 31 F.3d at 644 (commenting on the “objective-subjective conundrum,” Judge Kozinski notes that the judge applies the standard both as its interpreter and its object).

On further reflection, nine years later, in a case involving a high-profile political scandal, Lord Bingham announced a need for a “modest adjustment” to the reasonable observer test —the perspective would henceforth be that of a fair-minded and informed *lay* observer, which was acknowledged as a standard that was applied in other Commonwealth countries.³⁰³ Similarly, the Supreme Court of Appeal of South Africa believed that “there is a real distinction between assessing appearance of bias through the eyes of a trained and experienced judicial officer and assessing it through the eyes of a reasonable person... . They [judges] may more readily, therefore, in a given case regard a danger of bias as not real where the reasonable impression of bias would reasonably lodge in the mind of a reasonable person suitably informed.”³⁰⁴ The South African court also noted that viewing the reasonable observer through the eyes of a jurist creates the danger of an actual rather than apparent bias approach.³⁰⁵

With respect to who comprises the class of lay persons, the term encompasses the general public.³⁰⁶ The High Court of Australia stated that, in considering the formulation of the fictitious bystander regarding the impression which facts might reasonably have upon the parties and the public, the public includes groups of people who are sensitive to the possibility of judicial bias.³⁰⁷ Occasionally the perception of bias held by the parties, which clearly plays a pivotal role in the instigation of a recusal claim, has been acknowledged as an important factor to consider.³⁰⁸

The level of knowledge imputed to the fictional reasonable observer is often glossed over, a strange oversight given that the metaphorical reasonable observer is an integral component of how a court must view and adjudicate the reasonableness of the perception of partiality. Australian courts have been more explanatory and seem to take the view that a high level of knowledge or information should not be a necessary attribute of the hypothetical observer, who is viewed simply as a fair-minded person.³⁰⁹ On the other hand, Canadian courts seem to have imposed

³⁰³ See *Porter v. Magill* [2001] UKHL 67, [2002] 2 W.L.R. 37, at ¶¶ 103-104 [hereinafter *Porter*]. *Porter* significantly modified the prior objective test regarding the reasonable apprehension of bias, thus supplanting the other seminal case of *Gough, id.*

³⁰⁴ See *S. v. Roberts* 1999 4 SA 915 (SCA), at ¶ 36 (S. Afr.) (noting judges’ perceptions might be more subjective because of their training and experience).

³⁰⁵ *Id.* at ¶ 36.

³⁰⁶ See, e.g., *Shankar* [2006] SGHC 194, at ¶ 74-75 and *Porter*, [2001] UKHL 67, at ¶¶ 103-104.

³⁰⁷ See *Johnson*, 200 C.L.R. 488, at ¶ 52. See also nn. 351 and 352 *infra*.

³⁰⁸ See *Johnson, id.* at ¶¶ 12, 49, and 52 (recognizing the need to consider the complaint not by what adjudicators and lawyers know, but by how matters might reasonably appear to the parties and the public). Consider also *Perschbacher, supra* note 271, at 703, citing *Webb v. The Queen* (1994) 181 C.L.R. 41, wherein the author notes that Australian courts are not sufficiently receptive to the perception of the parties, stating that “It should be obvious that the parties, focused on their own cases and measuring bias from their own perspectives, are more likely to believe that bias exists, in contrast to the perspective of a so-called reasonable person seen through the eyes of the judiciary.”

³⁰⁹ See *Webb*, 181 C.L.R. 41, at ¶¶ 3 and 11 (noting “...in considering whether an allegation of bias on the part of a judge has been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case); and ¶ 49, *id.* (special knowledge should not be attributed to the reasonable bystander). The court identified, *inter alia*, the following attributes of the fictitious bystander: not

somewhat higher cognitive expectations on its metaphorical figure, describing the reasonable observer as an informed, reasonable, “right-minded person,” “one who views a matter realistically and practically,” and one who has “thought through” the matter.³¹⁰

B. THE REASONABLE PERCEPTION

The most challenging aspect in understanding the common law countries’ interpretation and application of the double reasonableness heuristic in recusal cases is the perception component: what precisely is the standard by which one defines and scrutinizes the reasonableness of the observer’s perception of bias? Traveling through the cosmos of the selected common law countries, one enters a veritable twilight zone of semantics. Common law jurisdictions have engaged in an alchemy of words to express and measure apparent bias – such as, the reasonable likelihood of bias, real danger of bias, real suspicion of bias, reasonable apprehension of bias, and real possibility of bias. Clarity becomes complicated by head-spinning semantical instability. One realizes that terms are not what they appear to mean. These Humpty Dumpty-like³¹¹ verbal gymnastics have led others to criticize the various approaches to apparent bias as: gratuitous semantic confusion,³¹² jumbled,³¹³ bewildering,³¹⁴ and semantically muddled.³¹⁵ Nevertheless, in the struggle for

a lawyer but not wholly uninformed regarding the most basic considerations relevant to the case; reasonable and fair-minded; knowledgeable about common place things; knowledgeable about the strong professional pressures on adjudicators, including traditions of integrity and impartiality; and neither complacent or unduly sensitive or suspicious. *Id.* at ¶ 53. *See also* Atrill, *supra* note 106, at 280-81 (noting that Australia often omits the “informed” attribute).

³¹⁰ *See, e.g., Wewaykum*, 231 D.L.R. (4th) 1. at ¶¶ 60, 63, and 74; *R v S (RD)*, 3 S.C.R. 484, at 507-09 (a racially charged case in which the Canadian court noted that a reasonable observer should be informed of the traditions of integrity and impartiality that form a part of the background as well as the social reality of a particular case, including the prevalence of racism and gender bias in a particular community); Perschbacher, *supra* note 271, at 703 (noting that Canada employs an elaborate standard of the reasonable observer who possesses a complex and contextualized understanding of the issues of the case); and Hughes & Bryden, *supra* note 177 (critical of the level of knowledge and information Canadian courts impute to the reasonable observer). *See also SARFU2*, 4 SA 147, at §§ 45 and 47 (noting that South Africa employs the same reasonable observer standard as Canada, *i.e.*, one who views the matter realistically and practically). *See also* Okpaluba & Maloka, *supra* note 20, at 107-11 (citing and considering Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General) [2015] 2 SCR 282.

³¹¹ *See* text accompanying notes 242-44.

³¹² *See Shankar*, [2006] SGHC 194, at ¶ 45, quoting *Tang Kin Hwa*, 4 S.L.R. (R.) 604.

³¹³ *See* Okpaluba & Juma, *supra* note 200, at n.72.

³¹⁴ *See Gough*, [1993] AC 646 2 All ER 724, at ¶ 21.

³¹⁵ *See* Okpaluba & Juma, *supra* note 200, at 28-29 (noting “Unfortunately, however, in reading recent judgments of the Supreme Court of Appeal of South Africa, one discerns a jumbled approach...,” citing cases at n. 72, *id.*). *See also* Morne Olivier, *Anyone but You, M’Lord: The Test for Recusal of a Judicial Officer*, OBITER 606, 608 (2006) (with respect to the controversy and uncertainty regarding the formulation of the applicable test, author posits that the incorrect and improper use of terminology as the contributing factor). *Cf.* Lionel Leo & Siyuan Chen, *Reasonable Suspicion or Real Likelihood: A*

conceptual clarity, a consensus seems to have appeared as to the essential concerns that should animate and guide appearance-based recusal.

The semantical labyrinth begins with the United Kingdom’s seminal case of *R. v Gough*³¹⁶ wherein Lord Goff in 1993 rejected “mere suspicion” or “reasonable suspicion” as the controlling test of apparent bias in favor of a “real danger (or likelihood) of bias” standard, which was then viewed from the perspective of the court. Lord Goff grappled with the confusion emanating from caselaw that viewed apparent bias inconsistently *viz.*, real likelihood *vs.* reasonable suspicion. In rejecting the suspicion route, Lord Goff decided to refine the nomenclature, saying: “Finally, for the avoidance of doubt, I prefer to state the test in terms of *real danger* rather than *real likelihood*, to ensure that the court is thinking in terms of *possibility* rather than *probability* of bias.”³¹⁷

The courts of Australia and South Africa decided to adopt a different approach. The High Court of Australia in 1994, in assessing apparent bias, decided that, of the various tests used to determine an allegation of bias, “the ‘reasonable *apprehension* of bias’ is by far the most appropriate for protecting the appearance of impartiality,” noting that the “reasonable likelihood” or “real danger of bias” tends to wrongly emphasize the court’s view of facts.³¹⁸ Later, in 2000, the Australian High Court acknowledged that Australia’s approach embraced possibilities (“might”) rather than high probability.³¹⁹

South African courts have also expressed the relevant apparent bias test differently. In *BTR Industries*, the Supreme Court of South Africa abandoned the “real likelihood of bias test” in favor of the “reasonable suspicion of bias” test, stating:

To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice...I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided, the *suspicion* of partiality is one which might reasonably be entertained by a lay litigant...If *suspicion* is reasonably apprehended, then that is an end to the matter.”³²⁰

Question of Semantics? Re Shankar Alan s/o Anant Kulkani, 2 SINGAPORE J. LEGAL STUDIES 446 (2008) (concluding, contrary to the views expressed in *Shankar*, that the competing tests are essentially equivalent in application; authors favor the “reasonable suspicion of bias” terminology in terms of denoting possibility).

³¹⁶ See *Gough*, [1993] AC 646, 2 All ER 724.

³¹⁷ *Id.* at 670 (emphases supplied). And see Olivier, *supra* note 315, at 609 (stating that the “real likelihood of bias” test had its origins in English law, citing, *inter alia*, *R (Donohue) v. County Cork Justices* [1910] 2 Ir. R. 271, and *R. v. Camborne Justices: Ex Parte Pearce* [1954] 2 All E. R. 850 (QB). With respect to Lord Goff’s clarifying comment in *Gough* and the dilemma of definitional elasticity, consider the Supreme Court of Africa’s observation, *i.e.*, the essential connotation of the word likelihood is that of probability. See *BTR Industries*, 3 SA 673, at ¶¶ 39-40.

³¹⁸ See *Webb*, 181 C.L.R. 41, at ¶ 9 (emphasis supplied).

³¹⁹ See *Johnson*, 200 C.L.R. 488, at ¶¶ 31 and 49.

³²⁰ *BTR*, 3 SA 673, at ¶¶ 52 and 53 (emphasis supplied).

Regarding the reasonable suspicion standard, the court also noted: “I consider that those very objects which the ‘reasonable suspicion test’ are calculated to achieve are frustrated by grafting onto it the further requirement that the *probability* of impartiality must be foreseen.”³²¹

Seven years later, the Supreme Court of Appeal of South Africa provided more specific guidance as to its reasonable suspicion of bias test by identifying the requirements: (1) there must be a suspicion that the judicial officer might -- not would -- be biased; (2) the suspicion must be that of a reasonable person in the position of the accused or litigant; and (3) the suspicion must be based on reasonable grounds.³²² As a capstone to South Africa’s recusal jurisprudence, the Constitutional Court of South Africa later re-assessed its semantics and decided that the term “suspicion” presented “inappropriate connotations,” and re-formulated the test as the “apprehension of bias,”³²³ subsequently re-labeled as the “reasonable apprehension of bias” test.³²⁴

The evolutionary development of the reasonableness test for apparent bias in other judicial systems (*e.g.*, the Strasbourg court and the High Court of Australia), prompted the United Kingdom eventually to make a “modest adjustment” to *Gough* in two respects: the identity of the reasonable observer and the applicable standard of review. First, adopting the reasonable perspective of the lay person, not the court, Lord Hope then stated that “the real possibility of bias” (rather than *Gough’s* real danger/likeness of bias) was henceforth the appropriate test to assess apparent bias.³²⁵ Thus, the controlling standard would be the *real possibility* of bias.

In comparison, Canadian courts have applied its reasonable apprehension of bias test in a manner that has provoked concern about credibility and legitimacy of the judicial process.³²⁶ In *R v S (RD)*, the Supreme Court of Canada applied its double reasonableness test from a seemingly more rigorous reasonable observer perspective, one based on a “real likelihood or probability of bias” assessment.³²⁷

³²¹ *Id.* at ¶ 50 (emphasis supplied).

³²² See *Roberts*, 4 SA 915, at ¶ 32. The court also added a fourth element, *viz.*, the suspicion is one which the reasonable person referred to would, not might, have. *Id.* at ¶ 34. The fourth element can be confusing but sensible; it does not diminish the degree of the belief (suspicion) required but serves to emphasize that the existence of the suspicion itself must be based on probability not possibility. Thus, the fourth element is extraneous to this article’s doctrinal objective and is omitted in the text of the article to avoid any unnecessary semantic or jurisprudential confusion.

