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Impartiality:
Balancing Personal and Professional Integrity in Judicial Decisionmaking

Sarah M. R. Cravens*

I.

In almost any discussion of legal ethics, it is important to separate lawyers from judges. While lawyers and judges are part of the same greater endeavor of the legal profession as a whole, these two roles make different demands and serve different immediate goals. One such contrast is particularly relevant to the topic of balancing personal and professional integrity: Where the lawyer's role is typically characterized by an ideal of *partiality* (for one's client), the judge's role is typically characterized by an ideal of *impartiality*.[1] Each of these ideals presents serious challenges for the achievement of a proper balance between professional ethics and personal integrity, but those challenges are so different for the two roles as to require separate treatment. This essay thus focuses specifically on the judicial role and considers the particular problem of balancing personal and professional integrity in light of a demand for impartial judgment.

This ideal of judicial impartiality (by no means the only, or the most important, quality in a judge, but the one most relevant to the topic of this book) might be described in many ways, but one particularly pernicious description all too often used is that of the judge as akin to an umpire calling balls and strikes in a game of baseball.[2] Certainly, this

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[1] A lawyer has an obligation of candor to the court, of course, but partiality for one's client is the more relevant and the more dominant ideal for the purposes of this comparison.

[2] In his opening statement at his confirmation hearings before the Senate Judiciary Committee, then-Judge John Roberts stated that it was his job to "call balls and strikes." Verbatim Transcript of September 12, 2005 Senate Judiciary Committee Hearing on Robert Confirmation, 2005 WL 2204109 (F.D.C.H. 2005). A lawyer and judge as intelligent and experienced as Chief Justice Roberts cannot possibly believe that his job is so simple and straightforward. He was clearly saying this for an audience other than those in the room (although it succeeds as a coded message to that more immediate audience as well). However, even the ABA uses this terminology on its website, explaining the role of judges. *See* ABA website, *available at*

is a model of impartiality, and there are many "easy" legal cases to which it can be applied, but as soon as a case comes along that does not have an easy or obvious single valid legal outcome, the umpire analogy fails by oversimplifying the job the judge must do.[3] Fairness to judges requires a more critical look at the intent and the meaning of the demand for judicial impartiality, particularly as it drives the practical balance between the judge's personal integrity and professional role-based obligations.[4] It also requires a consideration of the implications of that balance for the establishment of rules and practices that will most effectively encourage this virtue of impartiality in the judicial role.

At the most basic level, the judge's task is to decide cases *according to the law*, and therefore implicitly, *not according to something else*, whether that "something else" be personal bias, agenda, whim, or any of a number of other unacceptable bases.[5] This is what is typically or conventionally meant by "impartiality." Thus we might say that a "good" judge (an impartial judge) is one who exhibits excellence at separating, for example, personal moral beliefs or ideological commitments[6] from decisions about what the law requires in a given case. That excellence entails both the ability to *recognize*

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http://www.abanet.org/publiced/courts/judge_role.html (last visited July 24, 2006). Judges who know better may use this analogy specifically because it is the kind of thing that gives the public confidence, but it is false confidence, so it would be better not to do that.

[3] In the end, the baseball umpire analogy fails also because it unhelpfully confuses impartiality with passivity.

[4] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 167-168 (1921) (writing, on the theme of subconscious forces on the mind of the judge: "There has been a certain lack of candor in much of the discussion of the theme, or rather perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations.")

[5] There are of course plenty of other improper bases for legal decisionmaking - tossing a coin, taking a bribe, etc. – but this essay focuses on those relating strictly to the problem of impartiality as it more concretely implicates the ethical challenge to the judge in separating out matters of personal integrity.

[6] Personal moral beliefs or ideological commitments are by no means the only external influence on judicial decisions, but because this essay is about personal integrity, I use this example as one example of an external influence that a judge should generally not consider in deciding cases.

where the professional ends and the personal begins, and the ability to *separate* and focus solely on what is permissible in judicial decisionmaking while in the role.

However, there is a difficulty with this definition of judicial excellence. The judge is obligated to decide cases according to what the law requires, but the law may at times be insufficiently determined, so that in such cases, recourse to some extra-legal consideration will ultimately come into the reasoning.[7] That is, there are gaps to fill and judges have discretion to fill them, albeit within certain constraints. It is for this very reason that the balls and strikes analogy, so attractive for the purpose of promoting public confidence, will not work. The common law judge will always be striving toward an ideal that is almost never possible to achieve in full: first, because "the law" will not answer every question presented,[8] and second, because the empirical studies of judges demonstrate that human beings are simply not capable of completely excluding all of their personal perspectives from their reasoning processes.[9] There is no such thing as an absolutely impartial judge. Thus is it all the more important to assess the practical and theoretical implications of the thesis that a good judge is one who excels at separating personal integrity from professional ethical role obligations, so that we may ascertain

[7] *See, e.g.*, H.L.A. Hart, THE CONCEPT OF LAW (1961).
[8] Of course, in a common law system, considerations that look awfully like personal moral beliefs may in fact be a part of the law that governs many cases.
[9] See, e.g., Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743 (2005) (charting emergence of empirical work on judicial ideology); Andrew J. Wistrich, Chris Guthrie, & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (examining ability of judges to avoid being influenced by relevant but inadmissible information); Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (examining vulnerability of judges to five common cognitive illusions); John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465 (1999); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1988) (examining influence of ideology on decisionmaking in context of Sentencing Reform Act and Sentencing Guidelines).

what rules and practices would encourage virtue and discourage vice in the pursuit of this excellence.

After a brief examination of the current approach to concerns about judicial impartiality in the United States, this essay takes up three case studies to explore and illustrate the implications of its underlying thesis about judicial excellence. Two of the three hypothetical scenarios discussed in this essay are taken from rather high profile situations faced in recent years by one member of the United States Supreme Court, Justice Antonin Scalia. However, due to the vast difference in concerns attending selection, recusal, and speech of Supreme Court justices[10] from those of lower court judges, the facts of those situations have been reallocated to hypothetical lower court judges, rather than focus on the structure of rules and practices and ethical concerns only pertinent to nine men and women. Thus, for the purposes of this essay, I will set the particular issues relevant to Supreme Court justices largely to one side.

