

**REFOCUSING RECUSALS: HOW THE BIAS BLIND SPOT AFFECTS
DISQUALIFICATION DISPUTES AND SHOULD RESHAPE
RECUSAL REFORM**

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*“Many remark, justice is blind;
pity those in her sway, shocked to discover she is also deaf.”
David Mamet, Faustus*

ABSTRACT

In recent years a number of high-profile disqualification decisions have caught the attention of the legal community and the public at large. The most notable instances have involved Justices sitting on the United States Supreme Court, including calls by members of Congress and the legal academy for Justices Kagan and Thomas to step aside in the appeal challenging the constitutionality of the Affordable Care Act. In addition, a motion to disqualify the homosexual state court judge in the dispute regarding the constitutionality of California’s Proposition 8 which bans gay marriage, and the defense motion to disqualify the judge overseeing the trial of George Zimmerman for the murder of Trayvon Martin both engendered disagreements about the proper bounds of disqualification practice and judge shopping. Of course, there is the Caperton case—an epic battle over disqualification of a state supreme court justice in an appeal involving a stakeholder who provided significant campaign support to the jurist—which resulted in a landmark opinion on recusal standards from the United States Supreme Court.

Each of these disqualification cases is different in respect of the underlying causes of action and the type of relationships or other facts that suggest possible judicial bias. But in each case, the jurist whose impartiality was challenged was the person who, at least initially, decided whether he was biased and in each case the request to step aside was denied. Often the jurist’s decision to remain on the case was made with no satisfactory explanation and few, if any, other procedural protections. While in some cases the jurist may be guilty of a less than honest response to the recusal request, in most cases the judge likely is genuinely—though perhaps naïvely—convinced of his impartiality. Nevertheless, most of these decisions to remain on the case have been met with dismay by the litigants, scorn and ridicule from the media and the public at large, and, at best, skepticism from many within the legal academy. These negative reactions to the jurists’ decisions they are not disqualified reflect a disconnect between the way the challenged jurist perceives his own bias and the perception of others, including the litigants, the media, and the public.

This asymmetry in perceptions of bias between self and other is confirmed by recent research in cognition and social psychology that reveals we all suffer from a Bias Blind Spot. In other words, we don’t see our own biases—but we are quick to infer and even exaggerate bias in others. This Bias Blind Spot has three primary causes: (1) self-enhancement and self-interest motives; (2) the differing “evidence” of bias used to evaluate bias in self and bias in others; and (3) Naïve Realism. Each of these three phenomenon helps explain the

differing perspectives of challenged jurists and the public regarding judicial bias in specific cases. Also, these perceptions and misperceptions of bias can create a confrontational atmosphere that increasingly surrounds some high stakes disqualification disputes. Thus, understanding our Bias Blind Spot can help reshape the disqualification debate—both with regard to making disqualification decisions in individual cases and adopting system-wide reforms.

To accomplish these goals, this Article uses the Caperton case as an exemplar of how the Bias Blind Spot affects disqualification decisions, and to explain why new disqualification procedures that correct for this Bias Blind Spot must be adopted to protect litigants fundamental rights and to ensure continued public confidence in the judiciary. Part I briefly explains the importance of impartial judges in our legal system and the historical presumption of impartiality that permits the subject judge or justice to make a decision on his own disqualification with few, if any, other procedural protections. Also, in this section specific aspects of current disqualification practice are examined to help understand how the substantive and procedural standards working together increase the chances that jurists will make mistakes when deciding whether they must step aside. In Part II, the findings of recent social science research into the Bias Blind Spot and related cognitive illusions that are likely to affect disqualification disputes are explored. In Part III, the opinions of all three challenged West Virginia State Supreme Court Justices—Benjamin, Maynard, and Starcher—are analyzed to reveal exactly how the Bias Blind Spot likely shaped these decisions. This detailed review of what happened in Caperton exposes the flaws of current practice that permits the challenged jurist to decide his own disqualification dispute. In Part IV, this Article proposes that the best way to compensate for the effect of the Bias Blind Spot in disqualification decisions is to adopt procedural reforms that prevent the challenged jurist from being the decision maker in such disputes. This section also explores some of the more serious objections raised to the proposed procedural reforms. Based upon this analysis, the Article ends with a Conclusion that if we want to protect individual litigants' fundamental rights to a fair trial before a fair tribunal and preserve public confidence in our courts, then we must consider the cognitive illusions that affect decision making and refocus recusal reform on changing disqualification procedures in order to counter the effects of the Bias Blind Spot.

I. PRESUMPTIONS AND PERCEPTIONS OF JUDICIAL IMPARTIALITY

“Justice must satisfy the appearance of justice.”
Offutt v. United States, 348 U.S. 11 (1954)

A. *The Importance Of Judicial Impartiality*

“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”¹ This mandate of fairness means not only that the procedures used in the trial must be impartial—but also the decision maker must not be biased for or against a party or have prejudged the case.² The requirement of judicial impartiality is designed to produce just results in individual cases, as well as to promote public confidence in the justice system.³ The public must be confident that the judiciary is a legitimate institution in order to secure widespread compliance with court rulings, especially those that are unfavorable with a significant part of the citizenry.⁴ The legitimacy of the judicial branch depends more heavily on public confidence in the institution because, unlike the other two branches of government, the courts have “no influence over either the sword or the purse[.]”⁵ The judiciary creates public confidence in the legitimacy of the institution in a number of ways, including the use of fair procedures.⁶ When people evaluate the procedural fairness of institutions, like the courts, they are “especially influenced by evidence of even-handedness, factuality, and the lack of bias or favoritism (neutrality).”⁷ In other words, impartiality is a key component of how people assess the procedural fairness and, in turn, the legitimacy of the judiciary. Moreover, the Supreme Court has repeatedly recognized the importance of public confidence to maintaining the authority of the judiciary in our democracy.⁸ In fact, the requirement of an impartial judiciary has “been jealously guarded”⁹ by the Supreme Court.

1. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

2. Generally, the term “impartial” means “not favoring one side or party more than another; without prejudice or bias.” Webster’s New World College Dictionary (Wiley Publishing 2010). The ABA Model Code of Judicial Conduct defines impartial 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.” MODEL CODE OF JUDICIAL CONDUCT 3 (2011) available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.authcheckdam.pdf.

3. See *In re Murchison*, 349 U.S. at 136 (declaring that “fairness of course requires an absence of actual bias in the trial of cases” and that “our system of law has always endeavored to prevent even the probability of unfairness.”).

4. See Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006) (explaining that legitimate actors and institutions can more effectively and efficiently shape the behavior of citizens without the need to use rewards or threats and law-

B. *Procedural and Other Safeguards Protecting Judicial Impartiality*

Given the important role that impartiality plays in legitimating the exercise of judicial power, the federal government and the states historically have relied upon a number of procedures to protect judicial impartiality.¹⁰ First, the process of selecting judges in both the federal¹¹ and state court¹² systems is designed to ensure that jurists do not prejudice the cases or issues that might

related actors and institutions are legitimized through a number of means, including the use of fair procedures).

5. THE FEDERALIST NO. 78, 490 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1974); *see also* Baker v. Carr, 369 U.S. 186, 267 (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”).

6. Tom R. Tyler, *A Psychological Perspective on the Legitimacy of Institutions and Authorities*, in THE PSYCHOLOGY OF LEGITIMACY: EMERGING PERSPECTIVES ON IDEOLOGY, JUSTICE, AND INTERGROUP RELATIONS 416, 422 (John T. Jost & Brenda Major eds., 2001).

7. *Id.*

8. *See, e.g.*, Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (declaring the need to preserve “both the appearance and reality of fairness,” which “generat[es] the feeling so important to popular government, that justice has been done’ . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”) (citations omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) (finding that an impartial judge is necessary to maintain the legitimacy of court proceedings).

9. *Marshall*, 446 U.S. at 242.

10. Debra Lyn Bassett & Rex Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 195–96 (2011) (stating that judicial impartiality is protected by four distinct procedural safeguards, including disqualification); *see also*, Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 555–66 (2005) (describing five key procedural protections that result in legitimate judicial decisions, including impartial decision makers).

11. In the federal court system, Supreme Court justices, court of appeals judges, and district court judges—who are appointed for life—are nominated by the President and confirmed by the Senate using a process that is designed to determine the nominee’s suitability for judicial office. UNITED STATES COURTS, Federal Courts In American Government, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/FederalCourtsInAmericanGovernment.aspx> (last visited Apr. 19, 2013).

12. Over the years, states have adopted various systems for selecting members of the judiciary: appointment, merit selection, and election. In addition, states have changed those methods when judicial independence and impartiality were seriously threatened. In states that elect some or all of their judicial officers, judicial ethics codes and other laws have established restrictions on judicial campaign contribution solicitations, campaign promises, pledges, and commitments regarding cases likely to come before the courts, as well as limiting other forms of campaign conduct. JOHN L. DODD ET AL., THE FEDERALIST SOCIETY, THE CASE FOR JUDICIAL APPOINTMENTS (January 1, 2003), available at <http://www.fed-soc.org/publications/detail/the-case-for-judicial-appointments>.

come before them on the bench. Second, all federal,¹³ and most state,¹⁴ court judges take oaths of office in which they swear to be impartial in discharging their judicial duties. Third, most, if not all, judicial proceedings are conducted in the public view and follow other procedures designed to protect the process of fair adjudication.¹⁵ Fourth, in most cases, litigants may obtain appellate review of the procedures used and the rulings made that may have deprived them of a fair trial.¹⁶ Fifth, litigants have the right to seek disqualification of a judge who actually is not, or probably is not, impartial.¹⁷ Sixth, in more extreme cases, judicial officers can be impeached, suspended or otherwise disciplined for transgressions related to failings of impartiality.¹⁸ Of course, “these procedures work together: none, standing alone, is considered sufficient to guarantee fairness and impartiality.”¹⁹

However, some of these safeguards are being challenged in ways that are likely to erode judicial impartiality and jeopardize the legitimacy of this important branch of government. In recent years, the siege has come from politically motivated citizens, special interest groups, other branches of government, and even other judges.²⁰ The attacks take the form of new laws purporting to strip courts of jurisdiction to hear controversial cases,²¹ use of pre-election surveys to solicit commitments from judicial candidates on specific disputed legal issues,²² and the proposed elimination of judicial

13. 28 U.S.C. § 453 (2006) (“Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: ‘I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.’”).

14. See, e.g., OR. REV. STAT. ANN. § 1.212(2) (West 2012) (“I, _____, do solemnly swear (or affirm) that I will support the Constitution of the United States, and the Constitution of the State of Oregon, and that I will faithfully and impartially discharge the duties of a judge of the _____ (court), according to the best of my ability, and that I will not accept any other office, except judicial offices, during the term for which I have been _____ (elected or appointed).”).

15. Bassett & Perschbacher, *supra* 10, at 196.

16. *Id.*

17. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES, §§ 5.1–5.2 at 103–08 (2d ed. 2007).

18. See Jeffrey Stempel, *Impeach Brent Benjamin Now!? Giving Adequate Attention to the Failings of Judicial Impartiality*, 47 SAN DIEGO L. REV 1, 65–66 (2010) (suggesting that impeachment is warranted in certain cases of repeated or egregious failure to recuse).

19. Bassett & Perschbacher, *supra* 10, at 196.

20. See, e.g., Sandra Day O’Connor, *The Threat to Judicial Independence*, WALL ST. J., Sept 27, 2006, at A18.

21. *See id.*

22. JAMES STAPLES ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR

immunity for official actions and personal intimidation of judicial officers.²³ In addition, a growing number of state legislatures have proposed other politically motivated reforms that would impact the independence and impartiality of the courts affecting: (1) court's budgets and finances; (2) methods of selecting judges; and (3) changing the structure of the court system.²⁴ Finally, the independence and impartiality of state judicial officers are being undermined by the influence of big money and politics in the selection and retention of state court judges²⁵—who hear and decide most of the cases in our legal system.²⁶

These changes mean that in all courts, and certainly those in states where judges and justices are elected (which is the majority of states),²⁷ safeguards other than the method of selection will be increasingly important to maintaining judicial impartiality. Most of those other safeguards—including the oath of office, the public nature of litigation, the impartial procedures used to decide cases, and the right of appellate review—are not likely to be modified to meet the new challenges to impartiality created by more political judicial elections. In addition, although in theory impeachment or other removal methods²⁸ are available to address improper refusals to recuse—they are seldom used and often are cumbersome.²⁹ Rather, the right to disqualify a

COURTS—AND HOW AMERICANS ARE FIGHTING BACK 29, available at http://www.brennan-center.org/content/resource/the_new_politics_of_judicial_elections_2006.

23. See O'Connor, *supra* note 20.

24. *Courts under attack*, AMERICAN JUDICATURE SOCIETY, http://www.ajs.org/ajs/ajs_editorial-template.asp?content_id=987 (last visited Apr. 19, 2013).

25. STAPLES ET AL., *supra* note 22, at 29.

26. *What Federal Courts Do – Which Courts Handle More Cases?*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/federal/courts.nsf/autoframe?OpenForm&nav=menu2e&page=/federal/courts.nsf/page/5DD5E0A65BA87BCA8525682400517BA5?opendocument> (last visited Apr. 8, 2013).

27. AMERICAN JUDICATURE SOCIETY, *JUDICIAL SELECTION IN THE STATE APPELLATE AND GENERAL COURTS* (2010), available at http://www.judicialselection.us/uploads/documents/Judicial_Selection_Charts_1196376173077.pdf (reflecting that while fifteen states use merit selection panels for appointment of some judges, thirty-nine states, including some states that use merit panels for initial selection, still elect some of their judges in either partisan or nonpartisan contests).

28. In nearly all fifty states, the constitution includes the power to impeach a jurist. In most states, that power usually is controlled and exercised by the state's highest court working with the state's judicial conduct organization. In other states, removal is effected through legislative address or a recall election. *Methods of Removing State Judges*, AMERICAN JUDICATURE SOCIETY, http://www.ajs.org/ethics/eth_impeachment.asp (last visited Apr. 8, 2013). Of course, the litigant whose rights may be affected is not similarly empowered to call for the impeachment or other discipline of a jurist who is not sufficiently impartial. However, in states where judges and justices are elected—the litigant may take part in the political process to remove a specific jurist from office when he or she must stand for re-election or is the subject of a recall. *Id.*

29. Stempel, *supra* note 18, at 63-65.

judge or justice who is biased is the most—and in some cases only—effective way to address the problem of lack of impartiality.³⁰ Thus, disqualification standards and procedures will play an increasingly important role in not just protecting individual litigant's rights, but in preserving the public confidence in the legitimacy of the judiciary as a whole.

C. Differing Presumptions About Judicial Impartiality

Although judicial impartiality standards come from three basic sources—the Due Process Clause of the United States Constitution, federal and state adopted codes of judicial conduct, and federal and state statutory laws³¹—only one standard applies to all federal and state courts: the Due Process Clause.³² Until recently, the Supreme Court of the United States had held that

the Federal Due Process Clause requires disqualification of a judge [in only two situations]: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts [where the judge had participated in an earlier proceeding involving the contemtor or was the target of the contemptible conduct].³³

All other possible bases for judicial disqualification, including “matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion”³⁴ and, as such, did not rise to a constitutional level. Thus, the Due Process Clause, as applied before *Caperton*, mandated disqualification only in very limited instances.

This narrow view of judicial impartiality, upon which the Due Process standard for disqualification is based, originates from the eighteenth century English common law, which was summed up by Sir Edward Coke in a single pithy principle: “quiaaliquis non debet esse Judex in propria causa”³⁵ or “no man shall be a judge in his own cause.” This seemingly simple rule of disqualification is grounded in a strong presumption of judicial impartiality.³⁶

30. James L. Gibson & Gregory A. Calderia, Campaign Support, Conflicts of Interest, and Judicial Impartiality 20 (July 2, 2009) (unpublished manuscript), available at <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Gibson-2009-Judicial-Public-Opinion.pdf> (study showing that the negative effects of campaign support on perceptions of judicial impartiality can be rehabilitated significantly through recusals, but disqualification does not restore legitimacy to the levels found when no conflict of interest exists).

31. Bassett & Perschbacher, *supra* note 10, at 189–93 (identifying and explaining the three sources of legal standards applicable to disqualification motions).

32. *See id.*

33. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting).

34. *Id.* at 892.

35. *Dr. Bonham's Case*, (1609) 77 Eng. Rep. 646, 652 (K.B.).

36. *E.g.*, John P. Frank, *Disqualification of Judges*, 56 *YALE L.J.* 605, 609–12 (1947) (noting that “English common law practice at the time of the establishment of the American court

While the English common law standard is quiet narrow, some older judicial systems—including the Jewish legal system,³⁷ Christian canonical laws,³⁸ and Roman law³⁹—did permit parties to petition for the disqualification of jurists based upon a mere suspicion or appearance of bias. This more expansive view of disqualification was grounded in a presumption that judges—being human—are not immune to bias.⁴⁰

While there is some evidence that this more expansive view was the practice in the early English courts,⁴¹ that was not true at the time the American legal system was established. Instead, when our nation was founded, English common law—unlike the civil law and canonical law—severely limited the grounds for disqualification of judges:

By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that judges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.⁴²

was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.”); Richard E. Flamm, *History of and Problems with the Federal Judicial Disqualification Framework*, 58 *DRAKE L. REV.* 751, 753–55 (2010) (explaining that William Blackstone influenced English Parliament to adopt a disqualification standard that required pecuniary interest in the cause—thereby rejecting Bracton’s suggestion that judges should be disqualified on even a suspicion of bias).

37. See, e.g., FLAMM, *supra* note 17, at §1.2, at 6; EMANUEL QUINT & NEIL HECHT, 1 *JEWISH JURISPRUDENCE* 6 (1980) (“Every judge who judges a case with complete fairness, even for a single hour is credited by the Torah as though he had become a partner to the Holy One . . . in the work of creation.” (citing Babylonian Talmud, Tractate Shabbath 10a (n.d.))).

38. Harrington Putnam, *Recusation*, 9 *CORNELL L.Q.* 1, 6 (1923) (the Cornell Law Quarterly is currently published as the Cornell Law Review).

39. *Id.* at 3, n.10 (1923) (translating Codex of Justinian, Book III, Title 1, No. 16 “It is the clearest right under general provisions laid down from thy exalted seat, that before hearings litigants may recuse judges. A judge being recused, the parties have to resort to chosen arbitrators, before whom they assert their rights. Although a judge has been appointed by imperial power yet because it is our pleasure that all litigations shall proceed without suspicion, let it be permitted to him, who thinks the judge under suspicion to recuse him before the issue be joined, so that cause go to another; the right to recuse having been held out to him . . .”); see also Fred Blume’s Justinian Code Translation, available at <http://uwacadweb.uwyo.edu/blume&justinian/Code%20Revisions/Book3rev%20copy/Book%203-1rev.pdf>.

40. Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 *REV. LITIG.* 671, 699 (2011).