³²³ See *SARFU2*, 4 SA 147, at ¶ 38.

³²⁴ See *SACCAWU v Irvin and Johnson Ltd.* 2000 3 SA 705, at ¶ 14 (CC) [hereinafter *SACCAWU*] (S. Afr.). See also *Sager v Smith* 2001 3 SA 1004 (SCA) (noting the difference between the “reasonable suspicion of bias” and the “reasonable apprehension of bias” tests is one of semantics, not substance).

³²⁵ See *Porter* [2001] UKHL 67, at ¶¶ 103-04.

³²⁶ See *Hughes & Bryden*, *supra* note 177, at 173-76 (noting particular concern about the application of the standard in “marginal cases” and the consequential need to balance considerations).

³²⁷ See *R v S (RD)*, 3 S.C.R. 484, at 487 (in applying its reasonable apprehension of bias test,” the court stated: “The jurisprudence indicates that a real likelihood of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence.” See also *Committee for Justice and Liberty v National Energy Board*, [1978] 1 S.C.R. 369, 394-395 (applying the “more likely than not” standard) (Can.). In 2003, the Supreme Court

Coupled with the requirement of convincing evidence to rebut the strong presumption of impartiality, Canada's "more likely than not" standard theoretically imposes a heavier burden on one who asserts apparent bias.

C. THE SINGAPORE SYNTHESIS

A discussion of the double reasonableness heuristic—the reasonable observer and the reasonable observation—in the selected common law jurisdictions would not be complete without reference to the panoramic and complex analysis provided by the High Court of Singapore in 2006. The opinion in *Shankar*³²⁸ represents a valiant attempt to provide some analytical clarity to the semantically complex subject of appearance-based recusal from a comparative common law perspective. *Shankar* employed a comparative approach in identifying the perspective of the reasonable observer, which serves as the lynchpin in determining the appropriate level of scrutiny and the reasonableness of the observer's perception of bias. Addressing the confusing semantic controversies, Menon, J.C., noted:

Even with the rider that "likelihood" is to be equated with "possibility" there is a significant difference between the court inquiring whether on the one hand it thinks there is a sufficient (real) possibility that the tribunal was biased on the one hand, and on the other, whether a lay person might reasonably entertain such an apprehension, even if the court was satisfied that there was in fact no such danger.³²⁹

The court further explained at length the inter-relationship of the observer-observation components of the apparent bias heuristic:

I would therefore, with some reluctance, differ from the view taken by Phang JC in *Tang Kin Hwa*³³⁰ that there is no practical difference between the two tests. In my judgment, there are indeed some important differences between them the most important of which are the reference point of the inquiry or the perspective or view point from which it is undertaken, namely whether it is from the view point of the court or that of a reasonable member of the public; and the substance of the inquiry, namely, whether it is concerned with the degree of possibility that there was bias even if it was unconscious, or whether it is concerned with how it appears to the relevant observer and whether that observer could reasonably entertain a

of Canada, noting the considerable weight and strong presumption of impartiality, also applied the apprehension test in terms of "more likely than not." See also *Wewaykum*, 231 D.L.R. (4th) 1, at ¶ 59, 74, and 76. The text herein uses the qualifier "seemingly" because semantical interpretation, especially with respect to a foreign jurisdiction, can be tricky. For example, in American caselaw, "probable cause" is a term that is not synonymous with the common understanding of "probably." See, e.g., *infra* nn. 413-16. Likewise, one can never know how a jurist subjectively calibrates a standard or metric; but clear standards and explication of one's reasoning can provide enlightenment (and accountability).

³²⁸ *Shankar* [2006] SGHC 194.

³²⁹ *Id.* at ¶ 69.

³³⁰ See *Tang Kin Hwa*, 4 S.L.R. (R.) 604.

suspicion or apprehension of bias even if the court was satisfied that there was no possibility of bias in fact. These two aspects are closely related and go towards addressing different concerns.³³¹

Menon, J.C., then concluded:

The “reasonable suspicion” test however is met if the court is satisfied that a reasonable number of the public could harbor a reasonable suspicion of bias even though the court itself thought there was no real danger of this on the facts. The driver behind this test is the strong public interest in ensuring public confidence in the administration of justice.³³²

Rejecting the *Gough* standard of perception (“real likelihood”), the court in *Shankar* provided analytical clarity with the following remark:

[T]here is an inherent difficulty with the real likelihood test in that it is utterly imprecise. The court is not looking for proof of bias on a balance of probabilities. What then is the court looking for? A sufficient degree of possibility of bias is how Lord Goff put it in *Gough*. But that becomes inherently, indeed impossibly, subjective. The ‘reasonable suspicion’ test in my view avoids this because it directs the mind not towards the degree of possibility of bias which the court thinks there may be, but towards the suspicions or apprehensions the court thinks a fair-minded member of the public could reasonably entertain on the facts presented.³³³

Supporting the court’s careful jurisprudential analysis was its prior commentary regarding the “imaginary scales of justice” and the applicable levels of scrutiny -- beginning with doubt (which suggests a state of uncertainty), then “suspicion” (suggesting that something might be possible without yet being able to prove it, thereby requiring the adjective “reasonable” to require articulation of reasons, based on evidence presented, rather than fanciful beliefs), proceeding to “likelihood” (“which points towards a state of being likely or probable or, for that matter, possible), and finally “proof on a balance of probabilities” (suggesting a “more likely than not,” or its converse).³³⁴

In concluding that the reasonable suspicion test is the law in Singapore,³³⁵ *Shankar* looked to the High Court of Scotland and Lord Hope’s following observations in *Millar v. Dickson*:

³³¹ See *Shankar* [2006] SGHC 194, at ¶ 74.

³³² *Id.* at ¶ 75. JC Menon viewed the Australian case of *Webb*, 181 C.L.R. 41, as the key to his understanding of the different tests and the comparison of perspectives (the public and the court). See *Shankar*, *id.* at ¶ 65.

³³³ *Id.* at ¶ 84. Regarding the element of suspicion, see *supra* note 150 *supra* and *infra* note 451.

³³⁴ *Id.* at ¶¶48-51. See also text accompanying *infra* notes 407-11, regarding the levels of scrutiny.

³³⁵ *Id.* at ¶¶76 and 81.

The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice...It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. *The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further action in the case. No further investigation is necessary, and any decisions he may have made cannot stand.*³³⁶

D. CODA

St. Augustine reportedly stated that he knew what time it was until anyone asked him to explain it.³³⁷ The United States and its common law relatives share the fundamental value that justice must satisfy “the appearance” of justice.³³⁸ Explaining, however, what the appearance of justice means has been a formidable epistemic challenge with respect to judicial impartiality and disqualification. What distinguishes the approach of the common law jurisdictions herein (Australia, Canada, Singapore, South Africa, and United Kingdom) is the analytical depth of their struggle to understand and explain the practical import of the appearance concept. *Shankar's* exposition of the contending theories provides a useful backdrop for some generalizations about the jurisprudential guideposts that could be relevant in assessing apparent bias.

With respect to the reasonable observer, common law countries confirm that the hypothetical observer's perspective is interpreted through the eyes of a hypothetical lay person, not the court, thus imbuing the jurisprudential construct with a modicum (or appearance) of objectivity. They have viewed the lay observer as fair-minded, impartial, reasonable, one not possessing a high level of knowledge or insider information. Although such attributes are abstractions, they sufficiently serve to guide and constrain, at least in a theoretical and aspirational sense, judicial discretion.

As to the reasonable perception component of the appearance heuristic, which has provoked considerable analytical consternation among common law countries, there appears to be a consensus that the governing metric should be possibility, not probability.³³⁹ The perception, whether denominated as an apprehension or suspicion (of bias), however, must be a reasonable or “real” one, in the sense that there must be objectively demonstrable articulated facts rather than “mere” suspicion, conjecture, hypersensitivity, or tactical efforts designed to manipulate the judicial process.

³³⁶ *Id.* at ¶ 90 (emphasis in the original), citing *Millar v. Dickson* [2002] 1 L.R.C. 457 (PC), [2002] S.L.T. 988 (Scot.).

³³⁷ See PETER HEATH, *THE PHILOSOPHER'S ALICE*, at 69 n.7 (1974).

³³⁸ See *In re Murchison*, 349 U.S. 133, 136 (1954).

³³⁹ As with the “informed” attribute that has been attached to the reasonable observer, Canada seems to have adopted a more elevated metric of belief. See *supra* notes 326-37.

IV. RECONCEPTUALIZING AND CLARIFYING THE REASONABLE OBSERVER HEURISTIC

In their on-going struggles to define and understand the concepts of apparent bias and the reasonable observer heuristic, the preceding common law jurisdictions adopted an analytical approach that stands in sharp contrast to the lack of analysis in U.S. recusal jurisprudence. The American heuristic, conceptually at least, resembles the “double reasonableness” analytical framework of the common law countries – the focus is on both the *observer* and the *observation*, assessed through the opaque veil of *reasonableness*. The Anglo-American appearance of bias standard shares fundamental values – judicial impartiality, the appearance of justice, public trust and confidence in an unimpeachable judicial system. What differentiates the U.S. approach is the fact that the ethical standard of apparent bias is governed by specific textual language, found in codes or statutes—namely, disqualification is required whenever a judge’s “impartiality might reasonably be questioned.”

In the execution and interpretation of the appearance of impartiality ethic (notwithstanding the different Anglo-American analytical approaches), it is interesting to read the various concerns expressed by common law commentators regarding their application of the apparent bias heuristic.³⁴⁰ These commentaries are a reminder of our common dilemma in attempting to craft clear language to effectuate basic values and ideals. Anglo-American recusal jurisprudence demonstrates that language, through the process of interpretation, can serve—or subvert—the underlying values of a text or jurisprudential principle. As Mephistopheles observed in *Faust*, meaning is deciphered through the interpretation of words. Interpretation reflects—or should reflect—values and rationality. Rationality requires both reasons and reasoning.³⁴¹ Rational decision-making, however, becomes exceedingly complicated when it depends on inherently subjective and ambiguous concepts, such as reasonableness, the essence of the ethical mandate.³⁴² Such subjectivity enhances the potential for semantic inconsistency, ambiguity, and confusion, especially since logical thinking is not central to human reasoning.³⁴³ Judges are human and tend to favor intuitive, impressionistic, rather than deliberative thinking.³⁴⁴ Like all humans, judges are susceptible to egocentric biases that confirm their pre-existing beliefs; they may use themselves and their beliefs or values as an “anchor” in judging.³⁴⁵ Given such cognitive limitations, coupled with

³⁴⁰ See text accompanying *supra* notes 281-90.

³⁴¹ See NOZICK, *supra* note 6, at 71, 107, and 176.

³⁴² See *supra* § I(A).

³⁴³ See Gigerenzer, *supra* note 43, at 123. See also Halper, *supra* note 9, at 46 (referring to “amoeboid flexibility which allows the judge to admit or exclude particular cases with almost no consideration for overall conceptual rationality.”)

³⁴⁴ See Thornburg, *supra* note 45, at 1614 (noting, however, that legal rules can overcome heuristic biases, *id.* at 1635). See also Atrill, *supra* note 106, at 282-83 (noting judicial propensity for “impressionistic” decision-making). Cf. Johnson, 200 C.L.R. 488, at ¶ 46(5) where the High Court of Australia noted the “desirable development” of a trend away from viewing judges as ones with “unique perceptiveness” and now relying on “the logic of circumstances” and contemporary documents rather than mere impressions.”

³⁴⁵ TVERSKY & KAHNEMAN, *supra* note 50, at 20-21; KAHNEMAN, *supra* note 53, at 119-28; and Thornburg, *supra* note 45, at 1612-13; and Fairley v Andrews, 423 F. Supp. 2d 800, 820 (N.D. Ill. 2006) (judges come to the bench with backgrounds of experiences, beliefs, viewpoints, and associations).

the constraints of limited information and uncertainty, there is a recognizable need to provide analytical guardrails and signposts to support (and constrain) judges in their difficult (and inherently subjective) ethical decision-making process.³⁴⁶

Thus, a reconceptualized reasonable observer heuristic would be beneficial in helping judges to understand the “objective” appearance ethic, while helping them avoid the siren call of an actual prejudice analysis.³⁴⁷ In the absence of a reformulation (unlikely) or abandonment (ill-advised and perilous) of the appearance of bias standard, specifically with respect to the precept’s verbal fulcrum,³⁴⁸ the reasonable observer heuristic can be reconceptualized to promote greater analytical clarity and principled interpretation. Against the backdrop of the preceding sections, the following adjustments to the reasonable observer heuristic are offered.