II.

Current law in the United States clearly indicates a concern about judicial impartiality. While that concern is certainly legitimate, the approach to promoting it is misjudged. The concern for impartiality currently manifests itself in an over-emphasis on concerns about public confidence in the judiciary as determined by an appearance-based analysis. It shows a conviction that impartiality is so important that even the *appearance* of possible partiality must be eliminated. Thus, the analysis under current law does not

[10] The concerns I have in mind here include, for example, the uniquely in-depth process currently used to select justices; the current trend of accepting and ruling on cases that are cast in a more "political" than necessarily purely legal light; the unavailability of replacement if a justice recuses and the attendant number games for calculating outcomes; the unavailability of appeal, and so on.

focus on whether the judge will actually rule on the basis of any improper motivation, or even whether the judge is genuinely at risk of doing so, but instead the judge is simply to be removed from the scenario so as to appear wholly above reproach. Such an emphasis on appearances is ill-conceived. Indeed, even the underlying emphasis on public confidence that gives rise to the appearance-based analysis is ill-conceived. While it is important that the public buy into the legal process,[11] this prioritizing of appearance over actuality only masks the difficult issues in the area of judicial impartiality, without being designed effectively to reach better substantive outcomes.

When the over-emphasis on appearances works in combination with (what are often misplaced) concerns about the politicization of the judicial role,[12] the analysis moves even further from dealing with impartiality in a useful way. The criminal case in Texas state court against the politician Tom DeLay is a noteworthy example of this, with the recusal of one judge after another, first for being in the opposite political party from the defendant, and then for being in the same one. Ultimately this dilemma was only resolved by the hand-picking of the judge who had given the least amount of money to any political party.[13] Amid all the concern about removals and replacements of judges in that case, there was an overwhelming absence of concern about whether any of the judges selected would *actually* be able to be impartial when sitting on a criminal case involving money-laundering. Instead the focus was on the outward appearance of memberships in

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[11] *See, e.g.*, Abner J. Mikva, *How Should We Select Judges in a Free Society*, 165 S. ILL. U. L. J. 547, 555 (1992).

[12] So much is simply a matter of characterization, about whether a given view is on the one hand "political" (which is really being used to mean "partisan") or on the other hand simply a view of how the common law is to be interpreted, what the background values of a given law might be, and so on. We are losing track of what constitutes a view about what we seem to be comfortable with for judges, i.e. having a "judicial philosophy" or a theory of constitutional interpretation, and what constitutes an improper "political" view.

[13] *See, e.g.* Ralph Blumenthal, "*DeLay Case Turns Spotlight on Texas Judicial System*," New York Times (Nov. 8, 2005); Ralph Blumenthal, "*Judge in DeLay Case Is Ordered to Recuse Himself*," New York Times (Nov. 2, 2005).

political parties. This incident demonstrates how both recusal and selection methods (as they implicate partiality concerns based on both campaign money and partisanship) have gotten off track in the state courts.

This essay considers three hypothetical scenarios that implicate the judicial ideal of impartiality and may require a judge to separate concerns about personal integrity from concerns about professional ethical obligations. In considering each case, the discussion considers each of three stages or aspects of the judicial role in which impartiality comes to the fore: judicial selection, recusal, and off-the-bench speech. Each hypothetical focuses primarily on one of these three aspects of the role, which some brief indication in each about how impartiality concerns are implicated in the other aspects are implicated.

While the first point in the judicial role, chronologically, is the initial selection of the judge, perhaps the more obvious aspect of judicial decisionmaking implicating impartiality concerns is in the area of recusals – that is, in the threshold decisions about whether the judge assigned to a case may sit in that instance. We may then more usefully work backwards from recusal issues to determine what should go into the initial decision to elevate a person to the bench in the first place and into limitations on judicial speech throughout the judge's tenure.

If the basic idea of impartiality is not to allow personal beliefs to improperly influence judicial decision-making, one approach, and certainly the one taken by the American Bar Association's MODEL CODE OF JUDICIAL CONDUCT, is to suggest that judges should recuse themselves from any case in which their impartiality "might reasonably be questioned."[14] The focus is thus on the *appearance* of bias, rather than any indication (and certainly rather than any proof) of *actual* bias. The underlying concept

[14] ABA MODEL CODE OF JUDICIAL CONDUCT Rule 2.11 (2007).

here is that one may be perfectly suited to the role, but still may need not to sit on a particular case in order to preserve the ideal of impartiality. This, I will argue, is best accomplished by turning the focus away from appearances to look at the realities of the judge's work and by more seriously imposing a strong duty to sit.

This essay works on a threshold assumption that the role of the judge requires an acceptance of at least some form of role-differentiated ethics, so that if an individual feels bound to privilege personal integrity over basic professional obligations on any broad or frequent basis, that individual should not take on the role of the judge in the first place. When the judge is viewed as more or less an agent of the common law, the boundaries of legal and ethical behavior for the professional role are largely co-extensive. There may be some complication to this concept when an outcome may be justified in valid legal terms, despite some element of improper decisionmaking having entered the process along the way, but if the outcome can in fact be justified in valid legal terms, this may be a level of error we should accept. There is going to be some level of imprecision in any arrangement designed to get at improper bias or improper considerations in the judicial decisionmaking process. At present, recusals and disqualifications based on appearances err on the side of being far more over-inclusive than necessary. This does damage to the integrity of the judicial role than exceeds the damage (if any) done when a justifiable legal outcome is reached at least in part on an (unknown) improper basis. As long as we are in a position from which we are only guessing at what went into a judge's decisionmaking process, I will argue that we should simply look for a satisfying legal justification of the outcome, rather than disqualifying the judge from the start based on a guess that has the capacity to undermine the judge in multiple ways.