41. See HENRY DE BRACTON, *BRACTON DE LEGIBUS ET CONSUEUDINBUS ANGLIEA* 281 (George E. Woodbine ed., Yale Univ. Press 1942) (suggesting that a judge should recuse when he is related to a party, hostile to a party, or has been counsel in a case).

42. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 361 (Oxford at Clarendon Press 1768).

Blackstone went on to observe that if this strong presumption of impartiality proved to be wrong, then the judge could be impeached or otherwise held “accountable for his conduct.”⁴³

In other words, it was not the case that impartiality did not matter—rather it was presumed the judge would be impartial as that was central to the role of the common law judge. In fact, impartiality seems to have been critical to the self-identity of the common law judge—as reflected in other English common law sources regarding judicial conduct.⁴⁴ One such source is Sir Matthew Hale’s list of “Things Necessary to be Continually Had in Remembrance”—a set of rules established for his own conduct as a common law judge.⁴⁵ Of the eighteen standards of conduct enumerated as essential for judicial conduct, at least seven points addressed the need for the jurist to be and remain impartial.⁴⁶ Given this strong presumption of impartiality and the critical role it plays in judicial identity, to “challenge a judge for bias was, in effect, to accuse him of abdicating his role—an accusation the common law courts simply would not tolerate.”⁴⁷ Thus, the grounds for removal of an English common law jurist were quite limited: “a judge was disqualified for direct pecuniary interest and for nothing else.”⁴⁸

D. *Shifting Disqualification Standards*

However, since the English common law rule on recusal was first adopted in America, the principle has slowly, but steadily, been expanded to include more instances when disqualification is merited. The substantive standards for disqualification throughout the federal and state court systems have been modified (through legislative enactments and adoption of judicial ethics rules, as well as common law) in, at least, three important ways.⁴⁹ First, the grounds

43. *Id.*

44. Geyh, *supra* note 40, at 677–79.

45. See 2 LORD J. CAMPBELL, LIVES OF THE CHIEF JUSTICES OF ENGLAND 207–09 (James Cockcroft & Co. 1881) (quoting Sir Matthew Hale’s “Things Necessary to be Continually Had in Remembrance”).

46. The seven rules regarding judicial impartiality laid down by Sir Matthew Hale are: “4. That in the execution of justice I carefully lay aside my own passions 6. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard. 7. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard 10. That I be not biased [sic] with compassion to the poor, or favor to the rich 11. That popular or court applause, or distaste, have no influence into anything I do in point of distribution of justice. 12. Not to be solicitous of what men will say or think, so long as I keep myself exactly according to the rules of justice 16. To abhor all private solicitations . . . in matters depending.” *Id.* at 208.

47. Geyh, *supra* note 40, at 679.

48. Frank, *supra* note 36, at 609.

49. Deborah Goldberb et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 513 (2007).

for disqualification have been enlarged beyond mere pecuniary interest to include partiality, extra judicial knowledge of disputed facts, and judicial misconduct.⁵⁰ Second, the standard has evolved from one requiring a showing of actual bias to one requiring only an appearance of bias.⁵¹ Third, the jurist is now tasked with evaluating claims of bias under an objective test rather than a subjective standard.⁵² Taken together, these changes represent a significant shift from the original and rather narrow “no man shall be a judge in his own cause” standard, which resulted in disqualification only when the jurist had a direct pecuniary interest in the case.

This liberalization of the rules for recusal also is reflected in a series of United States Supreme Court cases applying the Due Process Clause to disqualification disputes. First, the types of disqualifying factors have been expanded to encompass not just a direct pecuniary interest—but indirect pecuniary interests⁵³ and instances of partiality, as well.⁵⁴ Second, the standard has shifted from one of actual bias to a lesser showing—a probability of bias, which is akin to an appearance of bias standard.⁵⁵ Third, the grounds for disqualification are evaluated from the perspective of someone other than the judge—making it an objective test rather than being a subjective inquiry.⁵⁶ All three of these changes are reflected in *Caperton*,⁵⁷ the most recent pronouncement by the United States Supreme Court regarding when Due Process requires recusal.

In fact, the Due Process standard for disqualification elucidated by the majority in *Caperton* mandates recusal when:

there is a serious risk of actual bias—based upon objective and reasonable perceptions when a person with a personal stake in a particular case had significant and disproportionate influence in placing the judge on the case by

50. *Id.*

51. *Id.*

52. *Id.*

53. *See generally* *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 812 (1986) (holding recusal required when state supreme court justice cast deciding vote upholding punitive damage award against insurer when justice was plaintiff in nearly identical suit pending in lower courts); *Ward v. Monroeville*, 409 U.S. 57 (1972) (holding mayor was disqualified from adjudicating fines for legal infractions because mayor was executive responsible for town’s finances).

54. *See generally In re Murchison*, 349 U.S. 133 (1955) (holding that judge cannot preside over a subsequent contempt hearing after serving as a one man judge and grand jury in earlier proceeding against same defendant).

55. *Id.* at 136 (“Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.”).

56. *Aetna Life Ins. Co.*, 475 U.S. at 822 (the inquiry is whether the “situation is one ‘which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true.’” (citing *Ward*, 49 U.S. at 60)).

57. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868 (2009).

raising funds or directing the judge's election campaign when the case was pending or imminent.⁵⁸

First, this standard encompasses potentially biasing factors other than the judge's direct pecuniary interest in the case before him.⁵⁹ Second, this standard does not require a showing of actual bias, but mandates disqualification when there is an unconstitutionally high "probability of bias."⁶⁰ Third, the assessment of bias is not based upon the jurist's subjective view of his own bias⁶¹—but on an objective evaluation of the facts by a reasonable other.⁶² Thus, even under the more stringent constitutional standards, there should be more instances now when judges must step aside to protect litigants' rights and the public's confidence in the impartiality of the judiciary.

In spite of these changes in the substantive law, it appears that litigants are seldom successful with the disqualification motions they do file. This is true, at least in part, because the standards for disqualification are still, in most instances, applied by the challenged jurist himself who makes that decision against a backdrop in which the jurist is presumed to be impartial.⁶³ This presumption of impartiality (along with the judge's own naïve belief in his impartiality) tends to limit the instances when jurists actually do recuse.⁶⁴ However, this may be changing as there also has been a shift in the strength of this presumption of impartiality that mirrors the shift with the law more generally from formalism to realism.⁶⁵ This movement makes sense given that

58. *Id.* at 884.

59. *Id.* at 876.

60. *Id.* at 872.

61. *Id.* at 869–70.

62. See, e.g., Raymond J. McKoski, *Judicial Disqualification After Caperton: What's Due Process Got to Do With It?* 63 BAYLOR L. REV. 368, 375–76 (2011) (under *Caperton* the objective "other" who must decide the probability of bias is "a reasonable person skilled in the art of judging" not the "ordinary lay person."); Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 75 (2010) (concluding that the ABA disqualification standard is evaluated from the perspective of a "member of the public," while the Due Process test is administered by a reasonable judge).

63. Frost, *supra* note 10, at 571 (2005).

64. Geyh, *supra* note 40, at 702–711 (explaining how the presumption of impartiality and psychological factors, including jurists' ambivalence about disqualification, result in fewer instances when jurists step aside).

65. That shift is reflected in the split between the majority and the dissent in the *Caperton* case. Justice Kennedy, writing for the majority, explicitly acknowledged that this presumption of impartiality can be overcome when he stated that the proper inquiry is not whether the challenged judge subjectively believes he can be impartial, but is an objective standard that requires "a realistic appraisal of psychological tendencies and human weakness." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 869–70 (2009). In contrast, Chief Justice Robert's dissenting opinion emphasized the "presumption of honesty and integrity in those serving as adjudicators" and predicted that the presumption of impartiality would be threatened by an increase in

the presumption of impartiality really is a belief in the judge's ability to act rationally and without regard to motives, emotions, politics, ideology, or other personal influences. While this presumption of impartiality increasingly is being challenged—it is slow to change as it has been an important part of American disqualification practice⁶⁶ and more generally judicial philosophy since the nation's inception.

In fact, our laws traditionally have assumed that judges—like other legal actors—behave as rational and autonomous individuals without regard to emotions, politics, ideology, or other personal influences. This formalist view of judging presumes that jurists decide cases by rationally, and somewhat mechanically, applying the law to the facts of a case.⁶⁷ In spite of what most of us understand about our own decision-making process, the formalist model of legal decision making presumes that personal ideology, emotions, motivations, and beliefs do not play a significant role.⁶⁸ This traditional view of judging is the basis for many of the substantive rules and procedures we have adopted as part of our legal system—including the strong presumption of judicial impartiality upon which much of our disqualification jurisprudence is based.⁶⁹

However, this strong presumption of impartiality based upon a legal formalist view of judicial decision making has been challenged by new theories about judging.⁷⁰ Most prominent among these more recent theories of judicial decision making is the legal realist view which holds that judges make choices that reflect their politics.⁷¹ In recent years, scholarship also has

disqualification motions that would follow and “bring judges and the judiciary into disrepute.” *Id.* at 891, 902 (Roberts, C.J. dissenting).

66. Geyh, *supra* note 40, at 672-677 (surveying the history of disqualification practice and identifying four distinct legal regimes over time).

67. BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 27-43 (2009).

68. *See id.*

69. *See supra* notes 10-30 and accompanying text.

70. *See, e.g.*, RICHARD A. POSNER, *HOW JUDGES THINK* 19 (2008) (positing that judicial decision making reflects a combination of nine different theories of judicial behavior—including attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist). Of course, the idea these other factors influence judicial decision making is not new. *See* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *COLUM. L. REV.* 809, 846 (1935) (suggesting that “the political, economic, and professional background and activities” of judges motivate their decision making). However, what is new is the increasing amount of empirical data to support these differing theories of what impacts judicial decisions.

71. *See* JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 401-02 (1949) (describing and documenting the legal realist view of judicial decision making); Charles Gardner Geyh, *Introduction: So What Does Law Have to Do with It?*, in *WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE* 1, 1-14 (2011) (collecting essays reflecting how both law and politics affect judicial decision making).

identified other factors—among them, personal experience and identity,⁷² social power structures,⁷³ and even financial interests⁷⁴—that likely influence, even motivate, the decisions of judges. In addition, legal scholars have presented new evidence and theories about how psychological motivations and cognitive processes⁷⁵ also impact judicial decision making.

In fact, legal scholars are increasingly turning to social science to understand how and why legal actors make the decisions they do.⁷⁶ Some legal scholars have begun to apply these social psychology insights to theories of how legal decisions are made by both policy makers⁷⁷ and judges.⁷⁸ Also, some recent and notable empirical studies demonstrate that judges are influenced by the same cognitive decision making processes and, therefore, make the same systematic errors in judgment that plague the rest of us.⁷⁹ A few scholars have even suggested that some of these cognitive illusions—including the Bias Blind Spot—may affect how judges decide disqualification disputes.⁸⁰

72. Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning* 73 N.Y.U. L. REV. 1377, 1385–88, 1472 (1998) (reviewing empirical research on race and gender biases of judges).

73. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 26–53 (1997) (describing social and cultural structures within the courts as influencing judicial decisions).

74. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 99–100 (2011) (finding that elected judges are more likely to decide in favor of the business interests that support their campaign and the likelihood increases as the amount of the campaign contributions increases).

75. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007).

76. Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1508 (1998) (surveying the then existing literature on behavioral theories of decision making and noting it is sparse, but growing).

77. Adam Benforado & Jon Hanson, *Naïve Cynicism: Maintaining False Perceptions in Policy Debates*, 57 EMORY L. J. 499, 573 (2008).

78. Bryan D. Lammon, *What We Talk About When We Talk About Ideology: Judicial Politics Scholarship and Naïve Legal Realism* 83 ST. JOHN'S L. REV. 231, 304–05 (2009).

79. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 780–83 (2001) (demonstrating that judges are just as likely to be affected by a number of cognitive illusions as the ordinary public). In addition, there is growing empirical support for the idea that judges are not alone—that many other highly skilled and qualified professionals such as accountants, appraisers, doctors, engineers, lawyers, and even psychologists—also are susceptible to cognitive illusions. *Id.*

80. See Geyh, *supra* note 40, at 729, 731 (arguing that reform of recusal procedures is warranted, but will only succeed if the judiciary and the public can agree on what constitutes an appearance of impartiality, which agreement is made more difficult by the judiciary's ambivalence to disqualification, a strong presumption of impartiality, and a lack of appreciation for psychological factors that affect a disqualification decision); 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, Spoliation, and Perceptual*

However, none of these recent works has either provided an empirical study of how these cognitive illusions affect disqualification decisions or explored in detail any instances when a judge's disqualification decision may have been affected by the Bias Blind Spot.

This Article attempts to fill that gap and build on these noteworthy efforts to apply insights gleaned from social psychology to questions about judicial decision making—specifically disqualification disputes. This Article does so by using the three disqualification disputes in *Caperton* as exemplars to demonstrate how the Bias Blind Spot and related cognitive illusions affected those jurists' judgment and likely impacted public confidence in the judiciary. The discussion of these decisions focuses on how the substantive standard combined with the current procedures introduces the risk of systemic error in disqualification decisions due to the Bias Blind Spot. This Article also explores ways we can use these new understandings of human cognition to reshape recusal reform so that we might not only preserve litigants' fundamental Due Process rights, but also maintain public confidence in the impartiality of the judiciary as a whole.

In order to determine whether judges are sufficiently unbiased about their own biases to consistently make reliable disqualification decisions, we must: (1) understand the Bias Blind Spot and other cognitive illusions that affect the judgments that are most critical to assessments of our own biases and our perceptions of bias in others; and (2) decide whether those cognitive illusions are likely to affect judicial disqualification decisions given the current substantive standards and procedural practices used to evaluate judicial impartiality under the Due Process Clause.

II. THE BIAS BLIND SPOT AND RELATED COGNITIVE ILLUSIONS

“There is no truth. There is only perception.”

Gustave Flaubert

A. *The Bias Blind Spot Defined and Disqualification Deconstructed*

The capacity to detect and adjust for his own cognitive biases is critical to any jurist's ability to properly resolve a disqualification dispute in which his impartiality has been challenged. However, we are all—including judges—subject to the Bias Blind Spot, which is the tendency to fail to discern one's own biases while at the same time inferring bias in others.⁸¹ This “meta-bias”

Realities, 30 REV. LITIG. 733, 739–40 (2011) (arguing that judges should not require near unanimity, consensus, or super majority view of what constitutes a “reasonable question” as to a judge's impartiality because of the divergence of views between the judiciary and the public regarding the impact of possible biases on decision making).

81. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 370 (2002).

creates the mistaken “conviction that one’s own judgments are less susceptible to bias than the judgments of others.”⁸² This “perceived asymmetry in susceptibility to bias” between self and others⁸³ plays an important role in disqualification disputes because of the substantive standard that applies to such challenges and the practice of permitting the challenged jurist to assess his own bias.

Under the applicable disqualification standard, the challenged jurist is required to assess his own bias not from his subjective point of view—but from the perspective of a “reasonable person.”⁸⁴ It does not matter whether that reasonable other is a layperson or average judge⁸⁵—it matters only that the perception of the reasonable other regarding the jurist’s bias will differ from his own perception of bias in self. Since we tend to consistently and unconsciously downplay our own biases while exaggerating biases in others⁸⁶—this difference in perspective will lead to systemic errors in applying the current substantive standards for disqualification. While judges often are tasked with stepping into the shoes of the “reasonable person” and assessing the conduct and interests of third parties in other areas of the law—only in disqualification disputes are jurists asked to assess themselves. It is this difference in the subject of the evaluation that gives rise to the Bias Blind Spot and causes judges to misapply the law. Thus, we need to understand the causes of the Bias Blind Spot so we can refocus recusal reform to avoid such errors.

Recent social science studies aptly demonstrate that the Bias Blind Spot has two primary causes: (1) self-enhancement and self-interest motives; (2) Naïve Realism, especially the Objectivity Illusion, Confirmation Bias, and Introspection Illusion.⁸⁷ Each of these causes for this asymmetry in perception of bias between self and others is explained below and then applied to the three disqualification disputes in the *Caperton* case in the following Part of this Article.

B. Self-Enhancement and Self-Interest Motives and the Bias Blind Spot

It should come as no surprise that the Bias Blind Spot functions, at least in part, as an ego-protection mechanism. This tendency to see one’s self in a more positive light in spite of evidence to the contrary is one of the most well-known

82. Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People’s Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681 (2005) (citations omitted).

83. Pronin et al., *supra* note 81, at 369.

84. McKoski, *supra* note 62, at 374-76; Bam, *supra* note 62, at 75.

85. *Id.*

86. Pronin et al., *supra* note 81, at 370.

87. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37-38 (2007).

forms of cognitive bias.⁸⁸ Despite the fact that most people acknowledge the role of self-enhancement biases in human cognition, they seldom recognize the impact it has on their own judgments. In fact, even when people “rate themselves as ‘better than average’ on a wide range of traits and abilities, most people also claim that their overly positive self-views are objectively true.”⁸⁹ While people are blind to their own self-enhancement biases, they are quick to detect such biases in others.⁹⁰ Thus, people seem to have a Bias Blind Spot in respect of the self-enhancement motivations that animate our decisions.

We exhibit the same Bias Blind Spot when it comes to our own self-interests. In fact, studies have shown that people do not readily detect how their financial, social, political, or other interests inform their own choices.⁹¹ However, most of us have no difficulty in recognizing that self-interest may motivate others’ decisions and actions and we often overestimate the influence of self-interest in others.⁹² Thus, we seem to suffer from the illusion of being superior to others when it comes to how self-interest motivates our decisions and actions.

While most studies demonstrating these ego-centric biases were not conducted using judges as subjects—there is no reason to believe that jurists will be less susceptible to these causes for the Bias Blind Spot. In fact, there is some empirical evidence that judges are prone to ego-centric biases. In one such study, federal magistrate judges were asked to estimate their reversal on appeal rates and the jurists “exhibited a strong ego-centric bias” on this measurement—with 87.7 percent of judges rating themselves as less likely than the average judge to be overturned on appeal.⁹³ In this study, the jurists appeared to suffer from ego-centric biases at rates comparable to those plaguing laypersons.⁹⁴ In another study, bankruptcy judges rated themselves as more fair in respect of their decisions on attorney fee applications than the lawyers who appear to make such requests of the court.⁹⁵ Thus, there is no empirically based reason to suspect judges are less prone than the rest of us to these ego-centric biases that help create the Bias Blind Spot.

88. *Id.* at 37.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Guthrie et al., *supra* note 79, at 814–15 (demonstrating that judges are just as likely to be affected by ego-centric biases and cognitive illusions as the ordinary public and suggesting such cognitive limitations could harm litigants).

94. *Id.* at 818.

95. Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. Q. REV. 979, 985–86 (1994).