A. THE REASONABLE OBSERVER SHOULD BE CONCEPTUALIZED REALISTICALLY AND FLEXIBLY

Regardless of whether the reasonable observer standard is applied in the religious endorsement or recusal context, common questions predominate: Who does the reasonable observer represent? Whose voice is the judge channeling? What does the reasonable observer know and see?

1. The Reasonable Observer: Identity

Commentators, including Supreme Court justices,³⁴⁹ have advocated for a more realistic, sensitive, and nuanced conception of the reasonable observer.³⁵⁰ As others have suggested, the reasonable person/observer is a heuristic that should reflect social (public) meaning; the heuristic should acknowledge and incorporate the real possibility of multiple personae.³⁵¹ Relevant to a broader, more flexible

³⁴⁶ See Sunstein, *supra* note 232, at 432-33 (identifying the need to produce institutional safeguards to over-ride error-prone intuitions).

³⁴⁷ See *Shankar*, [2006] SGHC 194, at ¶ 62, quoting *R v Inner West London Coroner, ex parte Dallagio* [1994] 4 All 139, at 152; Bassett & Perschbacher, *supra* note 281, at 159; and Shaman, *supra* note 54, at 629. Actual prejudice assessments invariably benefit the challenged jurist, especially when applied in connection with the presumption of judicial impartiality.

³⁴⁸ See *infra* §§ II(B)(3) and IV(B).

³⁴⁹ See Justice Stevens’ critique of the prior endorsement test in *Capital Square*, 515 U.S. 753, in *supra* § II(B)(2).

³⁵⁰ See Atrill, *supra* note 106, at 288; Tinus, *supra* note 70; Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285, 1310-11 (2020); and Moran, *supra* note 93 (feminist concerns regarding equality and the reasonable man standard).

³⁵¹ See Hill, *supra* note 60, at 509-10, 517-18; Hill, *supra* note 105, at 1452 n.211, citing Michael C. Dorf, *Same Sex Marriage, Second-Class Citizenship, and Law’s Social Meaning*, 97 VA. L. REV. 1267, 1336 (2011) (favoring a multiple reasonable observer approach, noting that there is no single perspective that warrants privileging); Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 775 (2018) (noting that no single perspective can be attributed to the reasonable observer); and Davies & Oakes, *supra* note 60, at 121-23, 132-34, and *infra* notes 372 and 373 (given the increased public sensitivity to the fair administration of justice, authors suggest a more nuanced and perhaps empirically-based approach regarding the observer

heuristic is the recognition of the futility and undesirability of trying to achieve an idealized, unattainable consensus.³⁵² The flexibility of this approach makes philosophical and jurisprudential sense if one considers the fundamental nature of the reasonable observer. In response to the persistent philosophical debate whether the reasonable person, as the designated representative of a global community (“the average Joe,” so to speak) is more statistical (i.e., average) or normative (i.e., the embodiment of an ideal or community values), commentators have favored the latter. A purely statistical approach is viewed as empirically impossible inasmuch as we lack objective means to reduce human beings or their beliefs to a single number, metric, or trait.³⁵³ The statistical approach, in its attempt to generalize reality, presents the danger of being over- or under-inclusive;³⁵⁴ in a sense, conceiving of reasonableness as an average or composite of multiple characteristics results in an unrealistic leveling of reality – it captures too much or too little, and thus can be viewed as exclusionary, a particularly troublesome analytic when placed in the context of ethics and justice.³⁵⁵ Additionally, supportive of a more flexible and recusal-sensitive approach to the reasonable observer heuristic is the fact that the heuristic is applied to the ethical domain of judicial impartiality, a secular value that ultimately reflects the ethic of caring for the interests of others,³⁵⁶ a viewpoint that is compatible with the classical notion of the reasonable person.³⁵⁷

The recognition of the interests of others, when relevant, should guide the formulation of the reasonable observer heuristic. The high court of Australia addressed the importance of considering the impressions of the public and parties in applying the reasonable observer (a/k/a fictitious bystander) heuristic:

It is their confidence that must be won and maintained. The public includes groups of people who are sensitive to the possibility of judicial bias. It must be remembered that in contemporary Australia, the fictitious bystander is not necessarily of European ethnicity or other majority traits.”³⁵⁸

fiction, extending it to include actual subjects of the judicial process).

³⁵² See Perschbacher, *supra* note 271, at 705 n.29, quoting Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification – and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoilation, and Perceptual Realities*, 30 REV. LITIG. 733, 739 (2011); and Mayo Moran, *supra* note 94, at 205-10 (author urges a standard more responsive to the realities of a multi-racial and multi-cultural world); Mayo Moran, *supra* note 93, at 1283 (emphasizing the importance of context, author suggests that “rhetorical unity” about the reasonable person may be dangerous).

³⁵³ See Miller & Perry, *supra* note 58, at 371 and 377.

³⁵⁴ See Tinus, *supra* note 70, at 42.

³⁵⁵ Consider, e.g., the exclusionary nature of the “reasonable man” in relation to a feminist perspective. See Moran, *supra* note 93; Miller & Perry, *supra* note 58, at 361-62; and Tinus, *supra* note 70, at 15-22.

³⁵⁶ See Tinus, *id.* at 48 (distinguishing the “reasonable person” from the “rational person,” the former being concerned with the interests of others; author endorses a reasonable person concept that is imbued with the normative of care).

³⁵⁷ See Tobia, *supra* note 67, at 302-05; consider also DiMatteo, *supra* note 11, at 305-08 (discussing the reasonable person in tort and contract law as the secularization of religious precepts and rooted in moral philosophy).

³⁵⁸ See Johnson, 200 C.L.R. 488, at ¶ 41.

Similarly, in identifying and applying the objective test for apparent bias, the High Court of South Africa acknowledged: “In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them.”³⁵⁹ In a racially-charged case, involving a white police officer’s arrest of a Black 15-year old who had allegedly interfered with the arrest of another youth, the Supreme Court of Canada applied its reasonable apprehension of bias test with the following caution: “Judges must be particularly sensitive to the need not only to be fair but also appear to all reasonable observers to be fair to all Canadians of every race, religion, nationality and ethnic origin.”³⁶⁰

The preceding commentary is relevant to the symbolic and practical issue of whose voice does the judge channel when conjuring the metaphorical reasonable observer. Joanna Grace Tinus, advocating a fine-tuning of the heuristic, has remarked that “...the objective nature of the [reasonable person] standard has been undermined by relying on a standard of reasonableness that tends to reflect social norms and particular prevailing ideas of particular classes of individuals.”³⁶¹ Others have focused their criticism on the fact that the reasonable observer heuristic suffers from an inherent majoritarian point of view, sometimes characterized as the “individuation problem.”³⁶² Associating the reasonable person with a majoritarian point of view, for example, had been recognized as a serious defect of the heuristic (as previously applied in America’s religious endorsement cases) given the potential impact on minority populations.³⁶³ Jesse Choper, for example, had recommended that religious minority interests should be part of the calibration.³⁶⁴

³⁵⁹ See *SARFU2*, 4 SA 147, at ¶ 43.

³⁶⁰ See *R v. S (RD)*, 3 S.C.R. 484, at ¶ 2.

³⁶¹ See *Tinus*, *supra* note 70, at 45; Resnick, *supra* note 44, at 1909-10 (no judge stands outside a social context; adjudication is socially embedded); and Robertson, *supra* note 351, at 749, 762 (noting the unconscious framing of issues that seem to support one’s social identity).

³⁶² See *Tobia*, *supra* note 67, at 347-50 (recommending a hybrid approach regarding the reasonable person construct); *consider also* Garrett, *supra* note 64, at 77 (noting, in a constitutional context, that if the main goal is to protect individual rights, then the perspective of an individual would be more important than the aggregate in determining reasonableness); and Davies & Oakes, *supra* note 351, at 154-55 (suggesting the consideration of a litigant’s perspective, which the authors note may be conceptually paradoxical in the application of a self-described “objective” reasonable observer test).

³⁶³ See *Hill*, *supra* note 105, at 1410-11; and Choper, *supra* note 113, at 518-19, 525 (noting that Justice O’Connor’s prior endorsement heuristic, *see* note 117 *supra*, suffered from being nebulous, unconstrained, legislative-like, and insufficiently sensitive to the reasonable minority observer).

³⁶⁴ See Choper, *id.*, at 519 n.107, and 525 (regarding the then-prevailing endorsement analysis, author noted that the calibration should be empirically influenced by the perceptions of the “average” member of the minority religious faith, if they are discernible). *See also* Justice Stevens’ views, text accompanying *supra* notes 108-109. As others have noted, caution must be exercised—the hyper-sensitive and those with extremist views or “distressed sensibilities” should be excluded from consideration. *See* Choper, *id.* at 521-524; and *Hill*, *supra* note 60, at 517-18 and n. 153. Unconventional views, however, should not be categorically excluded. *See* Miller & Perry, *supra* note 58, at 378. In 2022, the Supreme Court, as noted herein, has abandoned the endorsement heuristic in religious endorsement cases in favor of a history-and-tradition approach. *See Kennedy*, 142 S. Ct. 2407.

The recognition and incorporation of multiple perceptions, when appropriate and feasible, would promote greater jurisprudential sensitivity and clarity. Decision-making could be enhanced, for example, by taking a debiasing “external assessment approach.” As Richard Re notes:

Thus, a court could attempt to assess and take account of the views of other actors, even when the court itself is “internally” certain that the other actor’s reasonable view is incorrect. Scholars have labeled this basic approach an external assessment of ambiguity, by which one interpreter attempts to predict or imagine how other interpreters would resolve a particular issue.³⁶⁵

This external assessment of ambiguity approach, in which the identity of the perspective plays a key role, is believed to enhance analytical clarity and predictability. Such a mode of interpretation may be more appropriate when there is limited information and the governing perspective is that of an actor other than the deciding court,³⁶⁶ conditions that apply in the recusal context. Ward Farnsworth explains that the external assessment approach focuses on how ordinary readers would view an ambiguous issue.³⁶⁷ Noting that internal assessments about ambiguity are dangerous because they are easily biased by strong (sometimes unconscious) policy preferences, Farnsworth observes that the “external estimates of ambiguity, while sometimes inaccurate, are nevertheless *more* accurate than internal judgments when measured by the amount of agreement readers are able to reach about a statute [or text].”³⁶⁸ In reference to the task of interpreting an ambiguous statute, he states:

The external perspective...can serve as a useful heuristic in such cases where the clarity of a text is open to question, especially in areas of law where parties – or “ordinary readers” of the legal text in question – have a strong interest in notice. The external standard is a valuable corrective to the serious risks of bias that attend the more usual task of simply asking whether a statute seems clear to oneself.³⁶⁹

³⁶⁵ See Re, *supra* note 16, at 1517.

³⁶⁶ *Id.* at 1522.

³⁶⁷ See Ward Farnsworth, *Ambiguity about Ambiguity—An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 290-91 (2010). It is worth noting, however, that the appearance-of-impartiality ethical mandate does *not*, in this author’s view, implicate textual ambiguity; the words are simple and clear. It is the execution of the mandate that poses difficulties. *Cf.* Lee & Mouritsen, *supra* note 248.

³⁶⁸ *Id.* at 290 (italics in original).