Moving in some sense backwards from the recusal stage of the judicial role, we might consider how we would select judges who will exhibit the excellence of separating personal and professional integrity. That is, how we may find those judges who will least often seek or need to seek recusal from particular cases. While there is much variety in the way judges are selected in the United States, a majority of states incorporate some form of election into at least some parts of the judicial selection process. The point I will make on this issue is largely a negative one – that the way to select for this excellence is by some way *other than* the popular elections that continue to play a vital role in the make-up of so many state courts in the United States. There are flaws in the various current appointments systems (both state and federal) as well, but these are at least potentially remediable, whereas the flaws in judicial elections are intrinsic to the very concept of role-differentiated integrity. If the ideal of judicial impartiality is to separate personal beliefs from decisions about what the law requires in a given case, elections are a spectacularly bad way of selecting people to do that. The process calls on candidates to express personal views on issues (rather than just saying they will follow the law), and it calls on them (despite whatever coded messages the state ethics rules push them to use)[15] to talk in terms of legal outcomes on particular issues, both of which encourage narrowing of views to define oneself against an opponent and both of which send a message that we don't want impartiality. Finally they require fundraising and campaigning that only create more personal relationships that are more problematically tied to the role than ordinary personal relationships would be alone. What we should be

[15] Perhaps the most commonly used coded message among candidates for the bench in the U.S. is the statement that the candidate will be "tough on crime." This is allowed on the somewhat dubious basis that it is so vague as to be meaningless. *See* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 364 (2004) (annotation to Canon 5A(3)(d)(i)).

seeking are individuals willing and able to act, if you will, as agents of the common law itself. Elections, as a mechanism that renders the candidacy essentially all the more personal, encourage statements that would confuse personal and professional integrity in a vicious way.

Turning from selection for the bench to look at the broader sweep of the judicial role, it is evident that the regulation of judicial and extra-judicial speech[16] pervades the debate on various aspects of judicial impartiality. To allow judges more free rein in speech off the bench, as long as they can demonstrate by reasoned opinions the legal basis for their rulings, would be a better approach. The American rule as it stands is inconsistent, anyway. Judges are not supposed to say anything that might cast doubt on their impartiality (which by appearance standards as applied, may mean just about anything), but may speak about the law, improvement of the legal systems, and so on. That seems an all but impossible line to draw.

Here again, at least in the American system, there is an attempt to keep judges from ever having (or at any rate appearing to have) to practice this skill of separating the personal and professional, which does them a disservice. We want separation, but we don't want to attempt to keep judges from actually thinking about important issues. Judges should, at any rate, be intelligent people. They *should* have beliefs and interests and relationships. As long as judges refrain from making statements about legal conclusions in cases pending before them (which would indicate a closed mind and thus an abdication of the judicial role), and as long as they are at some level *capable* of separating their personal beliefs from their decisionmaking on the bench, there is no

[16] I use these terms to differentiate between speech delivered in the role or "from the bench" (which I refer to as "judicial speech") and speech delivered in a judge's personal capacity or "off the bench" and out of the role (which I refer to as "extra-judicial speech").

obvious argument based on actual impartiality that would require them not to speak about their personal views in their personal capacities.[17]

III. Three Case Studies on Impartiality in the Judicial Role

A. Duck Hunting

Imagine a trial court judge who goes on a duck hunting trip with a large group of people, one of whom is a government official (and a friend of the judge) named in his official capacity in a lawsuit pending before that judge's court.[18] A central issue in the case before him is whether the government task force headed by this official – his friend - must release certain documents to the plaintiff. Let us assume for the sake of argument concerning recusal issues that this judge is appointed and has life tenure. He is not subject either to reappointment or reelection in the future, but is removable by impeachment. The essential question is (or at any rate, *ought* to be) whether the judge can be impartial – whether the judge can demonstrate the excellence of separating his personal feelings from his professional obligation to make a decision based on what the law requires. If it is at least possible for such a judge to achieve this in the abstract, how will the judge or an outside observer of the judge predict whether he is likely to succeed at this separation? In the alternative, how might we assess, after the fact, whether the judge succeeded? In short, we need a meaningful standard for recusal that will achieve the end for which the device of recusals was established in the first place.

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[17] *See generally, e.g*., Republican Party of Minnesota v. White, 536 U.S. 765 (2002).
[18] This example is only very loosely based on *D.D.C. v. Cheney*, 541 U.S. 913 (2004) (Scalia, J.). Most essentially, it removes the scenario from the unique Supreme Court context to be more generally applicable to the rest of the judiciary.

The arguments made for disqualification in cases like this one are typically based on the concern of the party opposing the government official that the judge could not be impartial in this case because of the friendship itself. One might see an argument either that the judge has a stake of some kind in maintaining the friendship with the named party that will prevent him from focusing exclusively on the professional assessment of whether disclosure of the documents is required by law. In a similar vein, one might argue that the problem is not the friendship itself, but rather the friendship as a proxy or as evidence for an ideological commitment to a view on the side of one of the parties in the matter before the judge. (That is, the friendship might be taken to demonstrate a similarity of views, such that the judge would be predisposed towards the side of the argument favoring the government official.) With a judge at least generally capable as a threshold matter of effecting the desired separation of personal and professional obligations, the real concern ought to be with whether the judge *will* be partial towards his friend under such circumstances, rather than whether it will *look* like he *might* be partial.

It is of small matter which of these theories (stake in the friendship or proxy for an ideological commitment) forms the basis for the concern about the propriety of the judge's continued involvement. Every judge comes to the bench with some background set of traits, ideals, and even loyalties, that may hold some sway in his decisionmaking at one point or another.[19] There is perhaps an argument to be made that moral or political

[19] One classic example of an argument along these lines appears in one judge's denial of a disqualification motion brought in a racial discrimination case on the basis of the judge's race and his previous remarks in a speech made to a mostly black audience relating to civil rights movement, injustice to blacks in American history, et cetera. Comm. of Penn. v. Local Union 542, 388 F. Supp. 155 (E.D. Pa. 1974). Similar arguments have been made with regard to judicial gender bias. *See, e.g.*, Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).

views are different in kind from loyalties that a particular to individuals, but both are so particular to the holder of the idea that it will be impossible in either case to judge first of all what the judge might be thinking either about the ideology or the individual and second how that will affect the decisionmaking process. In short, mere suspicion based on such grounds is insufficient to allow an excuse from what should be a very strong duty of judges to sit on any case that comes before them.