C. *Naïve Realism and its Implications for Judicial Decision Making*

Another primary cause of the Bias Blind Spot is Naïve Realism. The core of Naïve Realism is the conviction that one perceives objects and events in the world the way “they really are”—in other words objectively⁹⁶—and when others do not perceive the world in a similar way, then we infer they do not “see” how the world “really is” because there is something wrong with them.⁹⁷ Naïve Realism is important not so much because it focuses on the fact that we subjectively perceive the world (though we most certainly do)—but on how and why we systematically fail to appreciate the subjectivity of our own perception while at the same time holding others accountable for theirs.⁹⁸ This asymmetry in perception is the crux of Naïve Realism and it has profound implications for disqualification jurisprudence because these cognitive illusions affect how all of us assess our own biases and why we judge others’ biases so differently. As a result, Naïve Realism has much to teach us about whether a jurist, who most likely will hold the naïve belief that he can be objective or unbiased about his own biases, really can be “a judge in his own [disqualification] cause” or if another procedure must be used to ensure judicial impartiality. Thus, we will carefully review each of the essential tenets of Naïve Realism and several of the most important cognitive illusions that underlie our naïve worldviews.

D. *The Basic Tenets of Naïve Realism*

Naïve Realism is deceptively simple and is made up of only three essential tenets:

1. I “see” the world objectively—“as it really is.”
2. Other reasonable people should “see” the world the way I do.
3. If other people don’t “see” the world as I do, then they aren’t seeing clearly.⁹⁹

96. Lee Ross & Andrew Ward, *Naïve Realism in Everyday Life: Implications for Social Conflict and Misunderstanding*, in *VALUES AND KNOWLEDGE* 110–11 (Terrance Brown et al. eds., 1996).

97. Emily Pronin et al., *Objectivity in the Eye of the Beholder: Divergent Perceptions of Bias in Self Versus Others*, 111 *PSYCHOL. REV.* 781, 783 (2004).

98. *Id.* at 781.

99. This syllogism was articulated by Lee Ross and Andrew Ward in their seminal work on Naïve Realism as follows:

1. . . . **I [perceive] entities and events as they are in objective reality**, and that my social attitudes, beliefs, preferences, priorities, and the like follow from a relatively dispassionate, unbiased, and essentially “unmediated” apprehension of the information or evidence at hand.

2. . . . **[O]ther rational social perceivers generally will share my [worldview, including my] reactions, behaviors, and opinions**—provided that they have had access to

While Naïve Realism seems simple—it actually creates something of a “logical labyrinth.”¹⁰⁰ That complexity is due to the fact that Naïve Realism is based upon two implicit assumptions: (1) All people who truly are open-minded and fair will agree with a reasonable opinion; and (2) I hold only reasonable opinions because if my opinion were not reasonable, I would not hold it.¹⁰¹ In other words, if other individuals or groups do not share our view of the world, then we infer there is something wrong with *them*.

We make these attributions of traits or motives or infer those others have shortcomings that explain their disagreement with us. We do this rather than attribute the difference to something faulty with our perception or concede that the disagreement simply reflects different choices made by two reasonable and honest people.¹⁰² We cannot attribute their disagreement to our faulty perception because, as naïve realists, we are convinced that our version of the event or thing in question reflects an objective reality.¹⁰³ Nor can we attribute the other’s different response to a reasonable and honest difference in opinions or values because our naïve realist viewpoint would require us to conform to those reasonable and honest opinions and values held by the other person.¹⁰⁴ Instead, when we perceive a difference that cannot be explained by differing information (which we often ascertain by trying to convince the other person of our worldview), then we attribute those differences to their perception of the information, their intelligence or their impartiality.

1. I “See” the World Objectively—“As It Really Is”

Despite the fact that most of us acknowledge—at least in the abstract—the subjectivity of our own perceptions, when we look at the world we tend to assume that what we perceive reflects an “objective reality.” In other words, we are convinced that we observe all events and objects that are truly significant and that what we think about those phenomena is reality.¹⁰⁵ This

the same information that gave rise to my views, and provided that they too have processed that information in a reasonably thoughtful and open-minded fashion.

3. . . . **[T]he failure of [other] individual[s] or group[s] to share my [worldview] arises from . . . three possible sources: [they are (a) not informed; (b) irrational; or (c) not impartial—being biased] by ideology, self-interest, or some other distorting personal influence[s].**

Ross & Ward, *supra* note 96, at 110–11 (emphasis added).

100. CAROL TAVRIS & ELLIOT ARONSON, MISTAKES WERE MADE (BUT NOT BY ME): WHY WE JUSTIFY FOOLISH BELIEFS, BAD DECISIONS, AND HURTFUL ACTS 42 (2007).

101. *Id.*

102. Pronin et al., *supra* note 97, at 783.

103. *Id.*

104. *Id.*

105. Gustav Ichheiser, *Misunderstandings in Human Relations: A Study in False Social Perception*, 55 AM. J. SOC. 1, 39 (1949) (“[W]e tend to resolve our perplexity arising out of the experience that other people see the world differently than we see it ourselves by declaring that

conviction that we perceive reality objectively is “inescapable and deep, and it governs our day-to-day functioning.”¹⁰⁶ In fact, this Naïve Realist view of the world affects what we perceive about ourselves, the world around us, and how we interact with that world (including others) based upon those perceptions. In other words, it affects all aspects of our reality:

[N]aïve [R]ealism makes its influence felt not only in convictions about physical reality but also in convictions about complex social events and political issues. We cannot fully escape the conviction that we likewise perceive such events and issues as they “really are,” and that other reasonable people who have the same information about those events and issues will, or at least should, perceive them similarly.¹⁰⁷

This “Naïve Realist” view of the world around us is constructed by us based upon a number of cognitive processes and motivational factors that influence our thoughts, feelings, and actions. These processes and factors—including the Illusion of Objectivity, the Confirmation Bias, and the Introspection Illusion—work together to sustain our Naïve Realist view and enhance the likelihood we will attribute biased motives to those who disagree with us.

a) Objectivity Illusion

We believe that what we perceive about the world around us relates directly to an objective reality of those stimuli and events. However, when we seek to understand what our senses perceive, we “go beyond the information given”¹⁰⁸ to construct a “meaningful ‘whole’ out of a complex and disorganized array of stimuli, always trying to make sense out of [our] experience[s].”¹⁰⁹ Our perceptions of reality make what we observe meaningful and are created when our brain fills the gap “between the objective world of stimuli and the subjective world of experience.”¹¹⁰ Thus, we construct this perception by interpreting the stimuli we do observe in terms of our “own needs, own emotions, own personality, [and] own previously formed cognitive

those others, in consequence of some basic intellectual and moral defect, are unable to see things ‘as they really are’ and to react to them ‘in a normal way.’ We thus imply, of course, that things are in fact as we see them and that our ways [of thinking about objects and events] are the normal ways.”).

106. Pronin et al., *supra* note 97, at 783.

107. *Id.*

108. Dale W. Griffin & Lee Ross, *Subjective Construal, Social Inference, and Human Misunderstanding*, 24 *ADVANCES IN EXPERIMENTAL SOC. PSYCHOL.* 319, 320 (1991).

109. *Id.* at 321.

110. *Id.* at 319. The authors offer a simple example of subjective construal when we are greeted by silence: “[S]ilence itself has no unique meaning. It could be construed as an indication of another person’s deliberate attempt at insult; but it alternatively could be construed as an indication of the other’s great sorrow, or great respect, or great embarrassment.” *Id.*

patterns.”¹¹¹ In other words, we do not perceive an objective reality—but a mediated version of objective facts that are interpreted through a variety of filters.

Nevertheless, we are convinced that we perceive an unmediated version of reality regarding all of our perceptions of the world. We believe we are objective about our perceptions of the objects in the world—the smells, sights, and sounds.¹¹² This illusion of our objectivity also extends to interpersonal relations and other more complex social events.¹¹³ These subjective interpretations of the phenomena we encounter affect the way we perceive ourselves, others, and our situations and, in turn, impact how we interact with others in a variety of complex social settings.¹¹⁴ More importantly, the brain plays this trick—subjectively construing the stimuli we encounter to create perceptions of ourselves and the world around us—without ever knowing we are doing it.¹¹⁵ Thus, our brains make us believe that we do “see” the world objectively—“as it really is.”

b) Confirmation Bias

The subjective interpretations we construct are likely to persevere, even in the face of contradictory evidence, because we select and process new information from our subjective and, therefore, biased perspective. This happens because when we assimilate new evidence, we “go beyond the information [actually] given”—by “fill[ing] in the details of context and content, infer[ing] linkages between events, and [adopting] dynamic scripts or schemes to give events coherence and meaning.”¹¹⁶ Our illusion of objectivity, coupled with the way we “fill in the gaps” leads us to accept, with little scrutiny, evidence that is consistent with our existing perspectives and

111. *Id.* at 321 (quoting DAVID KRECH & RICHARD S. CRUTCHFIELD, THEORY AND PROBLEMS OF SOCIAL PSYCHOLOGY 94 (McGraw Hill 1948)).

112. *See, e.g.*, Ross & Ward, *supra* note 96, at 114 (citing a “Musical Tapping” study that was designed to test subjective construal of stimuli and finding most participants failed to appreciate how their own richly embellished internal representations of the songs affected their judgment about the likely success of the listeners who were presented with only “impoverished, [ambiguous] stimuli” in the form of taps. The difference in the experience of tappers and listeners seems obvious—seeing it from our vantage point—but the differences in perception were not so obvious to the study participants).

113. *Id.* at 106–07 (describing a study that was a variation on the classic Prisoner’s Dilemma Game in which the object of the game was to win money and merely changing the name of the game affected whether the game would be played competitively or cooperatively.).

114. *Id.* at 104 (asserting that differences in subjective construal “matter” in everyday life and that social perceivers usually make “insufficient allowance[s]” for the impact of subjective construal when making inferences or predictions about others).

115. Pronin et al., *supra* note 97, at 784.

116. Ross & Ward, *supra* note 96, at 118.

beliefs.¹¹⁷ On the other hand, we intently scrutinize any evidence that is inconsistent with our understanding in order to resolve the cognitive dissonance such new information creates.¹¹⁸ This process of biased assimilation of new information often “leads to unwarranted perseverance of beliefs.”¹¹⁹

In addition, these biased perceptions and the biased assimilation of new evidence also can lead to perceptions of bias in others.¹²⁰ As a result, in situations when parties hold opposing views, the two sides “c[a]me away from the same set of mixed evidence even more polarized, and f[u]rther apart in their views, than they had been before”¹²¹ and with their version of “objective reality” more firmly entrenched.

c) Introspection Illusion

Of course, this is not to say that we do not sometimes appreciate the “reality” we, and others, perceive is subjective rather than objective. In fact, most of us assume that human behavior—certainly other’s behavior—is affected by people’s tendency to serve their own self-interests.¹²² Moreover, “we do not claim to be immune from wishful thinking, overconfidence, defensiveness, closed mindedness, and a host of other inferential and judgmental failings.”¹²³ But, we are likely to admit to such shortcomings only in connection with past behavior or instances of possible bias—not current instances.¹²⁴ In other words, we accept—in the abstract—that at least some of the time, we are susceptible to making biased judgments or decisions.

However, we consistently fail to recognize how bias affects specific judgments or decisions we are making currently. If we did appreciate the influence of bias, then we would change our assessment until it aligned with our perception of the situation.¹²⁵ Of course, to make such adjustments in our perceptions or convictions about a situation we would have to acknowledge that we were in error—something that is hard for us to do.¹²⁶ Instead, we cling to our “naïve reality” and continue to believe—sometimes even in the face of compelling contrary evidence—that we are objective and unbiased.

117. Pronin et al., *supra* note 97, at 796 (describing several studies that demonstrate this biased assimilation and the resulting perseverance of unwarranted beliefs).

118. *Id.*

119. *Id.*

120. Ross & Ward, *supra* note 96, at 118 (describing earlier studies that demonstrated how we assimilate new information in ways that reaffirm our beliefs and justifies our actions).

121. *Id.*

122. Pronin, *supra* note 87, at 37.

123. Pronin et al., *supra* note 97, at 783.

124. *Id.* at 783–84.

125. *Id.* at 784.

126. *Id.* at 783.

We are able to maintain this false belief in our own objectivity even after we are asked to determine whether our thoughts or judgments might be influenced by bias. We can maintain this illusion because of the way we evaluate our own bias.¹²⁷ In assessing our own biases, we rely heavily on introspection.¹²⁸ In essence, we search our private thoughts, feelings, motives, and beliefs—rather than evaluate our behavior in order to detect our own biases.¹²⁹ This method of assessing our own biases often results in our detecting no bias in the specific instance and at the same time may confirm our capacity for bias—at least in the abstract or in past circumstances.¹³⁰ Thus, our introspective analysis seldom reveals any bias or other reason we should change our minds.

However, that does not mean we chose introspection because it is the most reliable method of assessing bias. In fact, we likely chose to rely upon our own thoughts, feelings, and beliefs to assess our own biases for a combination of cognitive and motivational reasons.¹³¹ First, our introspections are less likely to reveal evidence of bias and, thus, we can maintain our positive self-image.¹³² Second, we likely will not be aware of the fallibility of introspective “evidence” of bias, but may honestly believe that our introspection is likely to prove reliable.¹³³ This is true, at least in part, because when we evaluate our thoughts, feelings, motives, and beliefs we often can recall past instances of when we may have been biased, thus, confirming the lack of bias presently.¹³⁴ Third, when we do introspect we often see our own status or experiences as “particularly enlightening.”¹³⁵

Unfortunately, this confidence in the efficacy of our introspection as a sound method of assessing bias is misplaced. While we do have conscious access to the content of our thoughts and feelings, we have no direct conscious access to “the cognitive and motivational processes (to say nothing of the

127. Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. OF EXPERIMENTAL SOC. PSYCHOL. 565, 566 (2007). Not surprisingly, when evaluating others’ biases we assess their behavior and give little weight to the others’ thoughts and feelings, even when we have access to them. *Id.*

128. *Id.* at 565.

129. *Id.* at 566.

130. *Id.*

131. *Id.* at 567; see also Ehrlinger et al., *supra* note 82, at 681 (suggesting self-enhancement motivation and naïve realist cognitive illusions as among the reasons we rely upon introspection when evaluating our own bias).

132. Pronin & Kugler, *supra* note 127, at 567.

133. *Id.*

134. *Id.* at 576.

135. See Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 647 (Thomas Gilovich et al. eds., 2002).

underlying biochemical processes) that influence our perceptions” of reality.¹³⁶ In other words, we are unable to accurately assess the influence of our own biases using introspection and are seldom persuaded that we are influenced by biases—cognitive or motivational.¹³⁷ In spite of the fallibility of introspection as an accurate gauge of our susceptibility to bias, most of us still rely upon our thoughts and feelings to judge our own potential or actual biases.¹³⁸

In contrast, we will often rely upon different evidence to discern bias in others—valuing their actions instead of their thoughts, feelings, beliefs, or conscious motivations. Also, when we do have access to introspective evidence for others—we tend to disregard that information as unreliable predictors of bias in others.¹³⁹ In addition, we similarly discount the unique status or experiences of others: “By contrast, we see others’ unique status or unique experiences as a source of inevitable and understandable biases that distort their objectivity and lead them to unwise or unreasonable positions on the relevant issues.”¹⁴⁰

These differences in how we evaluate our own biases (using introspective evidence) and how we assess the biases of others (with extrospective data) helps explain our persistent belief in our own objectivity, as well as the asymmetry in our perceptions of bias in self and others.

2. Other People Should “See” the World the Way I Do.

Given our conviction that our view of the world is both realistic and objective, we also believe that others will or, at least, should share our worldview—if they are informed, intelligent, and impartial. In fact, our Naïve Realist view also leads us to predict that our responses and reactions to the people, things, and events we encounter will be shared by reasonable others.¹⁴¹ In fact, we often overestimate the commonness and normative “correctness” of our response and reactions—a phenomena social psychologists have termed the “false consensus effect.”¹⁴² This effect leads us to be overconfident in our abilities to predict others’ behavior or choices based upon our perceptions of the situation.¹⁴³ Thus, when those others don’t agree with us, we struggle to

136. Pronin et al., *supra* note 81, at 378.

137. Pronin & Kugler, *supra* note 127, at 567 (describing how we use internal evidence of bias—our conscious thoughts and feelings—to judge our own impartiality, but rely upon conduct to evaluate the biases of others).

138. *Id.*

139. *Id.* at 566–67.

140. *See* Pronin et al., *supra* note 135, at 647.

141. Griffin & Ross, *supra* note 108, at 334–37.

142. *Id.* at 337–39; *see also* Ross & Ward, *supra* note 96, at 111–13 (describing earlier studies that demonstrated how participants’ unwarranted confidence in their “objective” perceptions led them to incorrectly predict others would share their experiences and responses).

143. Griffin & Ross, *supra* note 108, at 339–43.

make sense of the cognitive dissonance and often infer they are not informed, intelligent, or impartial.

3. If Other People Don't "See" the World as I Do, Then They Aren't Seeing Clearly.

When we encounter others who do not agree with our worldview, we make inferences about the reasons for their choices or behavior—often making attributions about their character, intellect, or motivations. We are driven to infer that these others are “not seeing clearly” because we have a strong need to resolve the mental tension created by these two seemingly contradictory ideas: (1) I am reasonable so all reasonable people will agree with me; and (2) you don't agree with me.¹⁴⁴ We must resolve this cognitive dissonance and the easiest way to do that while protecting our self-image and worldview is to infer there is something wrong with *them*.¹⁴⁵

Initially, we presume they are sufficiently intelligent and impartial—but that they are uninformed and simply need more or the right information.¹⁴⁶ In other words, we assume that the other:

has not yet been exposed to the ‘way things [really] are’ or has not yet been privy to the ‘real’ facts and considerations. Indeed, we may even be so charitable as to concede that [if] the other party [is made] privy to additional facts and considerations that [they] might actually change their own views.¹⁴⁷

Unfortunately, we soon discover that—in spite of what we believe to be our rational, objective, and open-minded attempts at enlightening the other—the disagreement often is not resolved, the differences seldom are narrowed, and sometimes the other's position becomes more entrenched.¹⁴⁸

After failing to convince our opponent (and not being persuaded to change our own minds), we inevitably turn to less charitable explanations to resolve the cognitive dissonance—we often conclude the other is not intelligent or not impartial. The attributions of a lack of impartiality can take the form of alleged self-interest, ideology, or some other influence that distorts an otherwise objective and reasonable view.¹⁴⁹ Since we are convinced we are objective and reasonable, we assume the “others” have used a less objective or biased approach to assess the situation:

144. Pronin et al., *supra* note 135, at 651–53.

145. *Id.*

146. *Id.*

147. *Id.* at 648.

148. *Id.* (explaining that these supposedly free exchanges of ideas seldom lead us to change our minds either because we are not presented with new facts or arguments that we find persuasive given we have already taken a position).