³⁶⁹ *Id.* at 291. Farnsworth’s examination of the external and internal modes of interpretation was based on an empirical study (a survey administered to a thousand law students). Farnsworth’s study recognized a hard reality: external judgments are hard to make accurately. *Id.* at 259-60. Obviously, judges are ill-equipped to rely on surveys for decision-making, assuming evidential propriety. But, as Farnsworth concludes, his study found “support for the idea that in at least some circumstances, judgments of ambiguity are best made by estimating how a clear statutory text would be to an ordinary reader [similar to the reasonable observer?] of English.” *Id.* at 260. Consider also Davies & Oakes, *supra* note 60, at 157 (in addressing the issue of empirical evidence to assess the intuitive perceptions of the judicial process in relation to the doctrine of appearances

The external approach in interpretation is a sensible one given that, as Christopher Brett Jaeger has noted, there is a distinction between legal reasonableness and lay reasonableness. Academic or theoretical discussions of the reasonable person, whose roots are empirical, are often divorced from the reality of how lay decision-makers encounter, understand, and apply the standard; it is an issue, he says, that deserves more attention. Jaeger posits that law should, as a normative matter, track the lay conception of justice and should mirror popular intuition.³⁷⁰

This analytical backdrop leads to the fundamental practical question as to the identity of the voice(s) of the reasonable observer. As emphasized by the high courts of the United Kingdom, Australia, and South Africa,³⁷¹ the fair-minded reasonable person is a lay person, not the judge— notwithstanding the reality that some subjectivity will inevitably seep in because a human (the judge) is the medium for interpretation. Likewise, the perceptions of the public and parties, while not determinative or controlling, are worthy of consideration in the formulation of the heuristic since the confidence of the litigants and the parties in the judicial system is fundamental.³⁷² Finally, while more difficult to assess, the reasonable sensitivities and perceptions of apparent bias, shared by identifiable segments of the population, should be considered if their “voices” have relevance to the issues in the proceeding given the over-arching policy objective of impartial decision-making.³⁷³

The identity of the reasonable observer is difficult, yet fundamental, to the integrity of the decision-making process. The issue of the hypothetical reasonable observer raises philosophical, jurisprudential, and pragmatic concerns. Since the reasonable person/observer question must be rooted in the realities (albeit speculative) of the lay observer, an empirical assessment would be a rational way to proceed. But how? While recognizing that the reasonable observer question is

in the European Court of Human Rights, the authors suggest that empirical research into the root causes of public attitudes to justice and the application of those findings in judgments should not be ignored); and *infra* note 448 regarding two empirical surveys on judicial disqualification.

³⁷⁰ See Jaeger, *supra* note 65, at 904, 934-35, 938; Zorzetto, *supra* note 225; and *supra* note 231 (empirical evidence issue).

³⁷¹ See *Shankar* [2006] SGHC 194, at ¶¶ 65 and 69 (Singapore); *Webb*, 181 C.L.R. 41, at ¶ 11 (Australia); and *Roberts*, 4 SA 915, at ¶ 36 (Australia).

³⁷² As the High Court of Australia noted in *Johnson*, 200 C.L.R. 488, at ¶ 52, the “public” includes groups of people who are sensitive to the possibility of bias; see also *Shankar*, *id.*, at ¶ 74 (“reasonable number of the public [who] could harbor a reasonable suspicion of bias”); *Roberts*, *id.*, at ¶ 31 (question of the reasonable person should be approached from the viewpoint of the party to the action not of that famous fictional character); and *BTR*, 3 SA 673, at 659C-E; and *Davies & Oakes*, *supra* note 60, at 134-35 (perception of the litigants).

³⁷³ See *Choper*, *supra* notes 363 and 364; notes 351 and 352 *supra* regarding multiple viewpoints. See also text accompanying notes 108 and 109 regarding Justice Stevens’ discussion of non-majoritarian viewpoints. Cf. *Commonwealth v. Druce*, 796 A.2d 321 (Pa. Super. 2002 (applying a “significant minority” of the lay community standard regarding disqualification). Pennsylvania’s lay minority standard was subsequently disavowed. See PA CODE OF JUDICIAL CONDUCT r. 1.2 cmt. [5] (2014) noting that the current “reasonable minds” standard for the appearance of impropriety “differs from the formerly applied common law test of whether ‘a significant minority of the lay community could reasonably question the court’s impartiality.’”

ultimately one of law,³⁷⁴ and is not determined by a simple calculation of votes, Jessie Hill concludes that an empirical consensus is difficult (albeit inappropriate) to attain and, ironically, runs the risk of supporting a discriminatory majoritarian point of view.³⁷⁵ Nevertheless, she posits that the reasonable observer's task (i.e., the determination of public or social meaning) can be approached by evaluating all relevant information,³⁷⁶ similar to the suggestion made by the Canadian Supreme Court, which stated:

Judicial inquiry into context provides the requisite background for the interpretation and the application of the law. An understanding of the context or background essential to judging may be gained from testimony by expert witnesses, from academic studies properly placed before the court, and from the judge's personal understanding and experience of the society in which the judge lives and works. *This process of enlargement is a precondition of impartiality. A reasonable person would see it as an important aid to judicial impartiality.*³⁷⁷

If information is available, and if the task is reasonably feasible and evidentially relevant, the process of enlargement should be considered. Doing so would make the reasonable observer heuristic in appearance-based judicial ethics more principled, jurisprudentially sound, and responsive to the changing realities of contemporary society's pluralism.

2. *The Reasonable Observer: Imputation of Knowledge*

Anglo-American jurisprudence identifies the metaphorical reasonable observer in generalities: fair-minded, reasonable, thoughtful, aware of the relevant facts and circumstances, and informed. As the prior discussion has indicated, the "informed" attribute has generated a considerable variety of opinion about the reasonable observer's level of knowledge and information.³⁷⁸ How "informed," "well-informed," "fully informed," or "knowledgeable" must the reasonable observer be? Discussion among judges and academics about the cognitive capacity and imputation of knowledge has occurred in two different legal contexts: constitutional religious endorsement and disqualification. Justice Stevens was particularly troubled by Justice O'Connor's more sophisticated formulation of the reasonable person heuristic as previously applied in the religious endorsement context. For Stevens, the legal construct of the reasonable observer unrealistically represented

³⁷⁴ See Hill, *supra* note 105, at 1440.

³⁷⁵ See Hill, *supra* note 60, at 517-22. Consider also *supra* notes 231 and 369 (regarding empirical evidence, judicial notice, surveys, polls).

³⁷⁶ See Hill, *supra* note 105, at 1410. The context of Hill's discussion was the former reasonable observer heuristic in religious endorsement cases.

³⁷⁷ See *R v S (RD)*, 3 S.C.R. at 488-89 (LaForest, L'Heureux-Dube, Gonthier and McLachlin, JJ) (*emphasis supplied*).

³⁷⁸ See discussion of cases in *supra* notes 207-20 and accompanying text, regarding the "informed" attribute.

a well-schooled jurist and a personification of a community ideal who possessed a high level of legal and historical knowledge.³⁷⁹

Despite the different contexts (i.e., constitutional religious endorsement and rule-based judicial ethics), the basic jurisprudential challenges about the “informed” reasonable observer are similar. American commentators concluded that the heuristic (as it had been applied in the constitutional religious endorsement context) presented a highly problematic, over-idealized, unrealistic caricature regarding the imputed level of knowledge.³⁸⁰ Common law commentators have also expressed their concerns about the “informed” attribute regarding their recusal jurisprudence. As noted, some common law countries have imposed a more elaborate or rigorous standard of the informed attribute.³⁸¹ That approach has been criticized.³⁸² Although expressing his displeasure with the “artificial” and “unworkable” reasonable lay observer heuristic, and favoring a return to a judge-centric approach, Professor Olowofoyeku, noted a trend that common law courts were imbuing the informed observer with increased knowledge and understanding so courts can reach a “right outcome,” which he says is inconsistent with the rationales for interposing a hypothetical lay person to judge the appearance of bias. As such, he notes, “this impartial observer might as well be a judge.”³⁸³ Similarly, critical of imbuing the reasonable person with insider information and the workings of the judicial system, two commentators have viewed the application of a higher standard as a way for courts to justify their refusal to recuse.³⁸⁴ In their view, this interpretation of the informed observer augments the significance of the judge’s sensibilities, hence subjectivity, and plays an important role in compromising judicial integrity and the apparent bias test.³⁸⁵ Simon Atrill, a proponent of a more nuanced observer test that emphasizes a balance of policy interests, likewise, viewed the imputation of a higher-level of knowledge as effectively facilitating a return to the *Gough* standard in which reasonableness is seen and judged through the eyes of the jurist.³⁸⁶ As the High Court in Singapore observed: “It is also why it would be a mistake for a court to simply impute all that was eventually known to the court to an imaginary reasonable person because to do so would be only to hold up a mirror to itself.”³⁸⁷

The Australian judicial system has stressed the importance of adopting realistic criteria for the variously described fictitious bystander. As the High Court of Australia explained: “Obviously, all that is involved in these formulae

³⁷⁹ See notes 108 and 109 *supra* and accompanying text regarding *Capital Square*, 515 U.S. 753 and *Kennedy*, 142 S. Ct. 2407 regarding the Court’s 2022 rejection of the observer heuristic in favor of a history-and-tradition analysis.

³⁸⁰ See Hill, *supra* note 105, at 1409-10; and Choper, *supra* note 113, at 511-14.

³⁸¹ See *supra* notes 309 and 310 and accompanying text.

³⁸² See Hughes & Bryden, *supra* note 177, at 181-82; and Perschbacher, *supra* note 262, at 699, 703.

³⁸³ See Olowofoyeku, *supra* note 274, at 404.

³⁸⁴ See Hughes & Bryden, *supra* note 177, at 180-83.

³⁸⁵ *Id.*

³⁸⁶ See Atrill, *supra* note 106, at 280-82; Bassett & Perschbacher, *supra* note 281, at 158 (stating that there is a serious risk that the judiciary is subjectivizing the objective standard, *i.e.*, the reasonable person is effectively a reasonable *judge*) (emphasis in original).

³⁸⁷ See *Shankar* [2006] SGHC 194, at ¶ 63. Regarding the troublesome self-referential perspective of judicial recusal, see Pines, *supra* note 134.

is a reminder to the adjudicator that, in deciding whether there is an apprehension of bias, it is necessary to consider the impression which the same facts might reasonably have upon the parties and the public.”³⁸⁸ To that end, Australia often omits the “informed” attribute in applying the reasonable bystander heuristic.³⁸⁹ For example, as noted in *Johnson*, the bystander is described as fair-minded and reasonable, neither wholly uninformed or uninstructed about the law in general or issues to be decided, knowledgeable about commonplace things, and possessing basic common sense regarding the process of adjudication and the judicial-legal profession, one who is neither unduly sensitive or suspicious.³⁹⁰

The High Court of England and Wales noted that the fair-minded observer cannot be ascribed all the knowledge and, indeed, assumptions of a trained judge, adding “The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny.”³⁹¹

How one describes—or embellishes—the attributes of the reasonable observer can be, knowingly or unwittingly, outcome-determinative. For conceptual and interpretive clarity, the reasonable observer should not be imbued with unrealistic or unnecessary qualities that threaten to convert the reasonable observer heuristic into a subjectivized judge-centric standard that muddies the focus of the standard (the objective and fair-minded lay member of the community) or undermines the standard’s fundamental values (appearance of impartiality, public trust and confidence). If an “informed” attribute is deemed necessary, then it should be a simple one, connected to the relevant facts and circumstances of the case – an attribute that supports the desired qualities of being thoughtful, fair-minded, and reasonable. Simply put, how “informed” must one be to make a commonsense, reasonable assessment of a jurist’s apparent impartiality?³⁹²

³⁸⁸ See *Johnson*, 200 C.L.R. 488, at ¶ 52.

³⁸⁹ See Atrill, *supra* note 106, at 280-82.

³⁹⁰ See *Johnson*, 200 C.L.R. 488, at ¶ 53. This narrative regarding attributes is a paraphrase and condensation of the relevant paragraph in *Johnson*. The opinion further noted that excessive “sophistication and knowledge about the law and its ways,” atypical of the general community, should be avoided. *Id.* at ¶ 54.

³⁹¹ See *M&P Enterprises Ltd v. Norfolk Square Ltd* [2018] E.W.H.C. 2665, at ¶ 27, quoting Lord Hope in *Gilles v. Secretary of State for Work and Pensions* [2006] 1 All E.R. 731, at ¶ 17.

³⁹² The question is not intended to minimize the important fact that, as caselaw repeatedly emphasizes, disqualification analysis is fact-specific. The question posed herein is cautionary. Anglo-American disqualification analysis can run the risk of being overly “facy” or unnecessarily complicated, obfuscating the appearance standard and potentially converting it into an actual prejudice standard. See *Shaman*, *supra* note 54, at 628-32. Regarding the notion of “facy” see, e.g., *SARFU2*, 4 SA 147 (involving a fact-heavy analysis of an “unprecedented” recusal challenge that focused on all judges of the Constitutional Court).