It is perhaps a more difficult question whether a close familial relationship or any significant financial stake in a case requires different treatment. Certainly judges must be afforded some space in which the system defers to their need to carry on their personal lives free of their role-based obligations, but this protection should be closely circumscribed. This release valve makes it possible for them to do their jobs, but should not be extended to eliminate *every* situation in which it will be a challenge for the judge to separate the personal from the professional. Further extensions only bring further into question whether a judge can be impartial in any case. The definition of that circumscription has proved elusive. In the absence of a principled or reliably consistent way to draw boundaries either on degrees or contexts for personal relationships or financial holdings,[20] I would put the burden on the judges themselves to explain in any given case, in writing, the basis on which they believe themselves to be incapable of separating their personal commitments from their professional obligations.[21] This regime would allow for the preservation of some zone within which the judge might prioritize

[20] It may go without saying, but I would of course allow and require recusal in any case in which the judge had personal involvement himself, whether as an attorney for one of the parties or as a participant in some relevant event. That would not be due to a problem of partiality, necessarily, but rather due to the possession of relevant outside information that another judge would not possess.

[21] For more detailed arguments on this proposal about providing written reasoning, see Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. ___ (forthcoming 2007).

personal integrity over professional integrity, while at the same time holding the judge accountable in a meaningful way. That is, it would allow an observer to determine the frequency with which the judge was opting out of the obligation to sit and the nature of the preference of personal over professional commitments.[22]

Again, this essay rests on a presumption of role-differentiated ethics to support a separation of personal integrity in the judge's life off the bench, from compliance with professional ethical obligations to the law on the bench. Rather than encouraging the ideal of impartiality in the form of judicial excellence I put forward here, the current appearance-based recusal standards mask the real and challenging issues for judges in achieving this differentiation by actively preventing judges from practicing their skills of impartial judging. The basic outline of the current regime[23] in the U.S., while nominally setting out a duty to sit on cases whenever the rules permit, in fact undermines the meaningful fulfillment of that duty to sit by excusing judges under an appearance standard. To excuse judges from fulfilling their role obligations should be rare, because the less we ask judges to practice their difficult task, the less opportunity they have to improve at it, the more eroded the areas become in which a judge's impartiality is accepted, and the less legitimacy judicial decisionmaking can retain, so that ultimately there will only be further damage to the integrity of the judicial role itself.

If the ideal of impartiality is to *separate* the personal and professional, the rules and practices of judging must be constructed somewhat differently. Judges need not be

[22] I leave aside for the purpose of this paper the practical question of the way(s) in which a judge should be held to account for whatever appears in that written record of explanations for recusals.

[23] There is of course wide variation in the regimes of the states and the federal judicial systems, but this variation is primarily at the level of details of application. There are sufficient similarities as to the general structure of recusal and disqualification laws to speak in generalities, using the Model Code of Judicial Conduct as a source for the generalities.

required to relinquish their private roles entirely when they come to the bench. They need not give up their personal integrity, but they must recognize what the role of the judge requires – that they become while on the bench effectively agents of the common law, rather than an agents for their own beliefs and interests. Judges do need some sphere in which they are protected from having to effect this separation, but it must be far more narrowly circumscribed to strengthen the duty to sit. Judges need practice at being impartial, even when – or perhaps especially when - it is difficult, in order to form good habits. A presumption that they must sit, and that they must explain the reasoning for their decisions in legal terms, will support both their actual practice and, to the extent we may now reconsider this value, public confidence in the process. There is an important difference between, on the one hand, the kind of partiality that derives from an inability to separate personal views from professional obligations, and on the other hand predetermined and immovable legal conclusions.

The judge who goes duck hunting in the company of an old friend who is named in his official government capacity in a lawsuit before the judge must separate his personal commitments, both to the friend and to whatever ideology they may (or indeed may not – how do we know, after all?) share, from the ethical obligations that arise from his professional role. He must prioritize the professional obligations wherever it is possible for him to do so and preserve the integrity of the judicial role by complying with his duty to sit, rather than to pick and choose which cases he will judge, and to be impartial in the application of the law to the case, no matter what friends from his personal life appear before him. Recourse to recusal as a means of avoidance of the problem of partiality should be strictly limited to those situations in which separation of

personal and professional integrity is not possible – that is, to situations in which there is a problem of actual bias, rather than merely apparent bias.

If the terms of the hypothetical are changed, however, to make the judge one who has been elected to the role and will face reelection at some point, the considerations on personal relationships and financial considerations must perhaps be reconsidered. The stakes introduced by elections are arguably more closely tied to the role itself, and are therefore potentially more problematic, a topic to be discussed in greater depth later in the next section of this essay.

Intertwined with both recusal and selection issues is a pervasive concern about what judges may say on or off the bench and what implications that speech may be fairly taken to have for the judge's impartiality in particular cases. We might question what the implications for impartiality might be when a judge speaks privately with a personal friend who is to appear in an official capacity before that judge. A rule addressing a judge's off-the-bench, that is to say, private speech may address a concern about the confidence of a suspicious public, but it does not deal directly with the real underlying issue of impartiality as it may affect judicial decisionmaking in practice. The impartiality implications of this issue, along with that of more public speech, both in and out of the role, will be addressed more fully in the third section below.