149. *Id.*

We assume that these biases distort either their construal of relevant information or their capacity to proceed rationally and cogently from facts to conclusions. We feel that while we have proceeded in a logical bottom-up manner, from the available [objective] facts to reasonable construals and beliefs, those who hold opposing views [must] have done the opposite (i.e., they have proceeded in a top-down fashion, [working] from preexisting motives and beliefs to biased interpretation).¹⁵⁰

Moreover, when we try to examine the situation more carefully, we see further proof of the others' biased approach. We do this because once we already assume they are biased—we assimilate only those facts that serve as “evidence” of their perceived bias.¹⁵¹ Our view is not only clouded by our “biased assimilation”—but our naïve realist view causes us to miss the fact that our own views and our own interests affect the way *we* construe the “new evidence” of the other's alleged bias.¹⁵² As a result, our closer examination of the situation “serves to sustain rather than allay [our] suspicions” that the other is not impartial.¹⁵³ In other words, our Bias Blind Spot causes us not only to underestimate how our own biases affect our own thoughts, feelings, and actions—it causes us to overestimate the biases of others and to make other inferences and attributions to explain why those others do not agree with our seemingly reasonable convictions.¹⁵⁴

150. Pronin et al., *supra* note 135, at 648.

151. *See supra* notes 116–21 and accompanying text (explaining phenomena of biased assimilation of new evidence in which we select and assess any new information in such a way that it confirms the biases we already hold, known as the Confirmation Bias).

152. Pronin et al., *supra* note 135, at 648.

153. *Id.*

154. Pronin et al., *supra* note 81, at 369–70 (describing studies demonstrating that individuals perceive the existence and operation of cognitive and motivational biases more readily in others than they perceive in their own feelings, thoughts, and behavior).

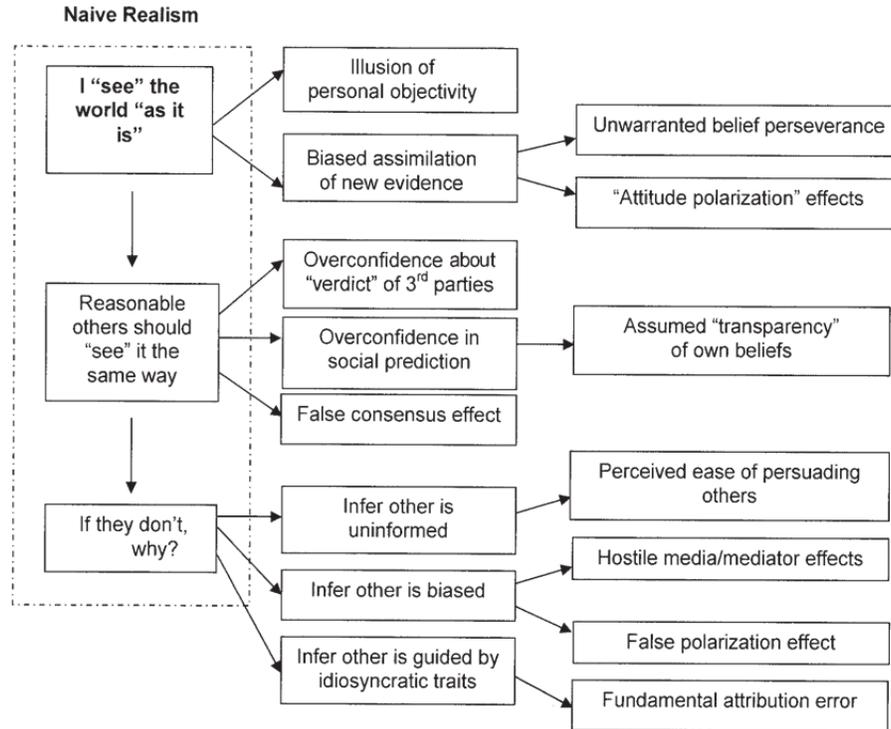


Figure adapted with permission from Pronin, et al., *Objectivity is in the Eye of the Beholder*, 111 Psychol. Rev. 781, 795 (AM. PSYCHOLOGICAL ASS'N 2004).

This asymmetry in our perception of bias in oneself and others—the so-called Bias Blind Spot—has serious implications for disqualification disputes—in specific cases and to the judicial system in general. The most obvious consequence is that the jurist who is tasked with deciding whether he or she is disqualified due to some alleged bias will not be able to see his or her own biases objectively. This Bias Blind Spot likely will lead to some judges and justices presiding over cases when he or she is actually biased and, thereby, depriving a litigant of a “fair trial before a fair tribunal.”¹⁵⁵ The other less obvious consequence is that the jurist’s own assessment of bias likely will differ in significant ways from how “reasonable” others who are well informed about the facts will assess the jurist’s actual or apparent bias. This asymmetry in perception of bias may lead to more than a disagreement over the disqualification decision—it also can create a maelstrom of misunderstanding and mistrust.

155. *Id.*

E. Disagreement Seen Through the Lens of Perceived Bias Becomes Conflict

In fact, our tendency to be blind to their own biases while at the same time recognizing and being quick to point out bias in others often turns a disagreement into a conflict.¹⁵⁶ The perception of disagreement, even when the parties actually have only minimal disagreement, can induce people to perceive those “others” not as reasonable people who simply disagree with us—but as biased adversaries.¹⁵⁷ These perceptions of bias on the part of others, in turn, cause one to be more likely to take competitive (and, thus, conflict-escalating) actions against their perceived adversaries.¹⁵⁸ The “adversary”—believing the other to be biased and aggressive—responds in kind.¹⁵⁹ Often this escalation from disagreement to conflict follows a classic downward spiral because “both sides aggress against each other, while adhering to the [naïve realist] belief that their own actions are merely a ‘defensive response’ to the ‘offenses’ of the other side.”¹⁶⁰ Thus, a disagreement—fueled by perceptions of bias—escalates into a conflict following much the same path as a classic conflict escalation spiral.

THE BIAS PERCEPTION CONFLICT SPIRAL

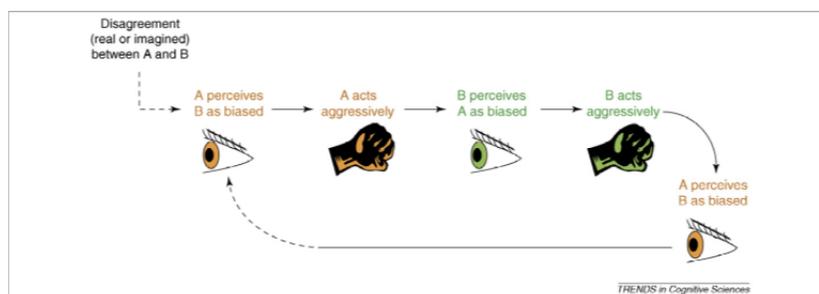


Figure adapted with permission from Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37, 37–38 (Elsevier 2007).

While we might be inclined to believe that the conflict escalates because each side has differing interests or positions in which they believe passionately, it appears that perceptions of bias play a very important role in creating and maintaining the seemingly endless cycle of conflict. In fact, recent psychological studies tested the hypothesis that perception of bias—rather than

156. Pronin, *supra* note 87, at 40 (describing the “bias-perception conflict spiral” in which the perception of bias fuels a cycle of increasing conflict).

157. *See id.* at 40–41 (citing earlier studies demonstrating that we infer that those who disagree with us are biased and this perception of bias may lead to increased conflict).

158. *Id.*

159. *Id.*

160. *Id.* at 41.

differing positions and interests—could cause us to unwittingly fuel the conflict escalation spiral.¹⁶¹ Thus, when we encounter others who disagree with us, we not only perceive them to be biased, we assume they are more likely to be competitive and so we respond to them—or sometimes act preemptively—in a more aggressive fashion.¹⁶² In this way, we take part in creating and maintaining a bias-perception conflict spiral that makes resolution of disagreement more difficult.

This is exactly what happened in *Caperton*—a case that involved the disqualification of three out of the five state supreme court justices that ended in a landmark disqualification decision by the United States Supreme Court. In each instance when one of the state supreme court justices was asked to step aside based upon an alleged appearance of bias,¹⁶³ the justice—naïvely believing he could be impartial—presumed the moving party was biased against him and then the jurist reacted in ways that not only did not resolve the disagreement but escalated the conflict. Moreover, in some instances the litigants themselves responded in kind: making further accusations of bias and becoming more persistent in their pursuit of the jurist’s recusal. This escalation of the conflict could have—and arguably did—taint the entire proceedings by affecting the perceptions those jurists held of the litigants.¹⁶⁴ It also changed the dynamic on the court—as evidenced by some of the opinions issued by the challenged jurists’ colleagues.¹⁶⁵ In order to more fully appreciate how the Bias Blind Spot can lead to a bias-perception, conflict spiral and infect a disqualification proceeding, we will take a closer look at the *Caperton* appeal as it progressed through the state courts before the case finally arrived at the steps of the Supreme Court of the United States.

161. Kathleen A. Kennedy & Emily Pronin, *When Disagreement Gets Ugly: Perceptions of Bias and Escalation of Conflict*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 833, 845 (2008) (describing a series of studies demonstrating that people’s tendency to impute bias to those who see things differently causes them to take competitive approaches, which lead to actions that increase conflict and those actions in turn prompt a similar response from the other).

162. *Id.*

163. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, at 873–76 (2009). Of course, the tenor of some parts of the motions seeking disqualification and the facts alleged in support of the recusal requests suggested that the targeted justice might actually be biased rather than merely appeared to be biased. *Id.*

164. *See id.* at 876 (accounting Justice Benjamin’s adamance in declining to recuse himself).

165. *Id.* at 875.

III. THE CAPERTON CAPER

“No man shall be a judge in his own cause; because his interest would certainly bias his judgment and, not improbably, corrupt his integrity.”

The Federalist No. 10 (J. Madison)

The *Caperton* litigation, commenced in late 1998, took nearly a decade to wind its way through the West Virginia state court system before it reached the United States Supreme Court (“SCOTUS”).¹⁶⁶ The appeal to SCOTUS brought by Hugh Caperton and his companies centered on whether Due Process demanded that one of the justices sitting on the highest court in West Virginia be disqualified because a person with an interest in the underlying litigation had expended substantial sums to oppose the justice’s election rival when the case was pending before the state supreme court.¹⁶⁷ Since the challenged justice’s vote was outcome determinative—he voted to reverse a nearly \$50 million jury verdict awarded to the Caperton parties—the majority of justices on SCOTUS concluded that Due Process required the state supreme court justice recuse himself and remanded the case to the West Virginia Supreme Court to be reheard without the disqualified jurist.¹⁶⁸ But, the *Caperton* dispute—which is really a story of business competitors who also were personal rivals—started well before the litigation ever even commenced.¹⁶⁹

A. *Contest for Control of the Harman Mine Coal*

On January 1, 1993, Hugh M. Caperton, through his ownership of several small, independent companies,¹⁷⁰ acquired all the rights to extract the exceptionally high-quality metallurgical coal in the Harman Mine of Buchanan County.¹⁷¹ Although Harman Mine had once been a productive operation, in

166. See First Amended Complaint at ¶ 1, *Caperton v. A.T. Massey Coal Co., Inc.* (W. Va. Cir. Ct. Dec. 10, 1998) (No. 98-C-192), 1998 WL 35232594, at *1.

167. See Brief for Petitioners at i, *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868 (2009) (No. 08-22).

168. *Caperton*, 556 U.S. at 890.

169. This Article, unlike the SCOTUS opinions, provides significant detail about the actual disqualification dispute as it arose and was addressed in the West Virginia Supreme Court proceedings. The details have been included to allow the reader to evaluate the facts relevant to the disqualification questions for herself. Also, the hope is that the reader will be able to more readily understand the asymmetry in perceptions of bias—by comparing her own perception of bias with how each of the challenged justices perceived their own biases.

170. First Amended Complaint, *supra* note 166, at ¶ 37. Those companies included Harman Development Company and its two wholly-owned subsidiaries Harman Mining Corporation and Sovereign Coal Sales, Inc. (collectively the “Harman Companies”).

171. This type of coal is prized by steel making companies because the coal’s chemical, mineral, and petrochemical characteristics cause the coal to burn at the particularly high temperatures needed to produce high quality coke for use in steel manufacturing. See John

more recent years the operations suffered from a lack of capital infusion and attention. However, by the end of 1993, Caperton had transformed the operations at Harman Mine—quadrupling the productive yield of the mine to 1 million tons a year and using 150 union miners, rather than contract workers, to do it.¹⁷² Caperton had no trouble selling the increased amount of coal produced by the Harman Mine, because the assets acquired when Hugh Caperton purchased his interest in the Harman Mine included a long term coals-supply contract with Wellmore, a third party buyer (the “1992 CSA”).¹⁷³ In fact, in each of the five years that the 1992 CSA was in effect, Wellmore Coal Corporation (“Wellmore”) purchased the total output of coal from the Harman Mine at a total cost in the range of \$15 million to \$20 million per year.¹⁷⁴

Because of this increase in production and a ready market for the coal, in 1996, A.T. Massey Coal Company, Inc. (“Massey”)—a large publicly traded energy company which specialized in production of metallurgical coal¹⁷⁵—became interested in controlling the Harman Mine. If Massey could acquire the output from the Harman Mine, that move could support a Massey plan to sell cheaper, less desirable coal to steel producers at higher profit margins.¹⁷⁶ In fact, Massey eventually acquired an interest in Wellmore, Harman’s prime customer, and caused Wellmore to breach the contracts.¹⁷⁷ These actions and other steps taken by Massey—all of which were directed by and through Don L. Blankenship, Massey’s CEO and President—allegedly drove Caperton out of business and into bankruptcy court.¹⁷⁸

B. *The Harman Mine Business Interference Litigation*

In December 1998, Hugh M. Caperton, and his company Harman Development Corp., along with the wholly owned subsidiaries Harman Mining Corp., and Sovereign Coal Sales (collectively, “Caperton”) filed a complaint against A.T. Massey Coal Company, Inc. and certain affiliates seeking compensatory and punitive damages arising out of the tortious interference and fraudulent actions of Massey.¹⁷⁹ The gravamen of the complaint by Caperton was that Massey “caused [Caperton] to lose the ability to continue in the

Gibeaut, *Caperton’s Coal*, A.B.A. J. MAGAZINE, Feb. 1, 2009, at 1, available at http://www.abajournal.com/magazine/article/capertons_coal/.

172. *Id.*

173. First Amended Complaint, *supra* note 166, at ¶ 36; *see also* Final Order, *Caperton v. A.T. Massey Co., Inc.*, (W. Va. Cir. Ct. Aug. 8, 2004) (No. 98-C-192), 2004 WL 4967480, at *7.

174. First Amended Complaint, *supra* note 166, at ¶ 41.

175. *Id.* at ¶¶ 70–72, 83; *see also* Final Order, *supra* note 173, at *6.

176. First Amended Complaint, *supra* note 166, at ¶¶ 77–84.

177. *Id.* at ¶¶ 96–100.

178. *Id.* at ¶¶ 175–84.

179. *Id.* at ¶ 1.

business of mining and selling coal [from the Harman Mines] and . . . caused the corporate Plaintiffs to become insolvent.”¹⁸⁰

In mid-August 2002, after more than three years of pre-trial activity and nearly seven weeks of trial, a West Virginia jury returned a verdict against Massey for tortious interference with contractual relations, fraudulent misrepresentation, and fraudulent concealment in connection with Caperton’s failed operations at the Harman Mines.¹⁸¹ The jury awarded Caperton nearly \$50 million in compensatory and punitive damages on its contractual and tort-based claims.¹⁸²

Shortly thereafter, on August 30, 2002, Massey filed its first in a series of post-trial motions seeking relief from the jury verdict, specifically asking the court to set aside or reduce the judgment in Massey’s favor as a matter of law, grant a new trial, or in the alternative reduce the punitive portion of the jury award.¹⁸³ During the next two years, Massey filed supplemental briefs and additional motions seeking relief from the \$50 million jury award.¹⁸⁴ In August 2004, the state trial court denied Massey’s post-trial motions challenging the verdict and seeking a reduction in the damages award, finding that Massey “intentionally acted in utter disregard of [Caperton’s] rights and ultimately destroyed [Caperton’s] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so.”¹⁸⁵ Thereafter, Massey filed further post-trial motions seeking entry of judgment in Massey’s favor as a matter of law, granting a new trial, or in the alternative reducing the \$50 million jury award.¹⁸⁶ In mid-March 2005, the trial court again denied all pending Massey motions for entry judgment as a matter of law and declined to grant Massey’s request for a new trial—criticizing the post-trial tactics employed by Massey.¹⁸⁷

C. *The Race for a Seat on West Virginia Supreme Court of Appeals*

While Massey’s post-trial motions for relief were pending, West Virginia held its 2004 judicial elections, in which one of the five seats on the state’s

180. *Id.*

181. Amended Circuit Court Order on Jury Award of Punitive Damages, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 22a (2009) (No. 08-22) [hereinafter Amended Order on Punitive Damages].

182. Caperton v. A.T. Massey Coal Co., Inc., 679 S.E.2d 223, 233 (W. Va. 2008).

183. *See* Amended Order on Punitive Damages, *supra* note 181, at 27a.

184. Circuit Court of Boone County, W. Va. Final Order, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 43a–103a (2009) (No. 08-22) [hereinafter Boone County Final Order].

185. Amended Order on Punitive Damages, *supra* note 181, at 32a.

186. Boone County Final Order, *supra* note 184, at 43a–103a.

187. *Id.*

highest court¹⁸⁸ was contested. Aware that the Supreme Court of Appeals of West Virginia (“WVSC”) would consider the appeal in the *Caperton* case,¹⁸⁹ Don Blankenship decided to support a little-known attorney, Brent D. Benjamin, who ran as Justice McGraw’s opponent. Blankenship contributed the \$1,000 statutory maximum to Benjamin’s election campaign committee.¹⁹⁰ However, Blankenship did more than that—he did much more.

In fact, Blankenship contributed or spent a total of nearly \$3.5 million to help Benjamin unseat Justice McGraw.¹⁹¹ Blankenship donated almost \$2.5 million to And For The Sake Of The Kids (“ASK”), a political organization formed under 26 U.S.C. § 527, which opposed McGraw and supported Benjamin.¹⁹² Blankenship’s donations to ASK accounted for more than two-thirds of the total funds the organization raised.¹⁹³ In addition, Blankenship spent just over \$500,000 more on direct mailings, letters soliciting donations, as well as television and newspaper advertisements “to support . . . Brent Benjamin.”¹⁹⁴ The more than \$3 million in contributions and independent expenditures Blankenship made aggregated more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin’s own campaign committee.¹⁹⁵ In addition, there was some evidence that the amount spent by Blankenship was \$1 million more than the total

188. See Natalie E. Tennant, W. VA. SEC’Y OF STATE, 2004 Election Returns <http://www.sos.wv.gov/elections/history/electionreturns/Documents/2004/2004%20Supreme%20Court%20Gen.pdf> (last visited Apr. 8, 2013); see also Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773, 1788–89 (2012).

189. The West Virginia Supreme Court of Appeals (“WVSC”) is the state’s highest court and the court of last resort in West Virginia. The WVSC hears all appeals in the state. West Virginia is one of only eleven states with a single appellate court. West Virginia Judiciary, <http://www.courtswv.gov/supreme-court/index.html> (last visited Apr. 19, 2013).