B. THE REASONABLE OBSERVER'S PERCEPTION SHOULD BE ANALYZED IN TERMS OF POSSIBILITY NOT PROBABILITY

1. The Judicial Transmogrification of a Clear Mandate

Identifying the voice and attributes of the reasonable observer is, as the high courts of Singapore and Australia recognized, the portal to understanding and applying a critical element of the apparent bias heuristic, *viz.*, the level of scrutiny applicable to the assessment of the reasonableness of a lay observer's perception of bias.³⁹³ As the preceding sections demonstrated,³⁹⁴ the common law countries have engaged in semantic struggles to identify the appropriate level of proof for assessing apparent bias: from "real danger," to possibility, to likelihood, to probability -- all considered in relation to the metaphorical observer's enigmatic manifestations (such as "apprehension" or "suspicion"). The labyrinth of language employed in the search for understanding and consensus has been Faustian.³⁹⁵

Commentators and jurists in the United States, on the other hand, have avoided (intentionally or unreflectively) such semantical quicksand. The approach has been devoid of meaningful analysis in the interpretation and application of the reasonable observer heuristic's "might reasonably be questioned." The modal verb "might" is the outcome-determinative fulcrum of the standard.³⁹⁶ "Might" and "would" are distinct terms.³⁹⁷ Yet, because of the lack of interpretive guidance, there has been confusion regarding the level of probability required: does it connote, as one commentator has observed, a higher level of certainty ("would") or lower a lower level of conceivability ("might")? ³⁹⁸ In terms of American recusal principles

³⁹³ See *Shankar*, [2006] SGHC 194, at 65, citing *Webb v. The Queen*, 181 C.L.R. 41, at 50-51.

³⁹⁴ See *supra* § III(B) and (C).

³⁹⁵ See text accompanying *supra* note 28.

³⁹⁶ See Winiharti, *supra* note at 246 ("would" is a modal that can be an expression of prediction; it is important to consider the context in which a modal is used). See also notes 248 and 249 *supra*.

³⁹⁷ See, e.g., *Webb*, 181 C.L.R. 41, at ¶¶ 33-34 (noting the distinction in terminology regarding whether a reasonable person *might* or *would* have a reasonable apprehension or suspicion). See also Okpaluba & Juma, *supra* note 200, n. 167 (noting, in reference to *McGovern v. Ku-Ring-Gai Council* [2008] 251 ALR 558, 42 NSWLR 504, that the Court of Appeal for New South Wales, dealing with the apprehension of bias, found the trial judge to have improperly applied the applicable test by asking the incorrect question, namely, whether the decision-maker *would*, rather than *might*, not be impartial) (emphasis supplied). *McGovern* is the leading case on apprehended bias in New South Wales. See also Martin J. Newhouse, *Mandating Recusal in the Absence of Bias: In re Bulger*, 710 F.3d 42 (1st Cir. 2013), 59 BOSTON BAR (Jan. 7, 2015), (emphasizing the standard's specification of "might" in contradistinction to the stricter standard of "would;" author suggests the words may be used interchangeably but that the standard tilts in favor of recusal, especially in sensitive cases, to protect the public's perception of judicial impartiality), <https://bostonbar.org/journal/mandating-recusal-in-the-absence-of-bias-in-re-bulger-710-f-3d-42-1st-cir-2013/>

³⁹⁸ See FLAMM, § 11.4, *supra* note 21. Why the Model Code's drafters chose the modal "might" instead of "would" is not explained in Thode's notes. See *supra* note 163. One can surmise, however, that the drafters were careful with terminology regarding such a pivotal concept. The verbal choice makes eminent sense given the precept's underlying value, *viz.* protecting the appearance of justice and the public's trust and confidence in

and practice, the question raises an important jurisprudential issue. Within a fluid spectrum of uncertainty, what is/should be the appropriate level of belief and evidential proof? ³⁹⁹ The dilemma of how to allocate the burden is exacerbated when information and human cognitive abilities are limited.⁴⁰⁰

Notwithstanding such constraints, the law has attempted to calibrate certitude, although, as one commentator has noted, remarkably no one has ever formulated an adequate model for applying the standards of proof.⁴⁰¹ Kevin Clermont notes: “The epistemological aim of evidence law is that the factfinder should construct a belief that corresponds to the outside world’s truth. Probability thus reflects a measure of the chance of that correspondence existing between finding and reality.”⁴⁰² The traditional method of legal reasoning is through imprecise probabilities. Civil law, for example, assigns evidential burdens through various perspectives such as preponderance of the evidence or clear and convincing evidence.⁴⁰³ Criminal law has adopted additional calibrations, such as reasonable suspicion, probable cause, and beyond a reasonable doubt.⁴⁰⁴ The Singapore High Court, for example, placed the “imaginary scales of justice” in distinctly impressionistic terms: doubt, suspicion, likelihood, and more-likely-than-not.⁴⁰⁵

Academics have not been able to resist the allure of positing alternative theories and methods to identify degrees of probability and certitude.⁴⁰⁶ Evidential

the judicial system and the critical need for the jurist to exercise caution.

³⁹⁹ Consider Fleming James & Roger P. Perry, *Legal Cause*, 60 YALE L.J. 761, 771 (1951) (noting, in the context of the chameleon quality of “proximate cause,” the problem of establishing sufficient causal evidence where an opinion is expressed in terms of possibility rather than certainty or probability or where there is an equipoise of possibilities).

⁴⁰⁰ See Vermeule, *supra* note 10, at 169-71.

⁴⁰¹ See Kevin M. Clermont, *Trial by Traditional Probability, Relative Plausibility, or Belief Function*, 66 CASE W. RES. L. REV. 353, 361 n.33 (2015) (noting that psychologists have contributed almost nothing as to how humans apply standards of proof). Consider, for example, Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443, 1461-62 (2019) (noting that a survey of federal judges placed reasonable doubt at “90% or higher” level, but jurors equate that highest burden with a much lower level of guilt).

⁴⁰² See Kevin M. Clermont, *Standards of Proof Revisited*, 33 VT. L. REV. 469, 481 (2009).

⁴⁰³ See Ronald J. Allen & Michael S. Pardo, *Relative Plausibility*, 23 THE INT’L J. EV. & PROOF 1 (2019) (a critique of conventional probability theory; notes that probabilistic standards in civil cases are vague and poorly understood, citing *Addington v Texas*, 441 U.S. 418, 425 (1979); authors favor relative plausibility theory as the best tool to assess juridical proof, but notes that critics question whether the two theories are meaningfully different, *id.* at 20-29); and cf. Kevin M. Clermont & Emily Sherwin, *A Comparative View of Standards of Proof*, 50 AM. J. COMP. L. 243 (2002) (noting a striking divergence between common law and civilian standards of proof in civil cases in England and the United States).

⁴⁰⁴ See Kevin M. Clermont, *supra* note 402 (standards of proof); Flemming, *supra* note 200 (burdens of proof and persuasion).

⁴⁰⁵ See Shankar, [2006] SGHC 194, at ¶¶ 48-51.

⁴⁰⁶ Consider Allen & Pardo, *supra* note 403 (relative plausibility); Michael S. Pardo & Ronald J. Allen, *Juridical Proof and the Best Explanation* (2007), available at <https://ssrn.com/abstract=1003421>; Paul Tidman, *Conceivability as a Test for Possibility*, 31 AM. J. PHIL. Q. 297 (1994) (considers the conceivability thesis regarding the relationship between conceivability and possibility, which he notes plays a crucial role

calibrations are inherently imprecise and unquestionably implicate a high degree of intuition and subjectivity in the decisionmaker. Attempts have been made to identify a hierarchy of standards of proof within the realm of traditional probability. Kevin Clermont, for example, disfavors quantification and has offered the following scale (“categories of uncertainty”) regarding decision-making.⁴⁰⁷

1. Slightest Possibility
2. Reasonable Possibility
3. Substantial Possibility
4. EQUIPOISE
5. Probability
6. High Probability
7. Almost Certainty.

Clermont notes that a higher standard is a way to inform the factfinder that the burdened party must provide a stronger showing of probability; a better way to envisage the whole scale of likelihood, he says, is as a set of fuzzy categories, or coarse gradations, of likelihood.⁴⁰⁸

Nevertheless, there is a gravitational pull to seek greater clarity and certainty through the assignment of more specific metrics, although judges reportedly eschew numerical or percentile interpretations.⁴⁰⁹ Ronald Bacigal, for example, has reformulated the levels of certainty into five categories by assigning the following statistical benchmarks:⁴¹⁰

1. Slight Possibility (1% to 10%)
2. Reasonable Suspicion (20% to 40%)

in philosophical and everyday thinking); Craig S. Lerner, *Reasonable Suspicion and Mere Hunches*, 59 VAND. L. REV. 407 (2019) (addressing the legal system’s deference to police officers’ intuitions); and Clermont, *supra* note 402 (author suggests a multi-valent “degrees of belief” approach as a better way to accommodate vagueness and imprecise probability).

⁴⁰⁷ See Clermont, *supra* note 402, at 482-83 n.31.

⁴⁰⁸ *Id.* at 485.

⁴⁰⁹ See Re, *supra* note 16, at 1503. See also *United States v. Fautico*, 458 F. Supp. 388, 410 (E.D.N.Y. 1978) (regarding a survey of how judges associated probability to the various evidential burdens); Clermont, *id.* at 482 and 484 (easier for judges to apply a deliberate and probabilistic approach to the standard of proof; noting also that judges have difficulty in conveying any standard of probability to a jury and juries have difficulty in quantifying the standards of proof); Bobby Greene, *Reasonable Doubt: Is It Defined by Whatever is at the Top of the Google Page?*, 50 J. MARSHALL L. REV. 933 (2017) (noting inability of judges to quantify the reasonable doubt standard); and Gretchen B. Chapman & Eric Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Values* (2000) in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE THOUGHT* 4-5 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds. 2002) (noting, in reference to numerical anchors that are uninformative but salient, that even judges agree that numbers are irrelevant but have an impact).

⁴¹⁰ See Ronald Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 333-34 (2004). Bacigal’s calibrations are within the context of a discussion about interpreting probable cause in a flexible way, citing Judge Posner’s focus on zones rather than specific points in a spectrum.

3. Fair Probability (40% to 49%)
4. More Likely Than Not (51%)
5. High Probability (80% to 100%)

Irrespective of the challenge of identifying and assigning probabilistic numbers to the standards of proof, Clermont, for example, acknowledges that the law allows recovery upon much less than a 50% showing of probability.⁴¹¹

The discussion of heuristic calibration takes one closer to an understanding of what should be a potentially more principled and rational understanding of the disqualification standard's "might." To do so, there is a need to expand the horizons by considering two related, but distinct, standards of proof that are applied in the criminal law context: probable cause and reasonable suspicion.⁴¹²

In the context of Fourth Amendment law,⁴¹³ "probable cause" is not what it appears to be. Probable cause is not synonymous with "probably." Probable cause signifies more than *bare* suspicion; nor does it require resolution of evidence according to a preponderance of the evidence or the more-likely-than-not standard.⁴¹⁴ Probable cause is understood as requiring a *reasonable ground* for belief.⁴¹⁵ Recognizing that probable cause is a fluid concept not easily reducible to a neat set of legal rules, Kiel Brennan-Marquez notes that the Supreme Court's reasoning in probable cause tracks the plausibility model of suspicion.⁴¹⁶

This discussion takes us to the U.S. concept of reasonable suspicion, which has its roots in *Terry v. Ohio*.⁴¹⁷ Craig Lerner noted that, in quantitative terms, and in comparison to probable cause on the spectrum of probability, reasonable suspicion

⁴¹¹ See Clermont, *supra* note 401, at 356. Consider, e.g., *Lageman v. Zepp*, 266 A. 3d 572, 597-99 (Pa. 2021) (Saylor, J., dissenting) (discussing the application of *res ipsa loquitur* when the evidence has not established negligence, citing *Norris v. Phila. Elec. Co.*, 5 A.2d 114, 115 (Pa. 1939)).

⁴¹² The caveat here is that application of the standards of proof and relevant tests may be comparatively helpful, but one must always be sensitive to whether the use is appropriate to the context. See § I(D)(4), *supra*, regarding the factor of context. Of course, one never knows if or how a metric or value judgment is being interpreted and applied.

⁴¹³ U.S. CONST., amend. IV, provides: "The right of the people to be secure in their persons, houses, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

⁴¹⁴ See Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical and Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69, 72 (citing cases); and Lerner, *supra* note 406, at 460.

⁴¹⁵ See Colb, *id.* at 72, noting also that the Supreme Court has not considered what numerical odds are sufficient to establish probable cause, *id.* at 75.

⁴¹⁶ See Kiel Brennan-Marquez, "Plausible Cause:" *Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1265 (2019).