B. Judicial Bypass of Parental Consent

Presumably we should attempt to select judges who can exhibit this excellence at separation of personal and professional roles in the first place in order to avoid as far as possible the need for recusals, and thus we should structure the selection process to

encourage rather than complicate the pursuit of that excellence. If this is done properly, the focus should then be shifted away from an appearance standard and the duty to sit should safely be more robustly defined and enforced. Turning to a new hypothetical scenario, imagine a person who is running for election to a judicial position, and whose personal ideological commitments run contrary to abortion under any circumstances. If elected, it is possible and indeed probable[24] that while sitting on the bench this person will be presented with a petition from a minor seeking a judicial bypass of the parental consent requirement for obtaining an abortion in her court's jurisdiction.[25]

As a practical matter, the election context will call for this candidate to speak out on specific *issues* that may come before them, rather than about general judicial philosophy. Most voters simply do not have any specific concept of judicial philosophy or judicial process, so they will require some other means through which to assure themselves that they find a given candidate acceptable for the position on the bench. To put forward the real logical disconnect of judicial elections: voters will naturally be looking for the judge who will best represent their own views on the bench, when the judicial role is not one characterized by a concept of representation of the people, but rather representation of the law.[26] Current law on election speech of candidates for the

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[24] Again, there is jurisdictional variance in the rules about what kinds of judges may be presented with these issues, but as a certain group of circuit court judges in Tennessee discovered, in the absence of the judge who would ordinarily handle them, another judge who would not ordinarily expect to handle these matters might be asked to step in for any number of reasons. Along the same lines, an appellate judge might not expect to handle a petition like this in the first instance, but might well be called upon to review the matter at a later stage, so there is no way to guarantee an avoidance of the issue by selection of the precise seat the judge would feel most comfortable sitting in.

[25] [Insert new example of judicial bypass statute to replace now-unconstitutional Ohio version.]

[26] *See, e.g.*, Republican Party of Minn. v. White, 122 S. Ct. 2528, 2550 (2002) (Ginsburg, J., dissenting) ("[J]udges perform a function fundamentally different from that of the people's elected representatives. Legislative and executive officials act on behalf of the voters who placed in them in office; judges represent the Law.") (internal alterations omitted); Chisom v. Roemer, 111 S. Ct. 2354, 2372 (1991) (Scalia, J., dissenting).

judiciary is nominally structured to avoid commitments to particular positions or outcomes, but such rules are doomed by their slipperiness to failure.

The election process is not designed for success in selecting judges who will exhibit the excellence of being able to separate their personal beliefs from their work in deciding cases according to the law. (That is not at all to say that judges who are elected necessarily lack this excellence. It is instead to say that they will have overcome a significant obstacle in the process.) If ordinary citizens are asked to elect judges, they will look for some proxy for an assurance that this or that judge thinks along the same lines they do, shares their values, whether or not those values are (or should be) actually relevant to the job for which the candidates are seeking election. The election process call for judges to make exactly the kinds of "politicized" statements about issues that the public is concerned about in terms of partiality, or improperly allowing personal beliefs to play a role in judicial decisionmaking. Judges who are good at separating out their personal views will be at a disadvantage in an election context.[27] Such judges would be limited to speaking about general judicial philosophy in a way that might well escape the average voter. In response to questions about their positions on issues, they would be limited to saying, for example: "my positions on these issues are not relevant to whether I would do a good job. My job is to resolve disputes according to the law, not according to what I personally believe is right." Responses like these might well appear evasive to the average voter, and would be unlikely to serve them well, due to the lack of a proxy offered by this vagueness.

Elections can prove unnecessarily harmful to impartiality in yet another way that implicates concerns about the need for recusal once the candidate reaches the bench. For

[27] *See, e.g.,* Failinger, *supra* note ___.

all that the Model Code tries to set up barriers between the judge and the actual cash coming in to fund the campaign, it simply will not work. Campaigning (and the fundraising it requires) inevitably leads to an accumulation of personal stakes and personal relationships that are actually far more tied to the professional role than to the personal role (where they may raise more than enough difficulties for the judge already). The election scenario, one already not designed to select the people who will be good at separating personal integrity from professional ethics as the role requires, takes a difficult situation, and makes it worse. The proliferation of relationships tied to the professional role, tied specifically to attaining it and later maintaining it, makes the judge much more involved than is necessary. It sets up an unavoidable structure not just of debt, but again of the idea that there will be an assessment at the point of re-election of how well the judge represented the views of those who put him in office in the first place. This is unnecessary and unhelpful pressure on the judge, and certainly does not foster the excellence of judicial impartiality.

Let us return now to the specific example of the candidate whose strong personal ideological commitments counsel against playing any role that might facilitate abortion. The original election process will, for the reasons discussed above, call for statements of beliefs like these to be expressed, and in doing so it will imply that such principles are relevant to the candidate's fitness for judicial office or to the work that the judge will do. Candidates for election must fund what have become very expensive endeavors. Voters concerned to see judges on the bench who reflect views consonant with their own will not only look for commitments by the candidates on issues, but may contribute financially to the campaigns of those who agree with their positions on the issues, just as they might

with a candidate for political office. This lays the groundwork for what is perhaps the more pernicious problem that comes to fruition at the re-election stage – when there will be some call for a demonstration of follow-through on the principles stated in the first election, viewing the judges in some kind of "representation" concept. And to be fair to these voters, of course, it does seem odd to elect representatives to the legislative branch, expecting them to represent the voters' views, and not to think of judges on the same ballot in the same light.[28] In the end, a system of elections may end up encouraging a narrowing of view (perhaps a single-mindedness about an issue that will define them sufficiently to get elected and then re-elected), and fostering an idea that personal views are relevant to judicial decisionmaking in a way they should not be.[29] Certainly elections do not foster an ideal of impartiality.

Election issues inevitably implicate speech issues for candidates for the judiciary as well as for judges subject to re-election. Again, the focus on impartiality matters primarily at the level of the actual results. If the results the judiciary produces are clearly supported by legal reasoning, rational public confidence should follow. To focus on the confidence of an uninformed public at the expense of the actual integrity of the judicial process is to miss the point. In the judicial bypass scenario, as long as the judge is aware of what the law allows and requires, and is resolved to apply it accordingly, her range of permissible speech on the issue itself need not be limited. In fact, as will be discussed further in the next section, providing an outlet for private speech on issues that matter to

[28] The better way to understand judicial elections is not to conceive of the role as representative, but rather to see the election as an example of the use of direct democracy to make what is effectively an executive decision.