190. See Benjamin for Supreme Court Committee, State of West Virginia Campaign Financial Statement (Long Form) in Relation to 2004 Election Year, reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 288a (2009) (No. 08-22) [hereinafter Campaign Financial Statement].

191. *Id.*

192. Concurring Opinion of Justice Benjamin, reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 672a–73a (2009) (No. 08-22).

193. And For The Sake Of The Kids, Post General Election Report of Contributions and Expenditures, reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 150a (2009) (No. 08-22).

194. Don L. Blankenship, State of West Virginia Campaign Financial Statement in Relation to 2004 Election Year (Sept. 14, 2004) reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 184a, 186a, (2009) (No. 08-22); Don L. Blankenship, State of West Virginia Campaign Financial Statement in Relation to 2004 Election Year (Dec. 6, 2004) reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 200a (2009) (No. 08-22) (quoting Blankenship’s state campaign financial disclosure filings).

195. Campaign Financial Statement, *supra* note 190, at 288a.

amount spent by the campaign committees of both McGraw and Benjamin combined.¹⁹⁶

When the election results were tallied, Brent Benjamin was the winner: Benjamin received 382,036 votes (53.3 percent), defeating McGraw, who received 334,301 votes (46.7 percent) cast in the state wide election, by a handy margin.¹⁹⁷

D. The Appeal and the First Motion to Disqualify Justice Benjamin

In October 2005, after Massey publicly announced its decision to appeal, but before Massey's appeal actually was docketed in the WVSC, Caperton moved to disqualify Justice Benjamin because of Blankenship's election support.¹⁹⁸ Caperton primarily based its claim for relief on West Virginia Code of Judicial Conduct Canon 3(E)(1), which provides a "judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."¹⁹⁹ Caperton argued that Blankenship's financial support of and involvement in the judicial election that resulted in Brent Benjamin becoming a Justice on the WVSC created reasonable questions about Justice Benjamin's impartiality.²⁰⁰ Although Caperton did not assert that Justice Benjamin was actually biased in favor of Massey—that wasn't required by state law, which encompassed an appearance of bias standard.²⁰¹

In support of the motion, Caperton submitted a number of exhibits. The evidence included an internal Massey memo authored by Blankenship decrying the jury verdict as "frightening" and vowing to appeal.²⁰² The other evidence proffered by Caperton included various financial disclosure forms filed by Benjamin's campaign committee, as well as ASK, the 527 organization that supported Benjamin's election and targeted his opponent, incumbent Justice

196. Brief for Petitioners at 28, *Caperton v. A.T. Massey Coal Co.*, (W. Va. Cir. Ct. March 15, 2005) (No. 98-C-192), 2005 WL 5679073.

197. Concurring Opinion of Justice Benjamin, *supra* note 192, at 677a.

198. Motion of Respondent Corporations for Disqualification of Justice Benjamin, *reprinted in Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 104a–320a (2009) (No. 08-22) [hereinafter Motion for Disqualification of Justice Benjamin]. Hugh Caperton also filed a separate motion seeking Justice Benjamin's disqualification based on essentially the same grounds. *See generally* Hugh M. Caperton's Motion for Disqualification Directed to Justice Brent D. Benjamin, *reprinted in Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 321a–35a (2009) (08-22) [hereinafter 2d Caperton Benjamin Disqualification Motion]. Both of the disqualification motions reference the Due Process Clause, as well as the general standards of fairness that underlie disqualification jurisprudence. However, the recusal requests are primarily focused on Canon 3(E)(1) of the West Virginia Code of Judicial Conduct.

199. W. VA. CODE JUDICIAL CONDUCT, Canon 3(E)(1) (2013).

200. 2d Caperton Benjamin Disqualification Motion, *supra* note 198, at 323a–32a.

201. *See id.*

202. Memorandum from Don Blankenship to Massey Members, *reprinted in Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 115a (2009) (No. 08-22).

McGraw.²⁰³ In addition, Caperton provided the court with prints of various television and newspaper advertisements paid for by ASK and Benjamin's campaign committee²⁰⁴ and the transcript of a public radio station broadcast on the influence of money in judicial elections and the need to recuse to preserve impartiality or the appearance of impartiality.²⁰⁵ Also, Caperton's motion cited a number of reporters, editorialists, and commentators who called for Justice Benjamin to step aside.²⁰⁶ In all, Caperton submitted over 200 pages of documents in support of its request for recusal.²⁰⁷

Caperton claimed the submissions supported its argument that Justice Benjamin was disqualified because the evidence:

connect[ed] the 2002 jury verdict in the above litigation with petitioner Massey's involvement in the 2004 judiciary election in which Justice Benjamin won his seat on the West Virginia Supreme Court of Appeals [and] creat[ed] reasonable and substantial, if not overwhelming, doubts whether Justice Benjamin—or any judge in his shoes—could be impartial and unbiased in adjudicating Massey's appeal in this matter.²⁰⁸

Notably, Caperton did not argue that Justice Benjamin was in fact biased. Rather, Caperton alleged only that reasonable and substantial doubts would be created about the ability of "any judge in his shoes" to remain impartial and unbiased given the timing, amount, and relative size of the campaign contributions and other financial support offered by Massey CEO and Chairman, Don Blankenship.²⁰⁹

Justice Benjamin never disputed the facts regarding the campaign contributions, independent expenditures, and other financial support that

203. And For The Sake Of The Kids, Third Quarterly Report of Contributions and Expenditures (Oct. 15 2004) *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 117a–141a (2009) (No. 08-22); And For The Sake Of The Kids, Post General Election Report of Contributions and Expenditures (Dec. 2, 2004) *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 142a–74a (2009) (08-22); And For The Sake Of The Kids, Year-End Report of Contributions and Expenditures (Jan. 31, 2005) *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 175a–80a (2009) (08-22).

204. Prints from Televised Advertisements Produced for And For The Sake Of The Kids And for the Benjamin For Supreme Court Committee, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 301a–313a (2009) (No. 08-22); *News Ads Criticize McGraw*, West Virginia Justice Watch (Sept. 7, 2004) *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 314a–16a (2009) (08-22).

205. Transcript from West Virginia Public Radio Broadcast re: Contributions to Supreme Court Race, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 317–20a (2009) (No. 08-22).

206. *News Ads Criticize McGraw*, *supra* note 204, at 314a–16a.

207. *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 177a–320a (2009) (No. 08-22).

208. Motion for Disqualification of Justice Benjamin, *supra* note 198, at 108a.

209. *Id.*

Blankenship—either directly or indirectly—provided to influence the judicial election.²¹⁰ Thus, the facts in support of the relief stood uncontested when Justice Benjamin made his disqualification decision in April 2006.²¹¹ At that time, Justice Benjamin denied Caperton’s disqualification motions in an order that contained a mere five paragraphs and was slightly more than two pages long.²¹² In his short opinion, Justice Benjamin stated that he “carefully considered the bases and accompanying exhibits proffered by the movants.”²¹³ Justice Benjamin admitted he did not review²¹⁴ any of the exhibits regarding the campaign contributions disclosure documents for his election campaign committee.²¹⁵ Nevertheless, Justice Benjamin denied the motions, finding them without adequate support:

no objective information is advanced [by movants] to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial. What is amply present in the materials filed is surmise, conjecture, and political rhetoric.²¹⁶

E. Justice Benjamin Votes to Reverse \$50 Million Jury Verdict Entered Against Massey

In December 2006, Massey filed its petition for appeal to challenge the \$50 million jury verdict entered in favor of Caperton and the WVSC granted Massey’s request for review.²¹⁷ In November 2007, the WVSC reversed the \$50 million verdict against Massey.²¹⁸ The majority opinion, authored by then

210. *See generally* And For The Sake Of The Kids, Third Quarterly Report of Contributions and Expenditures, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 117a–130a (2009) (No. 08-22); Order of Justice Benjamin Regarding Recusal, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 336a–38a (2009) (No. 08-22). The contributions are listed on these pages and not disputed by Justice Benjamin.

211. *See generally* Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–38a.

212. *Id.*

213. *Id.* at 336a.

214. *Id.* at 337a n.2. Interestingly, Justice Benjamin did not represent that he had no knowledge of what the publicly filed documents disclosed: Blankenship’s contributions to Benjamin’s campaign committee fund and significant support of an organization that was targeting Benjamin’s opponent in the election.

215. Apparently, Justice Benjamin believed that not reviewing those campaign financial records would protect him from recusal challenges in future cases in which other donors might be involved. However, there is nothing in the relevant judicial ethics codes to suggest that was correct. *See* W. VA. CODE OF JUDICIAL CONDUCT, Canon 5(c)(2) (2013).

216. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–37a.

217. Relevant Docket Entries from West Virginia Supreme Court of Appeals, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 4a–5a (2009) (No. 08-22).

218. *See generally* Opinion of the West Virginia Supreme Court of Appeals, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 344a–411a (2009) (No. 08-22).

Chief Justice Davis and joined by Justices Benjamin and Maynard, found that “Massey’s conduct warranted the type of judgment rendered in this case.”²¹⁹ In spite of this characterization of Massey’s conduct, the WVSC nevertheless reversed the jury verdict.²²⁰ Justice Starcher dissented, and decried the majority’s opinion as “morally and legally wrong.”²²¹ Justice Albright also dissented, accusing the majority of “misapplying the law and introducing sweeping ‘new law’ into our jurisprudence that may well come back to haunt us.”²²² Justice Benjamin sided with two other justices and voted to reverse the jury award against Massey.²²³ Following entry of the order reversing the judgment in its favor, Caperton renewed his motion to disqualify Justice Benjamin and also sought to disqualify Chief Justice Maynard.²²⁴

F. *Justice Benjamin Justifies His Participation in the Appeal*

Justice Benjamin cast one of the three votes in favor of reversing the jury verdict that Caperton had won, which means that his denial of the disqualification motion determined the outcome of the appeal. Thus, the reasons for Justice Benjamin’s refusal to step aside merit further review.

Unfortunately, we are unable to fully assess Benjamin’s legal decision in any meaningful way because he—like most other jurists²²⁵—provided little analysis of how the legal standards for disqualification applied to the facts presented in the disqualification motions. Instead, most of the short order is filled with conclusory statements rather than actual legal analysis.²²⁶ In fact, Justice Benjamin’s order—unlike the Caperton motions to disqualify him—contains absolutely no citations to the West Virginia Judicial Code, any cases applying that legal standard, or any other relevant legal authorities.²²⁷

219. *Id.* at 357a.

220. *Id.* at 345a. The court cited two independent legal grounds for the reversal. First, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia. The second ground for the reversal was that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. *Id.*

221. *Id.* at 420a–22a (Albright, J., dissenting).

222. *Id.* at 430a–31a (Albright, J., dissenting).

223. *Id.* at 412a–19a.

224. Motion of Harman Development Corp., and Sovereign Coal Sales, Inc. for Disqualification of Chief Justice Maynard and Renewal of Motion for Disqualification of Justice Benjamin, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 432a (2009) (No. 08-22) [hereinafter Renewed Motion to Disqualify Justice Benjamin].

225. *See* Frost, *supra* note 10, at 569 (calling for reform of the procedures used to decide disqualification disputes to include written opinions to give legitimacy to disqualification decisions).

226. *See generally* Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–38a.

227. *Id.* at 337a. Justice Benjamin did cite one case: *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976). But, this Watergate-era case, which holds that a judge may not disregard his

Moreover, the order provides no substantive response to the factual allegations that were provided in support of the recusal request.²²⁸ In spite of the limited analysis contained in the order, the writing does provide some insight into why Justice Benjamin may have declined to step aside.

1. Justice Benjamin Applies the Wrong Legal Standard

First, the order demonstrates that Justice Benjamin misunderstood the legal standards that govern judicial disqualification in West Virginia. Based upon his own order, it appears that Justice Benjamin applied a test of actual bias:

Each consideration of disqualification must be determined by the specific facts present in the case, and not by generalized subjective preconceptions, conclusions or speculations. A consideration thus necessarily must focus on objective bases specific to a given case and a given jurist, *i.e.*, ***whether there is a proper basis based on objective factors to believe that a given jurist will be unable to render a fair and impartial decision in a given case.***²²⁹

However, West Virginia disqualification practice, like in most states, is governed by an objective test that does not require a showing of actual bias. Instead, the applicable legal standard requires only that the movant demonstrate that the facts and circumstances give rise to an appearance of bias.²³⁰ Thus, Justice Benjamin's analysis focused on an incorrect legal standard—one of actual bias instead of a reasonable appearance of bias.

Second, the rest of the opinion shows that Justice Benjamin viewed the question of whether he might be biased from the wrong perspective. Specifically, it appears that Justice Benjamin determined whether he—not a reasonable and well-informed third party—would have doubts about his impartiality.²³¹ This is incorrect—but completely consistent with news stories reported shortly after the election, which contain statements from Justice Benjamin suggesting he would use this approach to disqualification in matters involving Massey and its affiliates.²³² However, his order went even further—

duty to sit and step aside because he is allegedly biased against a party based upon what transpires in the litigation, is inapposite. In fact, Justice Benjamin's reliance on this authority is seriously misplaced. *See* Stempel, *supra* note 18, at 39–40.

228. *See generally* Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–38a.

229. *Id.* at 336a (emphasis added).

230. *Id.* at 335a (characterizing the West Virginia standard for disqualification as when “a reasonable person, knowing all of the relevant facts, would harbor doubts about Justice Benjamin's ability to be impartial”).

231. *Id.* at 336a–37a.

232. *See* Brad McElhinny, *Benjamin knocks Warren McGraw off Supreme Court; Loser Lets His Son Speak for Him After Bitter, Brutal Campaign*, CHARLESTON DAILY MAIL (West Virginia), Nov. 3, 2004, at P1A available at <http://charleston-daily-mail.vlex.com/vid/benjamin-knocks-mcgraw-loser-bitter-brutal-64446339> (“Benjamin would not promise to remove himself

it seemed to require that the disqualification motions contain evidence that the jurist himself believed proved he could not be impartial: “[N]o objective information is advanced to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial in his consideration of matters related to this case.”²³³ Given this high standard—one that essentially requires the movant to convince the challenged judge himself that he could not be impartial under any set of circumstances—it is not surprising that Justice Benjamin declined to step aside.

Third, Justice Benjamin apparently gave little weight to the materials submitted by Caperton in support of its motions. That evidence consisted of objective facts regarding an appearance of bias, including: (1) the amount of financial support—whether direct contributions or indirect expenditures provided by Blankenship—totaling \$3 million; (2) Blankenship was the CEO and Chairman of Massey at the time; (3) Massey intended to appeal the jury verdict rendered in Caperton’s favor at the time the financial support was provided by Blankenship; and (4) the jury verdict against Massey was \$50 million plus a significant amount of interest.²³⁴ Also, Caperton offered information about the opinions of numerous reasonable others²³⁵—reporters, editorialists, and commentators—who believed that Justice Benjamin should step aside or had otherwise questioned the Benjamin-Blankenship connection.²³⁶ In spite of this information, Justice Benjamin stated that the disqualification motions mostly consisted of “surmise, conjecture, and political rhetoric.”²³⁷ Thus, it seems that Justice Benjamin substituted his own judgment for that of the “well-informed reasonable person.”

However, none of this explains why Justice Benjamin applied the wrong legal standard or what caused him to discredit the seemingly credible evidence that reasonable others “harbored doubts” about his impartiality. Since Justice

from any case involving Massey Energy, but he said he would disqualify himself from any case in which *he believed he could not be fair*. He said he thought he could be fair, though. ‘I don’t know why I wouldn’t be,’ he said”) (emphasis added); *see also* Toby Coleman, *Benjamin May Face Bias Questions; Court Winner Says He Is ‘Not Bought by Anybody,’* THE CHARLESTON GAZETTE (West Virginia), Nov. 4, 2004, at P1C available at <http://charleston-gazette.vlex.com/vid/benjamin-bias-winner-bought-anybody-64155894> (“Benjamin does not know if he will participate in any of those cases [involving Massey, with specific reference made to this case]. ‘I will have to see each case on a case-by-case basis,’ he said after promising to recuse himself ‘from any case I don’t believe I will be fair in’”) (emphasis added).

233. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–37a.

234. *See* 2d Caperton Benjamin Disqualification Motion, *supra* note 198, at 327a–33a.

235. *Id.* at 330a–31a, 333a–34a. Presumably these others—reporters, editorialists, commentators—were well-informed after reading the disqualification motions and sufficiently intelligent to comprehend the materials.

236. *Id.*

237. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 337a.

Benjamin's refusal to recuse was out of step with the convictions about his impartiality held by so many well-informed and reasonable others,²³⁸ we are left to infer that Justice Benjamin was not informed, not intelligent, or not impartial.²³⁹ In fact, this is exactly what at least one well-known legal scholar who regularly writes about judicial ethics and decision making has suggested about the jurist.²⁴⁰ However, there is another plausible, even more probable, explanation: Justice Benjamin—like most of us—has a Bias Blind Spot.

2. Justice Benjamin Naïvely Believes He Can Objectively Judge His Own Biases

In fact, most of the passages from Justice Benjamin's order reflect a naïve realist view of his own impartiality. This is understandable given that, although we want to be accurate, we also have a strong desire to see ourselves in a favorable light. This tendency, especially when coupled with the strong presumption of impartiality that supports each judge's self-identity as a jurist, certainly could—and apparently did—influence the disqualification decision. With the starting point of presumed impartiality, Justice Benjamin only needed to consider any specific evidence of his alleged bias in this particular case. However, there are two additional obstacles to accurately assessing one's own bias: the Introspection Illusion and the Confirmation Bias. Both of these cognitive illusions appeared to have affected Justice Benjamin's assessment of his own biases.

Based upon the lack of objective analysis of the facts presented, it appears that Justice Benjamin succumbed to the Introspection Illusion that plagues us all. There were two types of evidence available for Justice Benjamin to assess his partiality: introspective and extrospective. The first category includes the judge's own thoughts, feelings, and beliefs about his impartiality. The second category includes the judge's behavior or conduct—viewed objectively and

238. 2d Caperton Benjamin Disqualification Motion, *supra* note 198, at 330a–34a. Those well-informed reasonable others included not just the Caperton parties and the members of the press and the academy who were following the case at that time—but later included a host of others: (1) the literally hundreds of reporters or commentators who called for him to step aside; (2) the signatories of the amicus curiae briefs filed in support of Caperton when the case was pending before SCOTUS; and (3) the majority of SCOTUS Justices. Of course, there were reporters, commentators, judges, lawyers, academics, citizens of West Virginia, and members of the general public who did not see the need for Justice Benjamin to recuse himself. In addition, the dissenting SCOTUS Justices did not seem to be overly concerned with Justice Benjamin's decision that he need not step aside.

239. In writing this sentence, I am fully aware that making those kinds of attributions is *exactly* how a Naïve Realist deals with the cognitive dissonance created by Justice Benjamin's disagreement with the idea that he should have stepped aside given the facts presented and the legal standard that should have been applied.