⁴¹⁷ *Terry v. Ohio*, 392 U.S. 1 (1968) (probable cause not required to conduct a limited protective search for weapons when police, based on specific reasonable inferences, believe that criminal activity may be afoot and that the person with whom he is dealing may be armed and dangerous). *Terry* has since become immortalized as embodying the "reasonable suspicion" standard, although the Supreme Court's majority opinion did not use that term.

amounts to far less than 50%.⁴¹⁸ With its origins in English law and as explained in the Canadian case of *R v Kang Brown*, “A ‘reasonable’ suspicion means more than a mere suspicion, and something less than a belief based on reasonable and probable grounds.”⁴¹⁹

For our purposes, aside from its relatively lower-level quantitative aspect, the notion of suspicion is a fluid concept that reflects practical considerations of everyday life.⁴²⁰ Regarding both standards (reasonable suspicion and probable cause), the requirement of a narrative, factual explanation based on the totality of circumstances presented is important. The standards are concepts designed to explain, *not* predict. Brennan-Marquez notes that the Supreme Court has long understood probable cause and reasonable suspicion in explanatory terms, *i.e.*, requiring articulation of data and information supporting one’s inference or conclusion.⁴²¹ Essentially, identifying the governing standard of scrutiny with clarity, in conjunction with the requirement of factual articulation, would help to constrain discretion and subjectivity.

2. Reasons That Support a Clear and Strong Disqualification Standard

There is a need to re-interpret the appearance-based disqualification standard in a manner that re-balances the equation away from popular notions of probability or certainty. In doing so, we need to acknowledge the current unreflective jurisprudential approach and the importance of principled, analytical clarity. The operative disqualification standard—when a judge’s impartiality might reasonably be questioned—should be interpreted more carefully and less restrictively than it has been. The critical issue is how one interprets and applies the modal “might,” as modified by “reasonably.” In consideration of the preceding discussion about levels of belief, the appropriate level of scrutiny should be *reasonable suspicion*—not likelihood or probability. The following reasons justify such an approach.

a. Textual and semantic fidelity, ordinary usage: The glaring aspect of the appearance standard is that “might” is not synonymous with, and does not have the same semantical meaning of, “would.” The modal “would” is utilized frequently, without explanation or elaboration, in U.S. disqualification caselaw. To be clear, there is no semantic ambiguity in the disqualification standard’s specification of “might.” Whether “would” was considered by the drafters as an option, we do not know; in any event, the drafters specified “might.” Although it is impossible to discern the actual intent or state of mind regarding how one uses or interprets language, we can presume that words are used in a way that is consistent with

⁴¹⁸ See Lerner, *supra* note 406, at 460.

⁴¹⁹ See *R. v. Kang Brown*, [2008] 1 S.C.R. 456, at ¶ 75, cited in Terry Skolnick, *The Suspicious Distinction Between Reasonable Suspicion and Reasonable Grounds to Believe*, 47 OTTAWA L. REV. 223, 235 (2015-16).

⁴²⁰ See Brennan-Marquez, *supra* note 416, at 1265-66, citing *Brinegar v. United States*, 338 U.S. 160, 175 (1949) and *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). The author, in discussing probable cause and suspicion, notes that numerical benchmarks may be unstable and imprecise. *Id.* at 1266 n.51.

⁴²¹ Brennan-Marquez, *id.* at 1255. Author also notes that historically “probable” was more akin to “provable.” *Id.* at 1253-54 nn. 9 and 10.

their plain meaning—similar to how we approach and differentiate *actual* from *apparent* bias.⁴²² In the application of the disqualification standard, there should be congruency between the language of the text and the ordinary meaning of the words chosen to implement the text. In modern American usage, “might” is a word that occupies a place on the continuum of *possibility*.⁴²³ The proper interpretative approach is one that analyzes the disqualification standard from the perspective of possibility, not probability. Reasonable suspicion is a metric that is congruent with the plain and interpretive meaning of the ethical mandate’s “might.”

Adrian Vermeule provides prudent advice about interpretation in decision-making -- judges should stick close to the surface level or literal meaning of clear and specific texts, resolutely refusing to adjust those texts by reference to a judge’s conception of textual purpose, drafters’ understanding, public values and norms.⁴²⁴ In addition, consistent with Vermeule’s advice, judicial implementation of the semantically clear disqualification standard should avoid unnecessary and potentially distorting adjectival amplifications of the evidential standard. The standard for the perception of judicial impartiality should not be qualified or amplified by terms like “substantial,” “significant,” or “serious,” which are often applied in an *ad hoc* fashion to the reasonable person’s perception.⁴²⁵ Similarly, application of the appearance standard should not be weakened or compromised by self-serving, balance-shifting procedural devices, such as presumptions.⁴²⁶ If sufficient evidence is produced to undermine the presumption, the presumption should dissipate.⁴²⁷

⁴²² Consider, however, Silvia Zorzetto, *The Language of Legal Rules: Some Notes About Plain Meaning in Law* 10-12 (2013) (noting the relevance of context and citing instances when interpretation contradicts plain meaning), https://www.academia.edu/32601671/THE_LANGUAGE_OF_LEGAL_RULES_SOME_NOTES_ABOUT_PLAIN_MEANING_IN_LAW. See also *supra* notes 248 and 249.

⁴²³ See BRYAN A. GARNER, *GARNER’S MODERN AMERICAN USAGE* 529 (3d ed. 2009). See also THEODORE M. BERSTEIN, *THE CAREFUL WRITER: A MODERN GUIDE TO ENGLISH USAGE* 271 (1965) (in comparing “may” and “might,” author notes that the latter “adds a greater degree of uncertainty to the possibility”). See also *supra* notes 248 and 249.

⁴²⁴ See Vermeule, *supra* note 10, at 168-81. Consider also *Barrett v Commonwealth*, 430 S.W.3d 337, 342 (Ky. 2015) (court adopts a plain language approach and concludes that “reason to believe,” not probable cause, is the appropriate interpretation of the standard in *Payton v New York*, 445 U.S. 573 (1980)).

⁴²⁵ See cases cited in *supra* section II(B)(3). Consider also *R v. Lifchus*, [1997] 3 S.C.R. 320, at ¶ 26 (Can.) (with respect to the reasonable doubt standard, court says that explaining “doubt” through qualitative terminology such as “serious” or “substantial” should be avoided in order not to lead a juror to set an unacceptably high standard of certainty).

⁴²⁶ See Hill, *supra* note 105, at 1449-52 (in the context of religious endorsement cases, author noted the benefit of adopting procedural mechanisms to strengthen the reasonable observer heuristic, stating that presumptions can serve as tie breakers in close cases; however, they can be easily manipulated).

⁴²⁷ See Murl A. Larkin, *Article III: Presumptions*, 30 HOUSTON L. REV. 241, 241 (1993-1994) (presumption disappears upon rebuttal); Pines, *supra* note 134, at 106-09 (critical examination of the presumption of impartiality in the context of a jurist’s problematic self-assessment of impartiality, which paradoxically represents a “biased impartiality” endeavor); and Marbes, *supra* note 144, at 298-302 (proposing a flexible re-balancing of the presumption of impartiality, including a weaker presumption for self-disqualification decisions); see FLAMM, *supra* note 21, at § 4.5; and Yablon, *supra* note 201, at 227, 229 n. 7 (noting the “bursting bubble” theory of presumptions, *i.e.* once the party against

b. *Contextual adjustment of the metric*: Judicial impartiality is recognized as a value of the highest order, integral to the concept of a fair trial, a fair tribunal, and the public's confidence in our system of justice.⁴²⁸ Accordingly, when such interests are implicated, the level of scrutiny should be adjusted to accommodate and protect those fundamental interests.⁴²⁹ Fleming James suggests that in difficult cases, and to avoid a harsh or "unlovely" spectacle, courts may relax the requirements of proof.⁴³⁰ In the specific context of apparent bias, the *Shankar* court stated:

The point simply is this: there is a vital public interest in subjecting the decisions of those engaged in any aspect of judicial or quasi-judicial work to the most exacting scrutiny in order to ensure that their decisions are not only beyond reproach in fact and indeed from the perspective of a lawyer or a judge but also beyond reproach from the perspective of a reasonable member of the public. The inquiry should be directed from the perspective at whether the events complained of provide a reasonable basis for such a person apprehending that the tribunal might have been biased.⁴³¹

Adjusting the level of scrutiny in accordance with the reasonable suspicion standard provides a sufficient baseline, as well as procedural flexibility, to protect the appearance of judicial impartiality in the difficult context of uncertainty, limited information, and the public's trust and confidence in the judicial system's integrity.

c. *Minimizing the costs and risks of error*: The recalibrated level of scrutiny (reasonable suspicion) provides protection from the harmful consequences of erroneous decision-making in disqualification cases. A recalibrated standard, faithful to the precept's text and values, would promote greater judicial caution in recusal matters and engender greater public confidence. Allocating the burden of uncertainty (especially when decision-making is dependent on the "objective" application of a vague metaphorical construct like the "reasonable" observer) is a challenging task. Vermeule has suggested various strategies, such as the *maximin criterion* and *satisficing*. In the former, some choices dominate others in the absence of probability information because the dominant choice produces better outcomes

whom the presumption is raised meets a burden of production, the presumption "bursts" and falls out of the case; author notes major evidence treatises seem generally to endorse this view).

⁴²⁸ See Pines, *supra* note 134, at 103-09, and cases cited therein. As the cases from the common law countries herein demonstrate, the values are international.

⁴²⁹ See Yossi Nehustan, *The Unreasonable Perception of Reasonableness in UK & Australian Public Law*, III INDIAN J. CONST. & ADMIN. L. 83, 108 (2019) (in the context of British and Australian law, author advocates that the level of scrutiny should be adjusted in relation to the interests at stake, e.g., strict scrutiny when human rights are at stake); see also Bacigal, *supra* note 410, at 320-21 (in calibrating probable cause, it is important to identify the appropriate level of scrutiny by considering the importance of the interests).

⁴³⁰ See James & Perry, *supra* note 399, at 780-81.

⁴³¹ See *Shankar* [2006] SGHC 194, at ¶ 64. See also Hill, *supra* note 105, at 1452 n. 211 (in her analysis of the reasonable observer in endorsement cases, Hill cites Professor Dorf's suggestion that there should be heightened scrutiny when an identifiable group of people take offense at the government's message of perceived inferiority).

than the outcome of the alternative, and never produces a worse outcome.⁴³² In the latter, rather than adopting a maximizing strategy to pick the “best” option, one decides, in the face of constraints, to pick an option that is simply “good enough,” which can, as Vermeule notes, be a surprisingly good option for making accurate decisions.⁴³³ The interesting aspect of these options is that the reasonable suspicion standard is an approach that serves a fundamental risk-averse principle that is often stated (but not sufficiently implemented) in disqualification cases – *i.e.*, when in doubt, the jurist should err on the side of caution and disqualify.⁴³⁴

d. *The “reasonable” safety valve:* In disqualification matters, judges seem to exhibit scorn for a claim that exemplifies “suspicion,” often cavalierly linking it with the adjective “mere.”⁴³⁵ Sometimes, one senses that the real concern (misplaced) is with actual bias, often demonstrated by a defensive, good faith protestation of the jurist’s unimpeachable impartiality. Australia decided to use different nomenclature and adopted a “reasonable apprehension” standard.⁴³⁶ Whether one uses the terminology of apprehension or suspicion, the fundamental standard remains the same. *Reasonable* suspicion (or apprehension) is *not* mere suspicion -- it requires explanation and a careful articulation of the relevant facts and circumstances to support appearance-based recusal. Free-floating suspicion or unsupported belief will not, and should not, justify disqualification. Notwithstanding its semantically and psychologically slippery aspect,⁴³⁷ “reasonable” is the indispensable anchor for principled decision-making in appearance-based disqualification.

e. *Comparative jurisprudence:* The discussion about the jurisprudence from the selected common law jurisdictions reflects a studious (and, at times, admittedly complicated) attempt to eventually reach a jurisprudential consensus in the quest for a prudent, principled, and practical standard governing apparent bias. In its application of the lay observer heuristic, common law countries have demonstrated a determination to protect cherished public values and promote public confidence. Whether the reasonable observer standard is considered in relation to “suspicion” or “apprehension,” the common law jurisdictions have gravitated toward a calibration that reflects a lower level of probability (*viz.*, possibility).⁴³⁸

⁴³² See Vermeule, *supra* note 10, at 175-76.

⁴³³ *Id.* at 177-79. See also Re, *supra* note 16, at 1513-14 (suggesting an analytical framework for a clarity threshold, rooted in uncertainty, that would reduce a particular risk of judicial error and its consequences or maximize the odds of judicial accuracy; noting also that unpredictable rulings can be disruptive, yielding institutional and societal costs, *id.* at 1516).