[29] *See, e.g.,* Marie A. Failinger*, Can a Good Judge be a Good Politician? Judicial Elections From a Virtue Ethics Approach*, 70 MO. L. REV. 433 (2005) (arguing that elections are unsuited for selection of those with the best qualities for judging).

the judge in her personal life might make the separation of roles easier than it would be if the judge were forced to suppress her personal integrity entirely by keeping silent even off the bench. The important point here, though, is that the judge should not be selected for the bench on the basis of statements about her personal ideological commitments because it sends a message to the public that those commitments are properly relevant to the work she will do if elected.

As an example, imagine that our hypothetical judge has been elected and has now served on the bench, appropriately accepting her role-differentiated ethical obligations, and she is now subject to re-election. Imagine that she is (according to her own public speech) a devout Catholic, but grants most bypass requests. She may say, for example: "It's really tough. I'm as Roman Catholic as you can get, and I follow the church's teaching, but when these cases come before the court, I must follow the law. Whether I agree with (a girl's decision) is another issue. . . . I guess I feel kind of sad [about granting requests]. That's a better word than guilt."[30] This speech clearly differentiates between her personal and professional commitments and thus is perfectly appropriate, even admirably educational for the public about the separation itself.

However, the speech itself is irrelevant to any assessment of whether the judge has in fact achieved this separation and thus the ideal of impartiality in the judicial role. To assess that, we must look specifically to the legal reasoning she provides when she rules on these petitions and see, for example: the minor's failure to demonstrate knowledge of potential consequences; the minor's inability to articulate what would

[30] I have borrowed the statements for this hypothetical discussion from longer statements made by various (non-hypothetical) judges and members of private interest groups. *See* Phil Trexler, "Abortion Fiery Issue for Judges" Akron Beacon Journal A1 (Nov. 9. 2003). [Maybe credit Teodosio specifically here?]

happen during the procedure and an unawareness of the medical risks.[31] Certainly, the standards for judicial bypass are highly subjective determinations – is the minor "mature enough" to make the decision without a parent's involvement; is the bypass of parental consent "in the best interests of the child," and so forth. But they are not so open-ended as to allow the judge free rein to rely on wholly extra-legal beliefs. As long as the judge's reasoning is in accordance with the law, this speech is perfectly acceptable, and the fact of her religion generally or her personal feelings about abortion specifically should not be relevant to the election process.[32]

Of course, even if the outcome the judge reached could be justified on legal grounds, if the judge were to say in the course of her opinion, "the bypass of parental consent is denied in this instance because there is no set of circumstances that could justify such an immoral act," there would be evidence of a process tainted by improper considerations. In that scenario, the improper importation of personal values and thus partiality in decisionmaking is manifest. There is no guesswork about appearances. The partiality is demonstrably "actual," rather than merely apparent. Where there is no

[31] [CITE STANDARDS FROM STATUTE (find new one to replace Ohio version) AND reiterate that these are obviously subjective standards, but that's how the common law works and what she should be consulting is the body of precedent and the interpretation of the law in context, rather than her own ideological commitments.]

[32] Take another judge who speaks out in disagreement with the stance the law has taken – arguing that it makes no sense to require parental notification for ear piercings or to get aspirin in school, but to allow a bypass of notification for a major medical procedure. When asked about his record of having denied all the requests that have come before him for judicial bypass orders, imagine that he states that his personal beliefs have not influenced him, saying "We take an oath and must set aside our personal belief and follow the oath. I don't believe in divorce, but I sign a thousand of them a year. The bypass is no different." Trexler, *supra* note ___ . That is not enough in and of itself – that would simply be saying "trust me" whereas I want something more substantial as verification. Instead, the judge should be required to provide a written explanation of the legal grounds on which the decision was made. As long as those grounds are valid, the judicial speech itself is unobjectionable.

evidence of impropriety, and a reason given by the judge is legally valid, the appearance of possible impropriety is an insufficient (and certainly inefficient) basis for complaint.[33]

One might rationally ask why it would not be appropriate for a judge in this position to address the conflict of personal and professional integrity by recusing herself in advance across the board from all petitions to bypass parental consent requirements.[34] Aside from practical problems about, for example, access to justice, particularly on a time-sensitive matter such as this, such a blanket recusal would not promote the ideal of judicial impartiality. It is an abdication of professional ethics, rather than a separation of the personal and the professional. It is an attempt to avoid the obligation to separate the two, and instead preferences the personal over the professional in the context of the professional role.

The integrity of the judicial role requires the judge to take seriously *all* of her role-based obligations. It is a simply a matter of partiality on a larger scale if the judge abdicates the obligation to comply with the law in her professional role on particular points of law. It removes a valuable aspect of the role of the judiciary if only those who personally agree with the substance of the law will apply it. Furthermore, to allow the judge to choose for herself the particular laws she will or will not enforce would further undermine the integrity of the role and the authority of law by legitimizing a role for personal views in the judge's decisionmaking.

[33] As a practical matter, the more judges are required to give valid reasons, the more they will be hemmed in by reasoning they or other members of their courts have given before, giving them less room for disingenuousness explanations of the legal basis for outcomes. Furthermore, the practice of explaining their reasons will only help them to improve by developing a habit of disciplined analysis, knowing that they will have to "show their work," so to speak. For further interesting discussion of the problem of learning judges' "real" reasons, *see, e.g*., Jerome Frank, *Are Judges Human?*, 80 U. Pa. L. Rev. 22 (1931).

[34] In reality, this is the situation created by a number of judges on the Memphis Circuit Court in Tennessee. A group of law professors responded to the judges' blanket refusal by sending a letter to the Supreme Court of Tennessee suggesting the court address the propriety of such disqualifications. *See* Letter to Chief Justice Drowota, dated August 12, 2005 (on file with author).