240. See Stempel, *supra* note 18, at 55–57 (suggesting that Benjamin's decision to not disqualify himself reflects he was: (1) not intelligent; (2) immature; or (3) not impartial).

without regard to his subjective state of mind. Justice Benjamin was not persuaded by and in fact seemed to barely consider the extrospective evidence²⁴¹ that might reasonably call into question his impartiality. Instead, Justice Benjamin rejected the information that was offered as evidence and found instead that “no objective information [wa]s advanced to show”²⁴² any bias or partiality on his part. Thus, it appears that Justice Benjamin evaluated his impartiality in the same way the rest of us do: he relied heavily, if not exclusively, on introspection.

Given his Bias Blind Spot, when Justice Benjamin introspected about his possible biases, he found no evidence that he might not be impartial in this particular instance. If his introspection had revealed that “tug of wishful thinking” or “taint of self-interest,”²⁴³ then, presumably, Justice Benjamin would have stepped aside. Since our motivational and cognitive biases largely operate without us ever being consciously aware of their impact, we will seldom find evidence of our own biases when we consciously examine our own thoughts, feelings, and beliefs. In addition, Justice Benjamin valued his own internal assessment more than the assessments of others—even though the applicable law required him to apply an objective third person standard. Thus, Justice Benjamin did what most of us do when evaluating our own biases—he succumbed to the Introspection Illusion, which confirmed his belief that he was not biased in this specific instance.

Justice Benjamin fell for another trick the mind plays to help us maintain our conviction that our own perception of self is objective and accurate: the Confirmation Bias. Justice Benjamin selected and assimilated the new evidence of his possible or probable bias in a biased manner—thereby reinforcing his belief in his own impartiality. When we start with the presumption of impartiality (or after we determine we are not biased), we give credence only to the new evidence that supports our conviction of impartiality.²⁴⁴ One way we do this is to discredit the new contradictory evidence—labeling it as untrustworthy and doing so without any objective analysis of the value of the evidence. That is exactly what Justice Benjamin did when he declared the motions were filled with “surmise, conjecture, and political rhetoric.”²⁴⁵ The evidence presented included documentation of Blankenship’s direct contributions and support, as well as his independent expenditures and hundreds of news articles in which third parties questioned

241. See Geyh, *supra* note 40, at 709. This is the perspective a reasonable and objective third party likely would have about the situation based upon the connection between the jurist and an interested party.

242. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–37a.

243. See Ehrlinger et al., *supra* note 82, at 681.

244. See *supra* notes 116–21 and accompanying text (discussing Confirmation Bias).

245. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 337a.

his impartiality given the financial support of Blankenship.²⁴⁶ Thus, Justice Benjamin's summary dismissal of the data seems consistent with how such evidence is evaluated when viewed from a biased perspective.

At the same time he became more convinced of his own impartiality, Justice Benjamin inferred that there was something wrong with those who disagreed with him. Specifically, his order suggests that the Caperton parties (and their counsel) are not informed of the real or "objective" relevant facts, that they do not understand the legal standards or purposes of recusal motions, or that they are biased.²⁴⁷ In fact, Justice Benjamin suggests that the disqualification motions are ill-intended: "The proper purpose of such a motion is to preserve, not inhibit, the administration of justice."²⁴⁸ Justice Benjamin goes on to assert that it is the Caperton parties who are unfairly biased against him:

The measure of whether a Justice should or should not recuse himself necessarily is not the bias or prejudice which a litigant may have regarding the Justice. Our judicial system requires more. A litigant's subjective belief that a Justice may be more or less favorable to his position is therefore an insufficient basis for disqualification.²⁴⁹

As already noted, Justice Benjamin also characterized the motions as being filled with "surmise, conjecture, and political rhetoric."²⁵⁰ In this way, Justice Benjamin gave short shrift to the motions, and the hundreds of critics referenced in the motions who called for him to step aside. Thus, Justice Benjamin sought to explain why those "others" did not see the question of his bias the way he perceived his own impartiality by suggesting *they—not he*—were wrong.

In other words, Justice Benjamin succumbed to the naïve realist view of himself and the world around him. Starting with a strong presumption that he was impartial, Justice Benjamin introspected and found little or no evidence that he could not be fair. Thus, he became more convinced that his perception of his lack of biases was objectively correct—an unmediated and accurate depiction of the "actual" facts. When the movants and third party others did not agree with him, Justice Benjamin sought to resolve the cognitive dissonance by dismissing the new evidence that did not comport with his naïve realist view of his own objectivity. In order to resolve the cognitive dissonance created with those others that did not agree with his "objective" worldview, Justice Benjamin inferred that those others were not informed, not intelligent,

246. See generally Financial Disclosure Exhibits reprinted in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 117a–313a (2009) (No. 08-22).

247. Order of Justice Benjamin Regarding Recusal, *supra* note 210, at 336a–37a.

248. *Id.* at 337a.

249. *Id.* at 337a–38a.

250. *Id.* at 336a–37a.

or not impartial.²⁵¹ Thus, Justice Benjamin did what nearly every judge and every one of us would do if put in the same position: he overlooked what others saw—his own possible or probable bias—because of his own Bias Blind Spot.

G. Caperton and the Critics Respond As Naïve Realists

Not surprisingly, Justice Benjamin's decision to not step aside was met with the exact kind of response from interested others that Naïve Realism predicts: skepticism about the impartiality (and implicitly the integrity) of the challenged jurist. It is clear the Caperton parties thought Justice Benjamin had not been objective about his own impartiality. In fact, the Caperton parties said as much in their renewed motion for disqualification when they questioned Justice Benjamin's stated reasons for not stepping aside: "[a]pplication of the objective test mandated by this Court—rather than Justice Benjamin's subjective belief about his impartiality—requires that Justice Benjamin withdraw his vote in this matter and recuse himself from any further participation in the case."²⁵² This suggests that the Caperton parties had little faith in Justice Benjamin—either because he was not informed, not intelligent, or not impartial.

Also, the Caperton motion did point out the proper legal standard had not been applied by Justice Benjamin:

[The test applied by Justice Benjamin] is simply not the test against which [the disqualification motion] should have been decided. Rather, the test is whether a reasonable and objective person knowing all the facts would harbor doubts concerning the judge's impartiality Application of the objective test mandated by this Court—rather than Justice Benjamin's subjective belief about his impartiality—requires that Justice Benjamin withdraw his vote in this matter and recuse himself from any further participation in the case.²⁵³

This statement clearly infers a lack of both information and intelligence on the part of the jurist. The renewed disqualification motion also suggested that Justice Benjamin had not been impartial about his partiality by noting that there were ample "objective" facts regarding Justice Benjamin's connection with Blankenship that would cause a reasonable third party to call into question the justice's impartiality.²⁵⁴

251. *Id.* at 338a. This is not to say that Justice Benjamin held actual biases for or against a party or interested person in the case and that he was intentionally blind to those biases. Rather, the point is that Justice Benjamin was blind to how he could be affected by motivational and cognitive biases and be unaware of the impact of those biases.

252. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 438a.

253. *Id.*

254. *See id.* at 437a–38a.

Moreover, the renewed request that Justice Benjamin step aside was paired with a request that Chief Justice Elliot “Spike” Maynard be disqualified.²⁵⁵ The implication is clear: if another justice on the same court with close ties to Blankenship should step aside, so should Justice Benjamin. Of course, since the Caperton parties (and others) harbored doubts about Justice Benjamin’s impartiality in deciding the disqualification motion, they likely had similar doubts as to whether he actually judged the merits of the appeal impartially. In addition, those reporters, editorialists, and commentators following the situation responded with equally cynical views of Justice Benjamin’s decision to not step aside.²⁵⁶ These responses are completely predictable because when “others” don’t agree with our view of any given situation, we tend to infer not that *we* are not informed, not intelligent, or not impartial—but that something must be wrong with *them*.

It is tempting to think that this all happened simply because Justice Benjamin was not actually impartial. Justice Benjamin may have been motivated by a desire to stay on the case that at least indirectly involved a person who generously supported his election to high judicial office.²⁵⁷ But, when we look at the disqualification disputes involving two other Justices on the West Virginia Supreme Court who also were asked to step aside in this case—Chief Justice Maynard and Justice Starcher—we will see some strikingly similar behavior. In fact, review of those circumstances reveals further examples of how the Bias Blind Spot distorts a jurist’s ability to properly decide disqualification disputes in which he is the target. That examination also discloses how the naïve realist views held by the litigants, press, and public color the manner in which they respond, which engenders a more confrontational reply from the targeted jurist. In other words, the problems with these disqualification disputes follow the same pattern of thoughts and behaviors that lead to a bias-perception conflict spiral.

255. *Id.* at 434a.

256. See, e.g., Peter Geier, *Recusal Fight Highlights Judicial Election Concerns*, NAT’L L. REV., Apr. 24, 2006, at 6 (stating that “[a] West Virginia high court judge . . . declined to recuse himself from hearing the appeal of a \$50 million judgment against a company—despite the fact that its owner contributed at least \$3 million to the judge’s election” and quoting others critical of the decision or calling for the need to reform the disqualification process to address election-specific challenges); Adam Liptak, *Case Studies: West Virginia and Illinois*, N.Y. TIMES, Oct. 1, 2006, at A23; Adam Liptak, *The Worst Courts for Businesses? It’s a Matter of Opinion*, N.Y. TIMES, Dec. 24, 2007, at A10 (reviewing the failure of Justice Benjamin to recuse himself and suggesting that West Virginia Supreme Court judicial decisions should be judged more critically because of it).

257. This would be a reasonable inference to draw from Justice Benjamin’s behavior in light of the fact that he applied the wrong legal standard and provided little analysis to support his decision. In fact, at least one well-known scholar suggested that “[Justice Benjamin’s] performance cries out for at least some consequential discipline and could arguably support impeachment.” Stempel, *supra* note 18, at 9.

H. *The Disqualification Dispute Becomes Deeper and Darker*

During the pendency of the appeal, the Caperton parties also sought the disqualification of Chief Justice Maynard based upon his personal connections with Massey's CEO and Chairman.²⁵⁸ Caperton's motion alleged that Justice Maynard was seen dining with Blankenship on November 8, 2007, which was less than a month after oral argument in the appeal and "less than three weeks before [the WVSC] issued its majority opinion, in which Justice Maynard joined, overturning the judgment against [Massey]."²⁵⁹ Thus, Caperton called upon Justice Maynard to discharge his obligations under the West Virginia Code of Judicial Conduct²⁶⁰ and disclose "full and complete details . . . of his personal relationship with Mr. Blankenship, as well as the nature of the discussions [the two had] at this [dinner] or any other meeting during the pendency of this matter before [the WVSC]."²⁶¹ In addition, Caperton requested that if Justice Maynard had actually met with Blankenship while the case was pending before the Court, then Justice Maynard should recuse himself from any further proceedings and withdraw his outcome-determinative vote in the opinion that reversed the jury verdict in favor of Caperton.²⁶²

The request to step aside largely was based upon the justice's duty to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has personal bias or prejudice concerning a party."²⁶³ However, Caperton also sought Chief Justice Maynard's disqualification based upon his alleged failure to: (1) avoid impermissible *ex parte* communications;²⁶⁴ (2) conduct all extra-judicial activities so that they do not cast doubt on the judge's capacity to act impartially;²⁶⁵ and (3) refrain from permitting his social and

258. The Caperton parties made their first request that Chief Justice Maynard step aside just a few weeks after a majority of the WVSC (including Maynard and Benjamin) voted to reverse the \$50 million jury verdict and remand the case and while the Caperton parties' petitions for rehearing were pending. *See* Hugh M. Caperton's Motion for Disqualification Directed to Justice Elliott E. Maynard, *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W.Va. 2008) (No. 33350) [hereinafter *Caperton's Motion for Disqualification of Chief Justice Maynard*]. Note that this motion is not included in the record on appeal to SCOTUS, but other documents in that record do contain references to the motion and its contents. *See, e.g.*, Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 434a–35a.

259. Caperton's Motion for Disqualification of Chief Justice Maynard, *supra* note 258, at 1.

260. "A judge should disclose on the record information that the judge believes the parties or their lawyers *might* consider relevant to the question of disqualification, *even if the judge believes there is no real basis for disqualification.*" W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E)(1), commentary (1993) (emphasis added).

261. Caperton's Motion for Disqualification of Chief Justice Maynard, *supra* note 258, at 2.

262. *Id.* at 6–7.

263. *Id.* at 4 (citing W. VA. CODE OF JUDICIAL CONDUCT, Canon 3(E)(1) (2013)).

264. *Id.* at 5 (citing W. VA. CODE OF JUDICIAL CONDUCT, Canon 3(B)(7) (2013)).

265. *Id.* (citing W. VA. CODE OF JUDICIAL CONDUCT, Canon 4(A) (2013)).

other relationships to influence the judge's conduct or convey an impression of such influence.²⁶⁶ Thus, Caperton sought relief on multiple grounds—not just the appearance-of-bias standard—and the request that Maynard step aside was based on a myriad of facts allegedly demonstrating the jurist's improper behavior and possible bias.

Justice Maynard did not respond to the allegations of improper connection contained in the original disqualification motion. Nor did he disclose the details of his contacts with Blankenship during the time the appeal was impending or pending before the WVSC.²⁶⁷ However, his lack of response to this motion became moot because on January 14, 2008, seven days after the initial motion, Caperton filed an amended motion seeking to disqualify Chief Justice Maynard because of solid new evidence of additional contacts between the jurist and Blankenship.²⁶⁸ Following revelation of the *ex parte* contacts between Justice Maynard and Blankenship, the corporate Caperton parties filed a similar motion three days later on January 17, 2008, seeking relief on nearly identical grounds.²⁶⁹

The amended disqualification motion alleged that the previously revealed November 8, 2007, dinner in Logan, West Virginia, was “but one of many dinner meetings between [Justice Maynard and Blankenship] at critical junctures in the [appeal] proceedings.”²⁷⁰ In addition, the amended motion charged that Justice Maynard and Blankenship had spent time together while on vacation in the French Riviera in the summer of 2006, while the case was pending before the WVSC.²⁷¹ The motion also included thirty-four photographs evidencing these meetings between the men while vacationing abroad.²⁷² In fact, the time and date stamps on the photographs reflected that the two men spent at least part of three days together in July 2006, while the appeal was impending.²⁷³ Thus, Caperton's call for Chief Justice Maynard to

266. *Id.* (citing W. VA. CODE OF JUDICIAL CONDUCT, Canon 2(B) (2013)).

267. *See* Caperton's Motion for Disqualification of Chief Justice Maynard, *supra* note 258, at 2.

268. Hugh M. Caperton's Amended Motion for Disqualification Directed to Chief Justice Elliot E. Maynard at 1–3, *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223 (W.Va. 2008) (No. 33350) [hereinafter Caperton's Amended Motion for Disqualification of Maynard]. Note that this motion is not included in the record on appeal to SCOTUS, but other documents in that record do contain references to the motion and its content. *See, e.g.*, Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 434a–35a.

269. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 432a–37a.

270. Caperton's Amended Motion for Disqualification of Maynard, *supra* note 268, at 1–2.

271. *Id.* at 2.

272. *Id.*

273. *See id.* Apparently, some of the photographs contained images of female companions traveling along with the two men, and were, therefore, filed under seal. *Id.*

disclose his contacts with Blankenship was soon overtaken by these new revelations of dinner meetings and a trip abroad.²⁷⁴

The very next day, Justice Maynard responded by issuing a press statement in which he vowed to “file a written response promptly to the [disqualification] motion.”²⁷⁵ Justice Maynard did not deny the *ex parte* contacts that were evidenced by the photographs.²⁷⁶ Rather, he merely denied any *wrong doing*. In fact, Justice Maynard specifically decried that: “The suggestion I have done something improper is nonsense.”²⁷⁷ In other words, Justice Maynard disagreed with other’s perception of those *ex parte* contacts with the Massey CEO and Chairman because Justice Maynard subjectively construed those facts differently.

Justice Maynard also strongly denied that his personal connection with the CEO and Chairman of Massey Coal had actually affected any of his decisions on the Court: “Like most judges I don’t reward my friends, or punish my enemies from the bench. I have never denied my friendship with Mr. Blankenship. Our friendship has never influenced any decision I’ve made for the Court.”²⁷⁸

Justice Maynard went on to imply that the meeting in the French Riviera with Blankenship was not improper because Maynard had paid for his own trip: “I paid my own way, paid for my travel expenses, paid my own hotel expenses out of my own pocket. I have receipts and records to prove it.”²⁷⁹ While Justice Maynard may have paid for his trip and he may not have ever denied his friendship with Blankenship, he certainly did not voluntarily disclose the European vacation or the dinners he had with the Massey CEO and Chairman.²⁸⁰ Nor did Justice Maynard volunteer any details of those or any other *ex parte* contacts with Blankenship that occurred while the appeal was pending before the WVSC.²⁸¹ Instead, Justice Maynard left it to the party against whom he had voted on appeal to discover the contacts the jurist had with the CEO and Chairman of the prevailing party.²⁸² Thus, Justice Maynard

274. *See id.*

275. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 440a.

276. *Id.* at 440a–41a.

277. *Id.* at 440a.

278. *Id.* at 440a–41a.

279. *Id.* at 441a.

280. Order of Justice Starcher Regarding Recusal, *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 456a–57a (2009) (No. 08-22) (“The two vacationed in Europe together at the very time that this case was pending before the Court, and who knows what else? The details of that relationship and that vacation have still not been fully disclosed or independently investigated—and they should be.”)

281. *Id.* at 456a.

282. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 434a–35a.

left himself open to suspicions by reasonable others regarding the nature of his contacts with an interested party and the propriety of his conduct.

Moreover, Justice Maynard's statements proclaiming his impartiality despite the *ex parte* contacts completely miss the mark because they are aimed at defending a claim that Justice Maynard was *actually* biased. However, actual bias is not the proper legal standard nor was it the focus of the Caperton disqualification motions.²⁸³ In fact, the Caperton motion sought Justice Maynard's disqualification because a judge is duty bound to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party."²⁸⁴ Thus, Justice Maynard's initial response seems totally blind to the possibility—indeed the probability—that his conduct reasonably could be viewed by a well-informed person as casting doubts on the jurist's impartiality.

In fact, it appears that Justice Maynard—like Justice Benjamin²⁸⁵—made not only a legal error in applying the wrong standard but an error in judgment caused by his Bias Blind Spot. Instead of stepping back and seeing the situation from the perspective of another reasonable, informed person (which the law obligated him to do) Justice Maynard made the decision based upon his own perceptions of his own bias. As we have seen, this introspective approach invites other serious problems as well.

First, using introspection as a means of assessing one's own bias means the jurist likely will become more convinced of his objectivity.²⁸⁶ Second, this belief he is unbiased may also be reinforced merely because his impartiality is being challenged and that challenge is assessed from a biased viewpoint.²⁸⁷ There is some possibility that the challenged jurist could review the objective facts, including his own conduct²⁸⁸ rather than his thoughts, feelings, and

283. Caperton's Motion for Disqualification of Chief Justice Maynard, *supra* note 258, at 5-6. (In fact, the motion alleges Justice Maynard breached his ethical duties when he failed to take other steps to maintain his impartiality: (1) avoid impermissible *ex parte* communications; (2) conduct all extra judicial activities so they do not cast doubt on the judge's capacity to act impartially; and (3) refrain from permitting his social and other relationships to influence the judge's conduct or convey an impression of such influence.)