⁴³⁴ See, e.g., Potashnick, 609 F.2d, at 1112; New York City Hous. Dev. v. Hart, 796 F.2d 976, 980 (7th Cir. 1986) (doubts should be resolved in favor of recusal). The risk-averse rationale might arguably provide an underlying factor when an appellate court orders disqualification and reassignment after prior or repeated reversals. Consider U.S. v. Martin, 455 F.3d 1227 (11th Cir. 2006) and U.S. v. Torkington, 874 F.2d 1441 (11th Cir. 1989).

⁴³⁵ See, e.g., *In re United States*, 666 F.2d, at 695 (properly noting the distinction); *In re Allied Signal*, 891 F.2d at 970 (disavowing mere suspicion of Caesar’s wife as a standard); *Salemme*, 164 F.Supp.2d at 52 (rejecting the Caesar’s wife analogy).

⁴³⁶ See *Webb*, 181 C.L.R. 41, at ¶¶ 4, 10, and 11.

⁴³⁷ See *supra* §1.

⁴³⁸ The caveat, however, is that Canada seems to have formally adopted a higher (“more likely than not”) approach. See *supra* notes 326-27; and Okpaluba & Maloka, *supra* note 20. It is worth noting that American caselaw will occasionally express the reasonable

f. Symbolic utility: Commentators have recognized the importance of the expressive aspect of a government's statements or actions.⁴³⁹ Robert Nozick explains that the symbolic aspect of an action may sometimes be more important than a causal one and should be recognized as an important and independent factor in normative decision-making.⁴⁴⁰ Ethics reflects the values we cherish and protect. Recusal decisions can attract public attention, especially if a case or jurist is high-profile. Just one instance of a controversial refusal to recuse can result in significant reputational (institutional and individual) harm. The loss of public trust and confidence is very difficult to repair or restore. Erring on the side of caution, based on clear ethical and jurisprudential principles, is the prudent course of action to maintain the public's trust and confidence in the rule of law.

C. IMPLEMENTING THE REASONABLE OBSERVER HEURISTIC – CHANNELING DISCRETION THROUGH GUIDANCE

Judges have been placed in the difficult epistemic position of interpreting and applying a generalized, value-based, ethical standard with virtually no meaningful guidance. The approach in disqualification caselaw has been *ad hoc*, based on specific idiosyncratic facts, analyzed in the context of skeletal principles. U.S. caselaw and academic literature have not provided sufficient guidance. Naturally, whether specific guidelines would make an actual difference in decisional outcomes can never be definitively ascertained since it is impossible to discern actual intent or the mental processes of the judges involved in recusal decision-making. But such psychological impenetrability is no excuse for a lack of supportive clarifying information against which the rationality of judicial actions could be influenced and evaluated.⁴⁴¹

To address the various allegations of short-comings (*viz.*, vague, unprincipled, too discretionary, exclusionary, and impressionistic) of the reasonable observer heuristic,⁴⁴² whether in the religious endorsement or recusal contexts, commentators have suggested procedural mechanisms, for example, adjusting the burden of proof and presumption of impartiality, evidential flexibility, a better balancing of policy interests, and refining the relevant tests, as well as training and education.⁴⁴³ These suggestions have merit.

observer's perception in terms of "suspicion." *See, e.g., Hadler*, 765 F. Supp. at 979 (disqualification standard protects against actual and reasonable suspicion of judicial partiality); *David v. City and County of Denver*, 837 F. Supp. 1094, 1096 (D. Colo. 1993) (court has duty to determine every semblance of reasonable doubt or suspicion).

⁴³⁹ *See Hill*, *supra* note 60 (discussing speech act theory and expressivism regarding social meaning and application of the reasonable observer heuristic in religious endorsement cases); and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1995).

⁴⁴⁰ *See NOZICK*, *supra* note 6, at 26-35.

⁴⁴¹ *See supra* notes 161-63 (regarding, rules, standards, and categorical or *per se* rules).

⁴⁴² *See, e.g., Choper*, *supra* note 113, at 510-21 (regarding the religious endorsement test); and Moran, *supra* note 11 at 1234-37 (noting that the reasonable person concept may serve as a vehicle for importing discriminatory views into the heart of the legal standard).

⁴⁴³ *See, e.g., Hill*, *supra* note 105, at 1449-52; Atrill, *supra* note 106, at 282-84; Hughes & Bryden, *supra* note 169, at 176 and 187; Thornburg, *supra* note 45, at 1641-45; and Robertson, *supra* note 351 (favoring bright line rules and procedural safeguards).

Categorical (or *per se*) rules are designed to provide more direction and limited latitude, as compared to generalized standards, often expressed in elusive terms like “reasonableness.”⁴⁴⁴ The issue of legislative-like elasticity attending the reasonable observer heuristic⁴⁴⁵ could be more effectively addressed through the constraining role of explanatory commentary, which might ultimately promote greater sensitivity to and the internalization of ethical norms.⁴⁴⁶

Heuristics are designed to support decision-making. Accordingly, the following model commentary may provide a useful synthesis of essential principles regarding the reasonable observer heuristic in appearance-based recusal. The model commentary would guide recusal decision-making and discretion. The proposed commentary seeks to compensate for the regrettable and surprising lack of analytical clarity in appearance-based recusal jurisprudence.

MODEL COMMENTARY

Impartiality of judgment is a bedrock principle of the justice system—it is a manifestation of judicial morality. A corollary principle is that justice must satisfy the appearance of justice. Aetna Life Ins. Co. v Lavoie, 475 U.S. 813, 825 (1986). When a judge’s impartiality might reasonably be questioned, a judge has an ethical duty to disqualify (often referred to as recusal). This over-arching ethical mandate, separate from the other specific instances mandating disqualification, is referred to as the “appearance of impartiality” or the “apparent bias” standard. It is entirely distinct from disqualification based on actual bias, which is often hidden or unconscious (implicit bias).

The ethical focus is on appearances and the public’s perception of judicial impartiality. The appearance of impartiality standard is said to be an objective one—implemented through the perspective of an imaginary “reasonable observer.” The reasonable observer is a metaphorical construct, a heuristic (an analytical tool), that serves as the judge’s guide in the neutral and fair assessment of the appearance of impartiality.

The reasonable observer is described as a lay member of the public (not a judge), one who is fair-minded and informed, one who is knowledgeable of the facts and circumstances relevant to the ethical inquiry. The reasonable observer should not be imbued with any specialized knowledge, expertise, or insider information; nor should the reasonable observer embody hypersensitivity or extremist views. While the reasonable observer is a useful fiction symbolizing a representative of the public— an average citizen of aggregate traits—it should not be inflexibly viewed as a monolithic representation or a sterile abstraction.

⁴⁴⁴ See Daly, *supra* note 23; cf. Grodin, *supra* note 23 (considering the notion of “unreasonableness” when the decision-maker fails to provide intelligible reasons to justify a decision).

⁴⁴⁵ See Choper, *supra* note 113, at 520 (in endorsement cases, judges exercise substantial authority of a legislative-like nature).

⁴⁴⁶ See Brennan-Marquez, *supra* note 407, at 1256-57 (noting that explanatory standards vindicate goals that enable judges to navigate value-pluralism); Sunstein, *supra* note 439, at 2024-25 (discussing the potential of legal expressions to influence or even change social norms).

The metaphorical reasonable observer may, in appropriate cases, encompass more than one perspective. The legal and factual context of the case is relevant to the conception and application of the reasonable observer. In appropriate circumstances, when evidentially feasible, the reasonable observer heuristic should consider the reasonable perceptions of the parties and others, namely, those who might be reasonably suspicious or apprehensive as to the risk or possibility of judicial bias in a particular matter. Applying the heuristic is not an easy task. Oftentimes, reliance on the generalized, composite traits of the metaphorical “average” reasonable observer may be sensible and necessary.

The ethical appearance standard embodies possibility, not probability—specifically, whether a reasonable observer “might” reasonably question a judge’s impartiality. The ethical standard reflects a level of belief or apprehension that is akin to “reasonable suspicion.” It is not “mere” suspicion. The belief, perception, or apprehension must be reasonable, a critically important qualifier. A recusal challenge is a serious matter. Although the judge has an independent obligation to assess the appearance of impartiality, the burden is on the person who seeks disqualification. One who asserts the appearance of partiality must articulate specific facts that reasonably support a question of the jurist’s impartiality. Generalized allegations, unsupported conjecture, or mere belief will not satisfy the appearance recusal standard.

Recusal decision-making, in response to a challenge, should be supported by a written or on-the-record summary by the jurist of essential facts and legal rationale(s). When there is an absence or insufficiency of facts to support disqualification, the motion to disqualify should be denied. When the facts and circumstances present a close question about the reasonableness of the recusal challenge, the jurist should exercise caution and recuse, even if the jurist maintains a good faith belief in his or her actual impartiality. It is important to recognize that appearance-based disqualification is concerned with perception and does not signify incompetence or lack of integrity of the jurist. Rather, recusal represents the fulfillment of a paramount ethical mandate, a foundational responsibility designed to safeguard the public’s fragile trust and confidence in the judiciary and the rule of law.

One might question whether the proposed commentary would (or might) provide jurisprudential value. It is important to acknowledge that much of the American caselaw reviewed in connection with this article demonstrated reasonable and jurisprudentially justifiable outcomes, even when the analyses therein may have been conceptually vague or garbled (for example, minimizing or ignoring the centrality of appearances, or improperly collapsing an appearance analysis into one of actual prejudice, or inconsistently using and referring to a verbal metric that favors the challenged and presumptively favored jurist). Nevertheless, there are cases, which have been cited herein, in which a clarifying analytical framework, faithful to the text of the recusal mandate and its underlying policy, could have produced a different, more recusal-sensitive result.⁴⁴⁷ These examples portend

⁴⁴⁷ Consider, e.g., *Parker*, 855 F.2d 1510 (complicated labor dispute involving the close relationship of the judge and his law clerk with defense counsel; judicial admission therein that a lay observer might believe in the favorable treatment of defendants); *Drexel-Burnam*, 861 F.2d 1307 (in a case involving allegations of financial interest and

the likelihood of other similar recusal dilemmas. As other commentators have suggested, it is often in the area of marginal or close cases— when reasonable persons disagree— that a better calibrated and clarifying heuristic can educate others and make a practical difference.⁴⁴⁸

Given the reported existence of bias in the judicial system,⁴⁴⁹ including the challenging reality of implicit or unconscious bias,⁴⁵⁰ a more analytically clear and

heightened public awareness, the concurring and dissenting jurist favored a less legalistic analysis that supported recusal); *Salemme*, 164 F. Supp.2d 49 (extensive factual, and self-defensive, narrative in which the court acknowledges a close question regarding the appearance of impartiality); *Smith*, 203 Ariz. 75 (involving judge’s professional relationship with son and daughter-in-law of the murder victim, assessed in the context of “significant doubt”); *Lewis*, 826 N.E.2d 299 (involving a judge’s prior tense and acrimonious relationship with defense counsel, assessed in the context of “serious doubts” that gravitated toward an actual prejudice assessment); *Smulls*, 71 S.W. 3d 138 (in a capital murder prosecution that generated multiple appeals involving recusal issues, case involved racially-tinged comments as well as questionable interactions with a judicial colleague; the concurrence/dissent, at 163, noted that the case demonstrated the wisdom of teachings of prior cases in which doubts as to judicial impartiality should be resolved in favor of recusal); and *Winkle*, 434 S.W.3d 300 (in a civil commitment case of an alleged sexually violent predator, involving the judge’s questionable campaign comments and slogan about sexual predators and homosexuals, the analysis gravitated toward actual prejudice).

⁴⁴⁸ See Philip Bryden & Julia Hughes, *The Tip of the Iceberg: A Survey of the Philosophy and Practice of Canadian Provincial and Territorial Judges Concerning Judicial Disqualification*, 48 ALBERTA L. REV. 569 (2011). Authors conducted an empirical study of the practices and attitudes of Canadian judges regarding judicial disqualification, noting that conceptual tools addressing judicial impartiality failed in “analytically marginal” cases; the survey included common scenarios, such as professional and personal relationships, prior judicial knowledge, prior trials and proceedings. Authors concluded that jurisprudence did not offer much guidance and that judicial sensibilities played a significant role. They suggested the need for the development of an improved analytical framework, along with rules and judicial education. Consider also Dana Thorley, *The Failure of Judicial Recusal and Disclosure Rules: Evidence from a Field Experiment*, 117 NW. U. L. REV. 1277 (2023) (empirical, randomized blind field experiment regarding recusal in a limited context, viz., political contributions; study revealed trial judges’ failure to disclose financial interests or recuse in cases, many of which involved rulings in favor of the conflicted parties).