A judge who cannot achieve this kind of separation of the personal and the professional is not well-suited to this particular professional role,[35] which brings us back to the original point that elections, with their focus on candidates' individual positions impede the pursuit of the ideal of impartiality on the bench. There are always going to be cases that present moral challenges to the judge, but these are challenges that can be overcome with an acceptance of a role-differentiated ethical model, and by requiring judges to give legal analysis to support the outcomes they reach, we can keep sufficient bounds on judicial discretion and provide the transparency necessary to support legitimate public confidence in the judiciary. But as long as the judge may not legitimately incorporate her personal views on issues into her decisionmaking process on the bench, she ought not be selected by voters on the basis of those views, which will be the inevitable result of an election process. It is true that there are flaws in the current appointments systems as well, but those are flaws may be avoidable in the structure of the appointments context, in a way that the fundamental structure of elections will not afford. In short, selection of judges by popular election does more to impede than to encourage the ideal of impartiality.

C. Pledge of Allegiance

Partiality can be based on personal bias for or against a party, but it may also be based on some personal conviction or matter of principle that may play into the judge's reasoning. Imagine an intermediate appellate judge (again, for the sake of argument, let

[35] There is room, of course, for less than super-human judges on the bench. That is, there may be occasions on which the judge feels too strongly to feel confident in her ability to remain impartial in a given case, and thus might properly recuse herself. The important point is that this loses its legitimacy in the case of an advance blanket recusal in an entire area of the law.

us begin with an appointed rather than an elected judge) whose personal religious beliefs would favor inclusion of the words “under God” in the pledge of allegiance.[36] The ideally impartial judge would separate out that personal religious belief (and any other personal belief about whether the phrase belonged in the pledge of allegiance regardless of religious belief) from the legal determination to be made about the constitutionality of that inclusion. Imagine that while the case is pending before the intermediate appellate court on which the judge sits, the judge speaks out publicly, saying that the words “under God” are constitutional and that sister courts holding otherwise are misguided.

Presumably there is no possible objection to a judge having some kind of personal beliefs about religion in the first place – that much seems impossible to avoid, in fact. So the question is that of the extent to which it is appropriate for the judge to speak publicly with regard to that belief or any related or unrelated personal belief about the propriety of the incorporation of the words "under God" in the pledge of allegiance. There is a wide range of possible outlets for expression here: speaking publicly about her religious beliefs in the abstract, being seen reciting the pledge at his children's school (with or without the questioned words); speaking publicly about a general legal philosophy on the interpretation of constitutional law; speaking publicly on a view of the proper outcome of the pending case; and so on.

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[36] The pledge of allegiance is as follows: "I pledge allegiance to the flag of the United States of America, and to the republic for which it stands, one nation, under God, indivisible, with liberty and justice for all." [Do I need a cite for this?]
It would be just as possible for religious beliefs to counsel against inclusion, of course (“render under Caesar…” and so on). My point here is only to consider for the sake of argument one of the possible approaches that would make personal views potentially relevant to the decisionmaking process on a point of law. Incidentally, such an example demonstrates another flaw in the nature of an appearance standard: actions and beliefs alone, without specific statements about the holder's own understanding of their significance or their ramifications, could often signify in a variety of ways or in no relevant way, so an appearance standard is for yet another reason far too over-inclusive about what it throws out.

If a good judge is one who excels at the separation of personal and professional, how should a judge's speech be regulated? After all, keeping judges from *speaking* about their beliefs will not keep them from *having* beliefs, and to a certain extent those beliefs will come into their judging, so perhaps more transparency would be a good thing for promoting impartiality. Restraint from dialogue about those views may even work to prevent a certain amount of the potential entrenchment of position that could make impartiality harder to achieve. Separation may be the ideal, but it would be a mistake to promote that ideal at the expense of keeping judges on the bench who actually think about important issues. Judges should, after all, be intelligent people. They *should* have beliefs and interests and relationships in their personal lives. The value of *actual* impartiality does not have to require them to remain silent about their personal views, as long as they are *capable* of separating their personal beliefs from their decisionmaking on the bench, and as long as they refrain from making statements about legal conclusions in cases pending before them which would indicate a closed mind and thus an abdication of the judicial role. Limiting judicial speech off-the-bench effectively encourages judges either not to think at all, or else to be surreptitious about their thinking, rather than engaging openly in debate. Ultimately the treatment of judicial speech in the current U.S. approach (that is, as a potential basis for disqualification) takes away from judges further opportunities to practice and improve in their habits of separating the personal from the professional.

Let us take a more specific example of speech for this hypothetical judge. Imagine the judge says "the inclusion of these in the pledge of allegiance *is* obviously constitutional" without room for debate before the case is decided. This statement would

require recusal, but not because of a problem with appearances or because of an inability to separate the judge's personal integrity from a decision about what the law requires. Instead the problem is that the judge has made a statement indicating that her mind is not open to the arguments to be put before the court on the matter.[37] Here there is an indication of actual bias in the statement of a specific legal conclusion on a precise issue still to be ruled upon by the court.

Even though the statement about the constitutionality of the inclusion of these words may relate to some matter of personal, its substantive content contains a legal conclusion on a matter not yet decided, which is the more important point. The problem that requires recusal in such an instance is the demonstration of a mind closed to argument on the question of what outcome is "according to the law" for a given case. Recusal would perhaps the best solution in this instance, but in the bigger picture it is only a stop-gap measure. This is a judge who has primarily failed not due to actual bias or partiality for a personal view in this case, but because the judge has pre-judged the law, and in doing so has abdicated a primary professional ethical obligation to consider the arguments in the case before him with an open mind.[38]

Suppose instead that the judge had merely said publicly "I believe in God." That should not give rise to a need to recuse, because every judge would, presumably, have to fall on one side of the other – believing or not believing in God. Either statement would be potentially relevant to deciding the case impartially. However, an appearance-based

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[37] Once the case has been decided, there should be no obstacle to the judge discussing the reasoning in that case in public, whether she voted with the majority or not.