284. *Id.* at 4.

285. This is the same mistake that Justice Benjamin made. *See supra* notes 225-51 (discussing Justice Benjamin's improper use of introspection to assess his impartiality when the legal standard requires another perspective).

286. *See supra* notes 122-40 (discussing the Introspection Illusion).

287. *See supra* notes 116-21 (discussing Confirmation Biases).

288. In his press release, Chief Justice Maynard also promised to "address the specific allegations [of the disqualification motion] separately" at a later time. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 441a. However, Justice Maynard never provided any detailed explanation of his conduct or his contacts with Blankenship that had come to light.

beliefs about his impartiality. Unfortunately, given the cognitive illusions created by the Bias Blind Spot—we rarely “see” the situation of our own biases the same way as reasonable others do.

Despite his initial protestations that he did nothing wrong, Justice Maynard eventually did step down—but not because he agreed with others’ assessment of his bias.²⁸⁹ Interestingly, Justice Maynard’s memo explaining his decision to not participate in further proceedings in no way denies any of the facts alleged in Caperton’s disqualification motions—the dinner meetings with Blankenship or the time spent together while on vacation in the French Riviera.²⁹⁰ Nevertheless, Justice Maynard makes clear he believed that—in spite of his connections and contacts with Blankenship—he had been and could continue to be fair and impartial in the case: “I will recuse myself despite the fact I have no doubt in my own mind and firmly believe I have been and would be fair and impartial in this case. I know that of a certainty.”²⁹¹ Rather, Justice Maynard stated that he stepped aside because the disqualification dispute had “become an issue of public perception and public confidence in the courts.”²⁹² Justice Maynard went on to say that his recusal was necessary not because of actual bias but due to appearances: “The mere appearance of impropriety, regardless of whether it is supported by fact, can compromise the public confidence in the courts. For that reason—and that reason alone—I will recuse myself from this case.”²⁹³

Although his order contains a clear declaration of his innocence of any wrongdoing—it seems that even Justice Maynard could not ignore the objective facts presented by the photographs and other evidence, as well as the negative press about the connection²⁹⁴ captured in those pictures. In other

But, the demand for disclosure became a moot point when the photographs of Justice Maynard and Blankenship were made a part of the record of the case.

289. Order of Chief Justice Maynard Regarding Recusal *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 447a (2009) (No. 08-22).

290. *Id.*

291. *Id.* The order on page 448a states that Maynard “voluntarily” disqualified himself and cites Canon 3(E)(1)(d). However, that provision does not seem to apply on these facts. Instead, it requires recusal when “the judge or the judge’s spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person is (i) a party to the proceeding, or an officer, director or trustee, of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or (iv) is to the judge’s knowledge likely to be a material witness in the proceeding.”

*The editor’s notes to the CJC do not indicate it has been amended since this order of disqualification was entered.

292. *Id.*

293. *Id.*

294. See e.g., Ben Fields, *Maynard Trip Raising More Questions: Chief Justice Says He Did Nothing Improper*, HERALD DISPATCH, Jan. 16, 2008, at 1A, 7A, available at <http://www.herald-dispatch.com/elections/x1619683909>; Adam Liptak, *Trip to Europe has Repurcussions in West*

words, it seemed Justice Maynard had little choice but to step down—but did so only as he continued to protest his innocence.

Even as he stepped aside, Justice Maynard acted as any naïve realist would under similar circumstances. Justice Maynard’s reasons for recusing himself clearly demonstrate that the jurist clung to the belief that he had been and would continue to be objective. Also, Justice Maynard suggested that others who disagreed with him and believed he might be biased simply were not well informed: “regardless of whether [the appearance of impropriety] is supported by fact.”²⁹⁵ In addition, Justice Maynard implied those who harbored doubts about his impartiality were not being reasonable: “The suggestion I have done something improper is nonsense.”²⁹⁶ It seems that Justice Maynard chose to resolve the cognitive dissonance not by conceding that it would be reasonable for others to harbor doubts about his impartiality given Justice Maynard’s connections and contacts with Blankenship, which the jurist had failed to reveal.²⁹⁷ Rather, Justice Maynard resolved the cognitive dissonance by inferring those who disagreed did not “see” how the world “really is” because there was something wrong with *them*—a classic response predicted by Naïve Realism.²⁹⁸

Unfortunately, Naive Realism (and the more particular brand we are discussing—the Bias Blind Spot) does not merely affect the way that a judge or justice views his or her own impartiality—it can affect the psychology of the entire case. That is what appears to have happened when Justice Maynard initially responded to the Caperton disqualification motions. Given the content and tone of the rest of the press release, Justice Maynard’s promise to “address the specific allegations [of the disqualification motion] separately” seems less like a promise to provide a reasoned response to the motions and more like a vow that he will disprove the allegations of bias. In fact, the entire press release reveals a combative approach and goes so far as to say the basis for the disqualification motions is “nonsense.”²⁹⁹ This reflects an attitude that is hardly a model of judicial temperament that is expected and needed to preside over a case while maintaining at least the appearance of impartiality. Undoubtedly, this intemperate attitude would have affected the litigation had Justice Maynard continued to serve on the case.

Of course, Justice Maynard’s initial defensive response to Caperton’s disqualification motions is easily predicted by the social psychological studies.

Virginia, N.Y. TIMES, Jan. 15, 2008, at A12, available at http://www.nytimes.com/2008/01/15/us/15court.html?_r=0.

295. Order of Chief Justice Maynard Regarding Recusal, *supra* note 289, at 447a.

296. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 440a.

297. *Id.* at 432a–39a.

298. See Pronin et al., *supra* note 97, at 783.

299. Renewed Motion to Disqualify Justice Benjamin, *supra* note 224, at 440a.

In fact, the way the scenario played out was exactly like a classic Bias-Perception Conflict Spiral.³⁰⁰ In such situations, the first step is that A perceives B as biased (Caperton perceives Maynard as biased), A then acts aggressively (in filing both the original and the more strongly worded amended motions for disqualification), B perceives A as biased (Maynard calls suggestions of his lack of impartiality “nonsense”), and then B acts aggressively (Maynard vows to disprove the allegations and seems ready to fight the litigant). The next step in this conflict spiral is A perceives B as biased—which is the first step in the pattern of combative behavior.³⁰¹ The cycle then repeats until the gap between the sides is so wide that there is no room for respectful disagreement or a resolution.

Thankfully, this is not what happened in this instance because Justice Maynard was able to take a step back—he was able to refocus just enough to see that in his initial response to the disqualification motion he had overlooked something important: the legal standard. Perhaps when Justice Maynard reflected on his thoughts, feelings, beliefs, and motivations—his introspection revealed he actually did have a bias towards his friend Don Blankenship and Massey—though Justice Maynard denies that explanation. Possibly, it was Justice Maynard’s thirty years of experience as a public servant—including time on the bench—that gave him the necessary perspective to understand that continuing down the path he initially chose likely would damage his reputation even more than the photographs and other allegations of misconduct ever could. Perchance, a trusted colleague or friend who the jurist believed to be intelligent, informed, and impartial offered some sound advice that motivated Justice Maynard to see that recusal was both legally and ethically necessary. Maybe it was simply that the din of criticism was too loud for Justice Maynard to ignore any longer. We likely will never know what caused Justice Maynard to shift his focus from his own subjective thoughts and beliefs about his lack of bias to view the question of the appearance of impartiality from a third parties’ perspective. But we do know, based upon the social science, that shift in perspective is rare. Instead, most often, the systematic error introduced by the Bias Blind Spot is not corrected and the challenged jurist remains genuinely—though naïvely—convinced of his objectivity.

I. The “Cancer On the Court” Causes Starcher to Step Aside

On the other side, Massey sought recusal of Justice Starcher based upon both an alleged actual personal bias against Massey and Blankenship and the appearance of bias. Massey alleged that Justice Starcher’s public criticism of Blankenship’s role in the 2004 elections reflected an actual bias or at least

300. See Pronin, *supra* note 87, at 40.

301. *Id.*

created the appearance of bias against a party litigant.³⁰² Specifically, the motion to disqualify Justice Starcher charged that the jurist had a “personal bias and prejudice . . . that [was] well known throughout West Virginia.”³⁰³ Given the public nature of the disagreement, Massey called upon Justice Starcher to step aside because his animosity “reasonably call[ed] into question [Justice Starcher’s] ability to render an objective ruling” in the matter.³⁰⁴

In addition, Massey argued that if Justice Starcher continued to participate in the case in spite of the appearance of bias created by his public criticisms of Massey and Blankenship, that would harm not only Massey’s interests in the specific case, but public confidence in the courts: “Of equal import is not only the absence of actual bias, but also the appearance that the process is free of bias. [Thus], to perform its high function in the best way ‘[j]ustice must satisfy the appearance of justice.’ Public respect for the judiciary demands this result.”³⁰⁵ Relying on an appearance of bias standard, Massey moved for Justice Starcher to step aside.

In support of its position that Justice Starcher was disqualified, Massey relied upon both federal and state law standards. In its motion, Massey cited portions of the West Virginia Code of Judicial Conduct that requires recusal when the judge holds a “personal bias or prejudice concerning a party.”³⁰⁶ Massey also relied upon parts of the state judicial code that makes disqualification mandatory due to “any public or nonpublic comment [made by the judge] about any pending or impending proceeding which might reasonably be expected to affect its outcome or impair its fairness.”³⁰⁷ In addition, Massey claimed that its state and federal rights to Due Process would be violated if Justice Starcher did not step aside, but, instead, participated in the appeal.³⁰⁸ Thus, Massey argued that given his past conduct Justice Starcher was disqualified under both applicable state and federal law and duty bound to step down.

In support of these legal claims, Massey provided over twenty-five pages of speeches, newspaper articles, and transcripts from public television and

302. Motion for Disqualification of Justice Starcher at 7, *A.T. Massey Coal Co., Inc. v. Caperton*, No. 33350 (W. Va. Apr. 6, 2006); *see also* Order of Justice Starcher Regarding Recusal, *reprinted in* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 454a (2009) (No. 08-22).

303. Motion For Disqualification of Justice Starcher, *supra* note 302, at 1.

304. *Id.* at 1–2.

305. *Id.* at 2–3 (citing *Tennant v. Marion Health Care Foundation, Inc.*, 458 S.E.2d 374, 386 (W. Va. 1995)).

306. *Id.* at 2 (citing W. VA. CODE JUDICIAL CONDUCT, Canon 3(E)(1)(a) (2013)).

307. *Id.* at 7 (citing W. VA. CODE JUDICIAL CONDUCT, Canon 3(A)(9) (2013)).

308. *Id.* at 10 (citing *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986); *In re Matter of Hey*, 425 S.E.2d 221 (W. Va. 1992)).

radio interviews.³⁰⁹ These materials reflect that at various times before, during, and after the 2004 election contest between Justice McGraw and Brent Benjamin for a seat on the WVSC, Justice Starcher called Blankenship a variety of names in one speech Starcher used the disparaging labels of “outsider,” “stupid,” and a “clown”³¹⁰ to describe the Massey CEO and Chairman: “I think [Blankenship’s] a clown, and he’s an outsider, and he’s running around this state trying to buy influence like buying candy for children. And, I think its [sic] disgusting He’s stupid. He doesn’t know what he is talking about.”³¹¹

In addition, Justice Starcher suggested that Blankenship provided financial and other support to elect Brent Benjamin in an effort to curry favor in matters involving Massey that were impending or pending before the WVSC:

Justice McGraw was not opposed in the general election by some neophyte lawyer named Brent Benjamin. He was opposed by a Richmond, Virginia, resident named Don Blankenship who poked \$4 million into defeating Justice McGraw [for a seat on the West Virginia] Supreme Court So really, the election was bought, the seat was purchased on our Supreme Court and I’m highly offended by it. I’m highly offended by the obscene use of out-of-state money . . . to purchase a seat on our Supreme Court [T]hey tried to purchase a seat on our Supreme Court, and they succeeded.

Coincidentally, Massey Coal, [of] which Don Blankenship is CEO, has a \$60 million case on appeal in our court at this time. He has also – his coal company has more EPA violations than all other coal companies put together in West Virginia. [Don Blankenship] has a very special interest in owning a seat on the [West Virginia] Supreme Court.³¹²

Massey’s motion also cited to additional examples of Justice Starcher’s personal animus towards Massey and its CEO and Chairman, Don Blankenship. One particularly unusual piece of evidence was an *ex parte* communication that Justice Starcher sent to Don Blankenship while appeals involving Massey (not including the Caperton matter) were pending before the WVSC.³¹³ The package of materials sent to the Massey CEO and Chairman included a copy of Justice Starcher’s curriculum vitae and a short

309. Motion For Disqualification of Justice Starcher, *supra* note 302, at 11–39 (Exhibits “A”-“T”).

310. Justice Starcher later recanted these insulting remarks about Blankenship’s intelligence: “I apologize for calling Mr. Blankenship ‘stupid’ and a ‘clown.’ He is obviously an intelligent person. Intelligent people, however, can do stupid and clownish things – I should know.” Memorandum on Renewed Joint Motion to Recuse the Honorable Larry V. Starcher, *Massey Energy Co. v. Wheeling-Pittsburgh Steel Corp.*, Pre-Appeal No 07-185 (WVSC Apr 24, 2008).

311. Motion For Disqualification of Justice Starcher, *supra* note 302, at 6.

312. *Id.* at 5.

313. *Id.* at Ex. I.

autobiography of the jurist bearing a sarcastic inscription,³¹⁴ along with a handwritten note on the official WVSC letterhead which read: “Dear Mr. Blankenship – Some reading information to help you ‘keep the record straight.’ (signed) Larry V. Starcher P.S. I paid the postage.”³¹⁵

Justice Starcher did not dispute the evidence of his extra-judicial statements and conduct, he simply declined to find the evidence sufficient to require him to step aside. In fact, in his initial response to the request that he recuse himself, Justice Starcher admitted he made intemperate remarks about Massey: “True, I have said that in my opinion, Massey has not been a good corporate citizen.”³¹⁶ Justice Starcher’s characterization of his public remarks about Massey and Blankenship is very charitable when compared to his actual statements. For example, on the eve of the 2004 judicial election, Justice Starcher made this prediction about the outcome of the contest between then Justice McGraw and his opponent Brent Benjamin:

What we’re going to see is we’re gonna see Massey Coal . . . buy a seat on our Supreme Court, and I’ll be very sad to sit on that Supreme Court for the next four years, quite frankly. I hate to see out-of-state money be used in such an obscene way as it was in this race to buy a seat on the [West Virginia] Supreme Court and attempt to control it. It saddens me very much.³¹⁷

In light of this record, Justice Starcher would be hard pressed to deny that he made disparaging remarks about Massey’s CEO and Chairman, Blankenship.³¹⁸ Nevertheless, in his initial response to the disqualification motion, Justice Starcher seemed blind to the fact these statements were—when viewed from the perspective of a reasonable other—evidence of bias against a party.

Also, Justice Starcher noted the request was perhaps, the fifth motion to disqualify him filed on behalf of Massey Energy Company, its subsidiaries, and Don Blankenship, CEO of Massey, based upon Justice Starcher’s negative public comments.³¹⁹ Justice Starcher also referred to the reasons given in an earlier memorandum addressing another Massey motion to disqualify him in a different case.³²⁰ In that earlier ruling, Justice Starcher defended his decision

314. The autobiography, which included a photograph of Justice Starcher, bore this handwritten inscription: “Best wishes to a ‘fine West Virginian’ — (signed) L. Starcher 10-27-05.” *Id.* at 36.

315. *Id.* at Ex. I.

316. *Id.* at Ex. D.

317. Motion For Disqualification of Justice Starcher, *supra* note 302, at Ex. C.

318. In connection with another Massey motion seeking Justice Starcher’s disqualification in a different case on the same factual and legal grounds, Justice Starcher had denied making one of the statements attributed to him and claimed another was taken out of context. *See id.* at Ex. D.

319. *See Order of Justice Starcher Regarding Recusal, supra* note 280, at 454a.

320. *See id.*

that he was not disqualified on the grounds that his remarks about the Massey parties were nothing more than personal opinions that he could put aside:

I read papers and form personal opinions as other people do [I have opinions about smoking, murder and other crimes, child abuse and domestic violence, as well as full enforcement of environmental laws.] So, as one can see, this is not the first time I have been asked to sit in judgment of a party for which I may have less than full respect — in the past I have decided such cases in an impartial manner, and can do so in this case.³²¹

Of course, as the Massey movants pointed out, Justice Starcher's analogy was flawed because in each of those instances Justice Starcher had general opinions about the subject matter of the litigation—not specific negative impressions of particular litigants.³²² Moreover, while Justice Starcher had made public statements regarding his general positions in those other cases—he certainly did not vilify specific litigants or parties affiliated with litigants who had appeals pending before the court as he did in the Caperton matter.

Nevertheless, Justice Starcher decided—in spite of his intemperate public comments, including those indicating his “disgust” of Blankenship's efforts to “purchase a seat on [the West Virginia] Supreme Court”³²³—that he need not step aside because he was capable of being impartial. Justice Starcher apparently reached that conclusion based upon the facts that he believed were relevant to the question of his impartiality: “I have no financial interest in this case, do not know any of the litigants, and certainly have never socialized with any of the litigants, nor do I have any personal knowledge of the disputed facts in this litigation.”³²⁴ Notably, not one of these statements justifying his decision addresses Justice Starcher's personal animus towards Massey or its CEO and Chairman, Don Blankenship, or how that animus might create an appearance of bias against the Massey companies or any other party affiliated with Blankenship.³²⁵

Instead of evaluating the appearance of impartiality by assessing the import of his public comments and other extra judicial conduct, Justice Starcher appears to have evaluated his bias using internal evidence—his own subjective beliefs about his impartiality. This introspective assessment of his possible bias is reflected by his statement of assurances that Justice Starcher believed he would act impartially: “I can fairly sit on this matter and correctly

321. Motion for Disqualification of Justice Starcher, *supra* note 302, at Ex. D.

322. See Complaint for Declaratory and Injunctive Relief at 6, Massey Energy Co. v. W. Va. Supreme Court of Appeals, No. 2:06-0614 (S.D. W. VA. 2006).

323. *Id.* at 7, 9.

324. Memorandum on Motion for Disqualification of Justice Starcher, at 1, A.T. Massey Coal Co., Inc. v. Hoke, Appeal No. 06-0936 (W. Va. May 2, 2006) [hereinafter Memo of Justice Starcher on Disqualification].