⁴⁴⁹ See, e.g., Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013); Resnick, *supra* note 44, at 1903 (noting widespread institutional discrimination regarding sex and race); Frank M. McClellan, *Judicial Impartiality and Recusal: Reflections on the Vexing Issue of Racial Bias*, 78 TEMPLE L. REV. 351 (2005); Craig Nickerson, *Gender Bias in a Florida Court: “Mr. Mom” v “The Poster Girl for Working Mothers,”* 35 CAL. W. L. REV. 185 (2001) (concluding that gender bias permeates the family court system); Shaman, *supra* note 54, at 626-28 (regarding judicial racial, ethnic, gender, and religious bias); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from U.S. Federal Courts*, 44 J.L. & ECON. 285 (2001); Robinson, *supra* note 351 (noting the growing skepticism about the judiciary and its neutrality concerning politically sensitive topics); J. J. Harman *et al.*, *Parents behaving badly: Gender Biases in the perception of parental alienating behaviors*, 30 J. OF FAM. PSYCHOL. 866 (2016).

⁴⁵⁰ See, e.g., Jeffrey J. Rachlinski *et al.*, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009); John F. Irwin & David L. Real, *Unconscious Influences in Judicial Decision Making: The Illusion of Objectivity*, 42 McGEORGE L. REV. 1 (2010); Robinson, *id.* at 749, 762 (noting unconscious cognitive framing of issues

ethically solicitous and sensitive recusal framework can provide value.⁴⁵¹ Instead of unreflective reliance on a vague metaphorical muse, a more nuanced and realistic reasonable observer heuristic (one that recognizes the interests and concerns of our pluralistic and polarized society in appropriate situations), coupled with a recusal-sensitive evidentiary standard (one that rejects probability or certainty),⁴⁵² could provide greater conceptual clarity and utility in cases that, for example, implicate potentially volatile or controversial matters such as race, gender, religion, sexual orientation, or politics.⁴⁵³ Of course, such a sanguine viewpoint is necessarily

that support one's social identity). *Consider, e.g.,* *Belton v. State*, No. 8-2022 (Md., May 31, 2023) (respected appellate jurist's use of racially-tinged literary analogy created reasonable basis to suggest implicit bias requiring reversal).

⁴⁵¹ As Professor Resnick notes, however, there is an inevitable inherent tension between contextual particularity and the urge for universals. *See* Resnick, *supra* note 44, at 1910 (in the context of feminist considerations of the judicial role). *See also supra* note 448 regarding empirical surveys which expose a hard reality about judicial impartiality. Another cautionary observation is relevant, that is, whether the vigorous pursuit of the appearance ethic and an unimpeachable judicial system may, paradoxically, contribute to what others have called "a culture of suspicion" producing an adverse impact on the public's trust and confidence in the integrity and legitimacy of the judicial system. *See* Anne Richardson Oakes & Hayden Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 576-77 (2011) (analyzing the concept with respect to the judicial use of technical advisors in Europe; quoting the U.S. Conference of Chief Justices, the authors note that the uneasy relationship between appearance and reality is "arguably the defining problem of the modern age," *id.* at 620, n. 234). Concerns about exacerbating a culture of suspicion should be assessed in the context of a judicial system that demonstrates a commitment to vigilantly pursuing the fundamental ethic of judicial impartiality, in substance and appearance. Ethical transparency and accountability are enduring values that ultimately provide incalculable benefit for the rule of law, in both appearance and substance. *See also Liteky, supra* note 150.

⁴⁵² *See supra* notes 351 and 352.

⁴⁵³ *Consider* Bryden & Hughes, *supra* note 448, at 600-01 (noting that context is important; sensitive or high profile cases may require a heightened level of scrutiny). One could contend that the application of a better delineated and calibrated ethical appearance precept might have supported pro-recusal determinations in the following cases, which involved high profile or sensitive contexts (such as transgender rights, ethnicity, race, religious beliefs, and politics and law enforcement):

See *Jackson v. Valdez*, 2019 WL 6250779 (N.D. Tex., 2019) involving a transgender plaintiff alleging violations of her constitutional rights by Texas correctional officials in connection with an invasive body search during pre-trial custody. Plaintiff sought recusal based on the trial judge's history of multiple statements and advocacy, including legislative testimony, made when he served as deputy attorney general. The trial judge summarily denied the recusal motion concluding that a well-informed, thoughtful, and objective observer would not have questioned the judge's impartiality. The appellate court affirmed, noting that prior involvement and advocacy in high profile cases, without more, involving a group of people with which the plaintiff identifies, is an insufficient basis for recusal. (One could reasonably say that, given the multiple instances of prior advocacy, the appearance-recusal issue should not have been minimized as one simply involving prior employment. *See* FLAMM *supra* note 21, at § 10.6 regarding the potential impact of multiple, "sum of zeros," allegations.) However, in another transgender case, the refusal to recuse was arguably supportable. *See* *Soule v. Conn. Ass'n of Schools*, litigation which challenged Connecticut's transgender athletic policy.

The trial judge admonished counsel (associated with a reputedly anti-LGBT firm) about using terminology that was needlessly provocative and disrespectful of gender identity. The case was eventually dismissed as non-justiciable and moot. *See* Case No. 3: 20-cv-00201 RNC (D. Conn. Apr. 25, 2021). *And cf.* *Kristie Higgs v Farmer School and the Archbishops Council of the Church of England*, [2022] EAT 101 (July 5, 2022), a case involving the dismissal of a teacher regarding statements that reflected her religious beliefs (critical of LGBT issues). The Employment Appeal Tribunal, applying the fair-minded reasonable observer test, recused Edward Lord, a trans rights activist, because of public statements he had made on Twitter, which in the Board's view presented the real possibility of unconscious bias (¶¶ 51-52), notwithstanding the jurist's protestations of his actual impartiality.

In *Jitendra J.T. Shah v. Tex. Dept. of Criminal Justice*, Civ. Action H-12-2126 (S.D. Tex., Sept. 16, 2013), a Hindu plaintiff sought the trial judge's recusal because of his pre-trial remarks that mentioned Hitler and racial identity. The plaintiff's litigation alleged racial and national origin discrimination. While the judge's questionable refusal to recuse seems to have been predicated on an actual prejudice rationale, the ultimate outcome (judgment for defendant) appears ultimately supportable given plaintiff's failure of proof.

Idaho v. Freeman was a very publicized case raising the politically sensitive issue of the constitutional validity of Idaho's ratification of the Equal Rights Amendment, which the Mormon Church strenuously and officially opposed. Recusal was sought because the trial judge had occupied a high leadership position as a regional representative in the Mormon Church, a position of responsibility considered akin to a cardinal in the Catholic Church. The trial judge asserted his actual impartiality and denied the recusal request. *See* 478 F. Supp. 33 (D. Idaho, 1979) and 507 F. Supp. 706 (D. Idaho 1981). Regarding this case and the topic of religion and recusal, *see* Richard B. Sapphire, *Religion and Recusal*, 81 MARQ. L. REV. 351 (1998); Gwenda M. Burkhardt, *Idaho v. Freeman – Judicial Disqualification: The Effect of Religious Leadership on Judicial Impartiality*, 15 J. MARSHALL L. REV. 243 (1980) (noting that the trial judge's recusal decision undermined public confidence and was widely criticized). *Consider also* John Garvey & Amy Comey, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

Politicized matters can generate considerable public scrutiny of the judiciary's impartiality when a recusal challenge is presented. In discussing the growing skepticism of the judiciary's neutrality on politically sensitive topics, Cassandra Burke Robertson offers two cases, one from New York and the other from Ohio. In the New York litigation, involving the legality of New York City's controversial stop-and-frisk policy, the appellate court stayed the trial judge's ruling and disqualified her from the case because of the trial judge's prior statements and actions that might have led a reasonable observer to question the judge's impartiality. *See Ligon v. City of New York*, 736 F.3d 118, 124 (2d Cir. 2013). As Robertson notes, *supra* note 351, at 742, the forced disqualification was heavily criticized. And in the Ohio matter, involving a constitutional challenge to Ohio's regulations pertaining to abortion clinics, Ohio Supreme Court Justice Kennedy rejected calls from pro-choice groups for her recusal. The recusal challenge focused on the justice's speech before a right-to-life organization and a questionnaire she completed for a right-to-life organization, in which she affirmed her agreement with the positions advocated by the pro-life organization. *See* Robertson, *id.* at 742-43, referring to *Capital Care Network of Toledo v. State of Ohio Dep't of Health*, 58 N.E. 3d 1207 (Ohio Ct. App. 2016). Although no formal recusal motion was filed, grievances were filed. *See* Robertson, *id.*

For helpful and extensive commentary regarding recusal principles and caselaw relevant to these broad areas, *see* FLAMM, *supra* note 21, at §§ 35.1 to 37.6 (background and experience), §§ 28.1 to 30.8 (business and professional relationships), §§ 31.1 to

tempered by the reality that it is difficult, if not impossible, to expose (yet alone prove) the hidden presence of actual bias or to assess whether the decision-maker has, in fact, properly reached a value judgment in accordance with the appropriate and elusive ethical standard. Nevertheless, as to the suggested model commentary, it is worthwhile to remember that the perfect can indeed be the enemy of the good. One can only aspire, not guarantee.

CONCLUSION

Judicial impartiality and its corollary, the appearance of impartiality, are fundamental to the rule of law and the public's fragile trust and confidence in the judicial system. Justice must be impartial in both substance and appearance. It is remarkable that, unlike the approach and head-spinning epistemic struggles of our common law relatives discussed herein (Australia, Canada, Singapore, South Africa, and the United Kingdom, which share our ethical and jurisprudential values), little judicial or academic analysis has been devoted in the United States to understanding or explaining the appearance-based ethical standard that mandates judicial disqualification (recusal) when a judge's "impartiality might reasonably be questioned." There is a pressing need for greater analytical clarity.

The over-arching and semantically simple appearance mandate (also referred to herein as a standard or precept) is implemented in judicial disqualification cases through the heuristic device of the metaphorical "reasonable observer," a descendant of the common law's venerable Reasonable Man. As a result of the perplexing analytical void in recusal caselaw, the application of the heuristic has facilitated considerable judicial latitude that paradoxically subjectivizes the so-called objective ethical standard governing recusal. The regrettable result has been inconsistent, conclusory, and jurisprudentially confusing decision-making. With little or no guideposts, other than the enigmatic fictional abstraction of the "reasonable observer," judges must somehow find their way through a mysterious process that imaginatively interprets the mysterious wisdom whisperer. The challenging process impacts both the jurist's ethical responsibilities and the due process rights of the litigants. Through the make-believe perspective of the vague, fair-minded, and informed observer, judges have had to adopt an *ad hoc* approach to appearance-based disqualification decision-making. It is a decisional process that might be compared to magical realism – more fittingly, "magical legalism" – one that mixes fact with fiction to interpret a reality.

Significantly (perhaps through interpretive habit, a collective consciousness, or inattention), judges have subtly reengineered the plain text of the ethical mandate, particularly its critical verbal fulcrum (the modal "might"). There has been a semantically interpretive plasticity that has resulted in the transmogrification of the ethical standard – jurists have adopted, perhaps unwittingly, a higher level of belief ("would"). Fortified by a presumption of judicial impartiality, the reengineering essentially becomes a probabilistic approach that ultimately re-balances the recusal judgment scale to the benefit of the "objective" decision-maker, the one who is the adjudicator and subject of the recusal challenge.

34.4 (social relationships), and §§ 5.1 to 5.4 (class bias).

There should be greater recognition and understanding of what has occurred. Specifically, there should be a clear re-orientation in our jurisprudence that rationally reflects and implements the plain textual meaning of the ethical mandate and its underlying value—*i.e.*, preserving and protecting the public’s fragile trust and confidence in our justice system. *First*, the metaphorical reasonable observer heuristic should be better identified and explained. *Second*, the precept’s specific governing metric (“might”), regarding the perception or apprehension of apparent judicial bias, should be properly understood to denote *reasonable possibility* (not probability or certitude or “mere” suspicion).

After discussing and synthesizing the relevant jurisprudential-philosophical foundations and principles, as well as relevant recusal caselaw (American and common law), this article attempts to provide greater analytical clarity regarding the foundational principle of judicial impartiality. It culminates in a pragmatic proposal, in the form of a succinct model commentary, to accompany the governing ethical mandate. This model commentary, clearly recusal-sensitive, could provide much needed guidance to judges in more fully understanding, interpreting, and honoring their bed-rock ethical mandate of the appearance of impartiality. At a time in which the integrity of judicial decision-making and the rule of law are assuming increasing importance and scrutiny in our society, the public’s trust and confidence must be of paramount importance.