[38] It would be unwise for a judge to speak openly about any pending case, but stating a *conclusion* about a pending case is especially inappropriate. There are complicated lines to draw here, particularly about what constitutes a legal conclusion. Discussion of already decided cases may give hints as to how a judge would be likely to rule in a future case, but as long as there is no commitment about a ruling on a particular case pending before the judge, such discussion presents no problem in terms of demonstrating an improper judicial mind-set.

analysis in the current regime might well require recusal simply for the fact of coming out and stating publicly a potentially relevant private view. That is, the public statement may create an appearance of bias one way or another, whereas silence about an equally strongly held belief would not give rise to a need to recuse. At a certain level, we must accept that judges have personal views and beliefs that are potentially relevant to their decisionmaking, but must trust them to separate that belief out from the legal considerations, to make a decision and explain it on legal grounds, rather than simply removing from the case on the basis of appearances those whose views become known. No judge is a blank slate, nor should she be.[39]

To combine these issues with the problem of the appearance standard demonstrates how far this may all get from a regime that fosters impartiality in a meaningful way. Imagine one last scenario for this judge. Imagine she says nothing in public about her religious beliefs, and nothing about the constitutionality of the words "under God," but she sends her children to a parochial school where she has been seen on occasion reciting the pledge of allegiance along with the students, including the words "under God." These acts alone really tell the observer nothing concrete or relevant to the determination of whether the judge will incorporate (whether she even possesses) any personal convictions into her decisionmaking on what the law requires. If we rely on an appearance analysis, however, it is possible that this judge would have to be recused, even though there is no meaningful evidence to demonstrate that she would not be able to

[39] To the extent that judges are not blank slates, their eccentricities may in large part balance one another out in such a way that in the long run, little damage can be done by an individual judge's predispositions. *See, e.g.*, Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 177 (1921). *See also*, *e.g.*, Republican Party of Minn. v. White, 536 U.S. 765 (2002) (describing a judge without views on issues as unqualified, rather than improperly biased).

separate her personal integrity from her professional ethical obligation to decide the case only according to the law.

As suggested in the analysis of the judge faced with petitions for judicial bypass orders, merely providing an outlet for private speech on issues that matter to the judge in her personal life might make the separation of roles easier than it would be if the judge were forced to suppress her personal integrity entirely by keeping silent even off the bench. The important point there was that the judge should not be selected for the bench on the basis of statements about her personal ideological commitments because it sends a message to the public that those commitments are properly relevant to the work she will do if elected. There may be even more to this analysis, though, thinking more generally about speech and impartiality in the judicial role once the judge is on the bench. That is, it might be that a judge wants to speak publicly about an issue that in important to her personally precisely *because* she respects the law and thus thinks that it is important to change it, because she is unwilling to disobey it as it stands. Indeed, it may well be a part of the *personal* integrity of the ideal judge that she herself buys into the legal system enough to be bound to comply with what the law requires as it stands. There is nothing wrong with judges who *have* personal convictions. They simply must have in addition the ability to recognize the boundaries between personal conviction and judicial decisionmaking, and to accept some model of role-differentiated ethical obligations. Allowing judges breathing room to speak in their personal capacities (in a way that is not tied to their selection for the job) may thus promote greater impartiality in their professional capacities. Limiting extra-judicial speech does nothing to foster the judicial ability to separate personal beliefs from judging cases according to the law – it just

encourages judges to find other unspoken outlets for their beliefs, which might just be in their professional decisionmaking.[40]

The same issues arise in the pledge example: however much the American model code and cases and ethics opinions say that judges ought not to make commitments about how they will rule, the election scenario simply calls for judges to make those representations, so they make them in code. Granted, in the pledge hypothetical, the analysis is made easier by the fact that the judge actually states the legal conclusion that the language *is* constitutional, rather than giving a coded message that implies the same position. Elections urge candidates to stake out and claim territory and make promises about substantive issues, when all that is really relevant is whether they will do their best to rule according to the law. The danger is that in responding to a public desire for information about the candidates' views, the candidates may cast their responses in legal terms. They may attempt, unsurprisingly, given the goal at which the speech is aimed, to *sound judicial*. This results in the issuance of statements about legal conclusions on undecided issues, which are inappropriate.

A system of elections thus encourages the establishment of commitments on the kinds of extra-legal considerations that the ideal judge should strive to exclude from the reasoning of the cases before her. In order to better encourage judges to leave personal considerations out of their reasoning, it would be better to leave it out of their selection

[40] On the other hand, I would discourage judges from speaking freely in opinions or from the bench about their personal morality or their views on how the law should change, simply because, as in the election context, it may allow for some cognitive slippage between considerations that essentially belong to separate roles. For fuller discussions of the expression of personal views contrary to the legal outcome reached in judicial opinions, see, e.g., Kent Greenawalt, *Legal Reasoning and Personal Convictions*, in PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS (1994); Robert Cover, JUSTICE ACCUSED 226-267 (1975).

process and focus instead on their qualities as potential judges.[41] But this does not mean the solution is to limit judicial speech. It means instead that popular elections and the attendant campaigning are singularly unsuited to the promotion of an ideal of impartiality in the judiciary.

IV.

As Zechariah Chafee eloquently put it, "the man himself is a part of what he decides."[42] That said, the best way to address the genuine concern for judicial impartiality is by making changes to the rules and practices of judging as they are implicated in the balancing of personal and professional ethical obligations undertaken by virtuous judges. Therefore, rather than by encouraging wholesale opt-outs from the requirements of the judicial role, recusals should be limited to a smaller range involving only rare cases of unavoidable actual bias. The problem of the appearance of partiality which may disturb public confidence in the judiciary should be addressed more constructively, by a requirement that judges give written explanations of the legal bases for the dispositions of the cases that come before them. Judges should not be selected by popular election but by some other method that does not involve fundraising or incurring other related or similar indebtedness to other members of the judge's community, and that is not tied to partisan politics. Finally, judges should be allowed to speak freely off the bench and out of their professional roles, about the law and about their personal values, as long as they remain clearly out of their professional role in doing so and refrain in

[41] As previously stated, the appointments process is in dire need of an overhaul as well, but I will leave that to a separate discussion.
[42] Z. Chafee, *Do Judges Make or Discover Law?*, 91 Proceedings of the American Philosophical Society 405, 420 (1947).

particular from commentary on cases pending before them in order to make that separation clear. These changes would better promote the ideal of impartiality by supporting judges' efforts to separate their concerns for personal integrity from the significant professional ethical obligations imposed by the judicial role.