325. See *id.*

and fairly apply the law. [Thus,] I respectfully decline to step aside.”³²⁶ In other words, Justice Starcher did not focus on the external evidence that a well-informed reasonable other would evaluate to assess the jurists’ impartiality. Instead of assessing the right evidence, Justice Starcher did what most Naïve Realists do—he ignored his behavior and valued instead his own thoughts, feelings, and beliefs about his impartiality.³²⁷ Not surprisingly, Justice Starcher’s introspection apparently revealed no “taint of self-interest” or “traces of guilty bias” because our self-interested biases are largely unconscious.³²⁸ Thus, Justice Starcher found—as he had the five prior times—that he held no “legally disqualifying personal bias” against Blankenship or the Massey parties and concluded that he need not step aside: “Therefore, I again respectfully decline to recuse myself from this matter pursuant to Rule 29 of our Rules of Appellate Procedure.”³²⁹ Of course, this means Justice Starcher failed to apply the legal standard correctly as the appearance of bias standard asks whether a reasonable third party who is well-informed of all the relevant facts would likely harbor doubts about the jurist’s impartiality.³³⁰

In addition to making the same errors in judgment that his brethren Benjamin and Maynard had made, Justice Starcher also compounded the problem by suggesting there was something wrong, not with him, but with those others who did not see things “as they really are.”³³¹ In other words, Justice Starcher attributed biased motives to his opponent—stating that Massey’s CEO and Chairman, Don Blankenship had created the recusal controversy by initiating a public campaign to “take [him] out” in 2008 when Starcher would be up for re-election.³³² Justice Starcher went on to characterize those statements as part of an effort to create an appearance of impartiality that would require him to step aside by saying such statements by Blankenship, which were “designed to create a controversy between him and me, should not be permitted to become a vehicle to force me from sitting as a jurist in the [Caperton] case.”³³³ Apparently, Justice Starcher reasoned that he had no duty to step aside when a party affiliated with the litigant that sought his disqualification had created the controversy that led to an alleged appearance of bias on his part. In other words, Justice Starcher concluded as most Naïve Realists do: since I am not biased and they don’t agree with *me*

326. *Id.*

327. Pronin, *supra* note 87, at 38 (discussing how we use less reliable introspective “evidence” to assess our own biases while evaluating others’ behavior to assess their biases).

328. *Id.* (discussing the unreliability of introspection and unconscious affects of bias).

329. Memo of Justice Starcher on Disqualification, *supra* note 324, at 2.

330. *Tennant v. Marion Health Care Found.*, 459 S.E.2d 374, 385 (W. Va. 1995).

331. *See* Motion for Disqualification of Justice Starcher, *supra* note 302, at Ex. D.

332. Memo of Justice Starcher on Disqualification, *supra* note 324, at 1.

333. *Id.*

that I am not biased—there must be something wrong with *them*—they must be biased.

It also is clear that Justice Starcher surrendered to another Naïve Realist tendency when he evaluated the disqualification motion: biased assimilation of new evidence or the Confirmation Bias. First, he overlooked some important facts about his own behavior. Justice Starcher did not dispute and even admitted that he made comments about Blankenship—including public pronouncements that called into question the Massey CEO and Chairman’s intelligence, integrity, and motives.³³⁴ Most people would likely characterize these remarks as reflecting a personal bias against the target of the comments. However, Justice Starcher succumbed to the Confirmation Bias when he downplayed that evidence, which was inconsistent with his pre-existing conviction that he could be objective.³³⁵ In addition, Justice Starcher spotlighted Blankenship’s statements as evidence of his opponent’s bias against him³³⁶—another way in which the jurist confirmed his biased view of his own impartiality. This selective assimilation of new information confirmed the conclusion Justice Starcher had already reached: there was nothing wrong with *him*—but *his opponent* was biased.

This is not to say that Justice Starcher was not sincere in his perception of his own bias and his perception that his opponents were motivated by self-interest. In fact, that is exactly what the Bias Blind Spot helps us to understand: in spite of our tendency to attribute a lack of information, intelligence, or impartiality to a jurist who does not step aside when we believe he should recuse—those judges often are genuinely convinced of their objectivity. Naïve Realism also suggests that it would be very difficult—if not impossible—for a jurist in such circumstances to put aside his personal bias against a litigant. This is true partly because our self-interested motivations and biases are largely unconscious.³³⁷ In other words, even if Justice Starcher were “trying hard to be fair,” those efforts to minimize his personal bias against Massey’s CEO and Chairman likely would backfire.³³⁸ They could even make the situation worse because in that instance the illusion of objectivity combines with the motivation to be impartial to reaffirm the conviction that the Naïve Realist is being unbiased.³³⁹ Thus, in spite of “trying hard to be fair” it is

334. *See id.* at 454a, 460a.

335. *See id.* at 454a–55a.

336. *Id.* at 455a–56a.

337. *See* Pronin, *supra* note 87, at 38. This is, of course, why our self-interested biases and motivations remain undetected even after we evaluate our conscious thoughts, feelings, and beliefs. *Id.* (explaining Introspection Illusion).

338. Cynthia Frantz, *I AM Being Fair: The Bias Blind Spot as a Stumbling Block to Seeing Both Sides*, 28 BASIC & APPLIED SOC. PSYCHOL. 157, 158 (2006) (discussing backfiring effect of efforts to correct for liking or disliking somebody).

339. *Id.*

unlikely that Justice Starcher could have remained impartial and there is a danger he would become more combative.

In fact, it appears that is exactly what happened—the dispute became a conflict—at least up to the point when Justice Starcher finally stepped aside. In each of his memoranda denying recusal in other Massey cases, we see a progression of increasing hostility and defensiveness. Even in the order in which he agreed to withdraw from the case because he “had become part of the problem,” Justice Starcher was still strident as he blamed Blankenship for bringing to light the jurist’s criticisms of him:

Still, it is really the height of irony for the appellants to suggest that my public statements about certain views and practices by the appellant’s CEO, Don Blankenship, should disqualify me from participating in the decision of the instant appeal.

In fact, it has been Mr. Blankenship who has gone out of his way to bring public attention to my views about his “one rich man buys an election” tactics. Mr. Blankenship even sported a “GetStarcher” ball cap announcing me as his “next target” as he publicly celebrated spending millions to influence elections in our State. As a judge I am limited in my public comments, but I do have a constitutional right — and in fact a duty — to speak out on matters affecting the administration of justice. And let me be clear about this: I believe Mr. Blankenship’s conduct does have an effect on the administration of justice, in that it has become a pernicious and evil influence on that administration.³⁴⁰

The irony is that Justice Starcher seemingly still did not understand that *he had created the appearance that he was biased*—by making disparaging public remarks about Massey and its CEO and Chairman.

While Justice Starcher may not have been clear about how his own conduct would cause a well-informed person to have reasonable doubts about the jurist’s impartiality—he certainly had no difficulty discerning the bias of his colleagues. In fact, Justice Starcher’s order on recusal not only impugns Justice Maynard’s integrity, but it insinuates Justice Benjamin is acting without integrity, as well:

Additionally, shortly before this case was appealed to this Court, another justice ran an election campaign in 2004 that was supported by somewhere around \$4,000,000 from Mr. Blankenship and/or Massey associates. So far that justice has refused to recognize that this fact has a bearing even on his *perceived impartiality*. That justice not only remains on this case, as well as other Massey cases before the Court, but that justice continues at this time to appoint replacement judges in all Massey cases.³⁴¹

Justice Starcher goes on to urge Justice Benjamin to step aside as well— noting that “Blankenship’s bestowal of his personal wealth, political tactics,

340. Order of Justice Starcher Regarding Recusal, *supra* note 280, at 455a–56a.

341. *Id.* at 457a.

and ‘friendship’ have created a cancer in the affairs of this Court.”³⁴² While Justice Starcher’s call for Justice Benjamin to step aside may have been correct under the “objective” facts—the focus on Justice Benjamin’s possible bias at a time when Justice Starcher still seems unable to see his own behavior clearly highlights the asymmetries in perception of bias in self and in others the Bias Blind Spot produces.

J. Justice Benjamin Again Decides He is Not Disqualified In Spite of A Public Opinion Poll That Suggests Otherwise

Following the recusals of Justice Maynard and Justice Starcher, a new panel of justices was constituted to rehear the appeal. Then, Justice Benjamin, now acting as Chief Justice of the WVSC, selected Circuit Judge Cookman and Judge Fox to replace the disqualified Justices. In March 2008, before the newly reconstituted panel issued its ruling, the Caperton parties requested for a third time that Justice Benjamin step aside and not participate in the appeal.³⁴³

That last Caperton disqualification motion went further than just arguing Justice Benjamin had failed to apply the correct standard for recusal under West Virginia law. The renewed motion again sought Justice Benjamin’s recusal under applicable state judicial code and pointed out that Justice Benjamin had applied the wrong legal test.³⁴⁴ In addition, the Caperton parties also included additional evidence to support a finding that a reasonable person well-informed of the relevant facts would harbor doubts about Justice Benjamin’s impartiality.³⁴⁵ Specifically, the Caperton parties had commissioned a “well-regarded public opinion and market research firm” to conduct a public opinion poll to determine whether the West Virginia public would harbor doubts about Justice Benjamin’s impartiality.³⁴⁶ The survey indicated that over 67 percent of West Virginians doubted Justice Benjamin would be fair and impartial.³⁴⁷ This data, the Caperton parties contended, further supported the conclusion that reasonable, well-informed others would harbor doubts about Justice Benjamin’s impartiality and, thus, he had to step aside.³⁴⁸

Notwithstanding this new public opinion information and the recent examples provided by his brethren Justices Maynard and Starcher, Justice

342. *Id.* at 460a.

343. *See* Second Renewed Joint Motion for Disqualification of Justice Benjamin *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 464a (2009) (08-22).

344. *Id.* at 466a (Caperton argued that “a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin’s ability to be fair and impartial.”).

345. *Id.* at 466a–67a.

346. *Id.* at 467a.

347. *Id.*

348. *See id.* at 464a–67a.

Benjamin again refused to withdraw. Just three days after the new disqualification motion was filed, Justice Benjamin filed a memorandum denying for the third time a request he recuse himself.³⁴⁹ In his order, Justice Benjamin not only repeated his flawed approach to the legal issue—but he criticized the Caperton parties for filing the motion and introducing new information at such a late date in the proceedings:

It is noted that this filing comes nearly four years after the 2004 race in which this Justice was elected by the people of West Virginia; comes over seventeen months after the filing of this appeal with this Court on October 24, 2006; comes over four months after the initial decision of this Court on November 21, 2007, in which this Justice voted with the majority of the Court against the interests of the joint appellees; comes over a month after supplemental briefs were filed and considered on the reconsideration of this appeal; comes over two weeks after oral arguments were heard on the reconsideration of this appeal; and comes over two weeks after this Court's Decision Conference on this appeal's reconsideration.

The said motion relies on arguments which relate to the 2004 campaign and which could have been advanced in a timely manner, but have instead been raised now, nearly four years after the 2004 race, during the pendency of a new 2008 political race. Citing no good cause for the delay in raising issues which could have been earlier raised, the said motion is untimely.³⁵⁰

While it is true that the third disqualification motion was filed nearly four years after the election campaign and late in the appellate proceedings, it is a misleading characterization of the record. In fact, the Caperton parties sought Justice Benjamin's disqualification nearly three years earlier—when the appeal first came before the WVSC.³⁵¹ Those initial motions—like the others that followed—were based upon the same underlying facts and the same legal standards for disqualification.³⁵² The only thing new in Caperton's third request for recusal was the public opinion survey commissioned in response to Justice Benjamin's earlier criticisms of the lack of "objective" evidence presented in support of his disqualification.³⁵³ Since the case was reargued before a reconstituted panel—the motion, even the new evidence, was not nearly as untimely as Justice Benjamin suggests. But, Justice Benjamin's

349. Order of Justice Benjamin Regarding Recusal *reprinted in* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 483a (2009) (08-22).

350. *Id.*

351. *See generally* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 app. at 104a–320a; *see also* 2d Caperton Benjamin Disqualification Motion, *supra* note 198, at 321a–35a.

352. *See* Motion for Disqualification of Justice Benjamin, *supra* note 198, at 106a–08a.

353. Second Renewed Joint Motion for Disqualification of Justice Benjamin, *supra* note 343, at 466a–67a.

characterization of the request as untimely, and his out of hand dismissal of the new data reflect his Naïve Realist perspective that Caperton was biased against him.

In addition, Justice Benjamin's dismissal of the public opinion survey is another example of his biased assimilation of new evidence that served to confirm his conviction of his own impartiality. It also tended to polarize the parties and their positions—creating a more combative exchange.³⁵⁴ Justice Benjamin could have diffused the acrimony by evaluating the new public opinion survey evidence on its merits. Instead he chose to make little serious effort to evaluate the data or methodology of the survey and merely concluded that: “[The] ‘survey’ which appears to be a ‘push poll’ specifically designed with limited information for the purpose of supporting the instant [disqualification] motion, is, *as a matter of law*, neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification.”³⁵⁵

While the survey may well have been of limited evidentiary value due to flaws in the design,³⁵⁶ Justice Benjamin provides no legal authority, no legal analysis, or any other credible basis for his conclusion that the data is essentially inadmissible evidence as a *matter of law*. However, Justice Benjamin gives us a clue for the real reason he rejected the survey data: he believed it was “specifically designed with limited information for the purpose of supporting the instant [disqualification] motion.”³⁵⁷ In other words, Justice Benjamin believes the survey—commissioned by Caperton—was biased in favor of Caperton, and he believes that without regard to the reputation of the professionals who designed and conducted the survey or the methodology used. Thus, Justice Benjamin dismisses new evidence that does not confirm his previously held belief that he is unbiased. In doing so, Justice Benjamin is able to resolve the cognitive dissonance that must have been created when he read that nearly 75 percent of citizens of West Virginia questioned his impartiality³⁵⁸—a much wider margin than his electoral victory.

354. *See id.* at 471a.

355. Order of Justice Benjamin Regarding Recusal, *supra* note 349, at 483a (emphasis added).

356. The possible problems with the design of the survey were better explained by some scholars and other commentators than Justice Benjamin. *See, e.g.*, Stempel, *supra* note 18, at 40–51 (2010) (explaining a “push poll” and questioning the validity of some aspects of the Caperton survey design that may have influenced participant responses in favor of finding Justice Benjamin should step aside).

357. Order of Justice Benjamin Regarding Recusal, *supra* note 349, at 483a (emphasis added).

358. Second Renewed Joint Motion for Disqualification of Justice Benjamin, *supra* note 343, at 471a, 477a, 481a.

K. Justice Benjamin Is Criticized by His Colleagues for Participating

In April 2008, a divided WVSC again reversed the jury verdict, and again it was a 3-to-2 decision in favor of Massey. Justice Davis filed a modified version of her earlier opinion in which she supported the first reversal and repeated the two earlier legal holdings on which that initial decision was based.³⁵⁹ She was joined by Judge Fox and Justice Benjamin.³⁶⁰

Justice Albright, joined by Circuit Judge Cookman, dissented³⁶¹ and criticized the majority's ruling and its analysis of the legal issues: "[n]ot only is the majority opinion unsupported by the facts and existing [West Virginia] case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority."³⁶²

The dissent not only criticized the legal holding reached by the majority, but also called out Justice Benjamin for refusing to recuse. Although the dissenters did not go so far as to state they believed that Justice Benjamin was actually biased, they did suggest that Justice Benjamin's failure to step aside impacted the outcome and had created a genuine problem for the court:

Unfortunately, with true regret, we are unable to stand silent in the present circumstances. Upon reviewing the cases of *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986), and *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed 942 (1955), it is clear that both actual and apparent conflicts can have due process implications on the outcome of cases affected by such conflicts. On the record before us, we cannot say with certainty that those cases [mandating disqualification under the Due Process Clause when a person has certain pecuniary interests in the outcome] have application here. It is now clear, especially from the last motion for disqualification filed [by Caperton against Justice Benjamin], that there are now genuine due process implications arising under federal law, and therefore under our law, which have not been addressed.³⁶³

359. *Caperton v. A.T. Massey Coal Co., Inc.*, 679 S.E.2d 223, 229–64 (W.Va. 2008); *see also* Opinion of the West Virginia Supreme Court of Appeals *reprinted in* *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 app. at 485a–580a (2009) (08-22).

360. *Caperton*, 679 S.E.2d at 265; *see also* Opinion of the West Virginia Supreme Court of Appeals, *supra* note 359, at 580a.

361. *Caperton*, 679 S.E.2d at 265–85; *see also* Opinion of the West Virginia Supreme Court of Appeals, *supra* note 359, at 581a–634a.

362. *Caperton*, 679 S.E.2d at 284; *see also* Opinion of the West Virginia Supreme Court of Appeals, *supra* note 359, at 633a.

363. *Caperton*, 679 S.E.2d at 285, n.16 (Benjamin, C.J., concurring); Opinion of the West Virginia Supreme Court of Appeals, *supra* note 359, at 633a (Justice Benjamin's concurring opinion also essentially defended his vote in support of the majority decision to reverse the \$50 million jury verdict against Massey that had, with interest, grown to nearly \$80 million. Interestingly, Justice Benjamin wrote nineteen pages on the merits of the case—but took a total of forty-six pages to defend his disqualification decision.).

L. Justice Benjamin Responds to His Critics

Four months later in July 2008—over a month after Caperton filed its petition for writ of certiorari with the United States Supreme Court—Justice Benjamin filed a concurring opinion in which he attempted to defend the merits of his decision not to recuse himself.³⁶⁴ Justice Benjamin’s opinion frames the question as one of “actual” justice—which he defines as “actual impartiality in decision making [that] is conveyed in well-written *legal* opinions which are founded in the rule of law.”³⁶⁵ Then, Justice Benjamin—nearly four years after the issue was first joined—again applies the wrong legal standard to decide whether he is disqualified.³⁶⁶

This last opinion—like the three earlier memoranda—contains the same fundamental flaws in his legal analysis and judgment. First, Justice Benjamin ignores the applicable state law standard, which does not require a showing of actual bias as he suggests, but is an appearance of bias test.³⁶⁷ Second, he places a higher and perhaps impossible burden of proof on the moving party to show the jurist cannot be impartial rather than just whether one might harbor doubts about impartiality.³⁶⁸ Third, Justice Benjamin again confuses his own subjective belief about this impartiality with “objective” evidence of bias (whether actual or apparent).³⁶⁹ In fact, Justice Benjamin goes on to reiterate that he had no “direct, personal, substantial, pecuniary interest” in this case.³⁷⁰ Further, Justice Benjamin suggests that the challenge to his impartiality is improperly motivated when he concludes that adopting “a standard merely of ‘appearances’ seems little more than an invitation to subject West Virginia’s justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations.”³⁷¹

All of these mistakes in his legal analysis, along with the tone of most of the orders on recusal and the last ditch effort to defend his disqualification decision lead one to infer—as any Naïve Realist would—that Justice Benjamin was not informed, was not acting intelligently, or was not actually impartial. In

364. *Caperton*, 679 S.E.2d at 285 (Benjamin, C.J., concurring); Concurring Opinion of Justice Benjamin, *supra* note 192, at 635a.

365. *Caperton*, 679 S.E.2d at 285–86 (Benjamin, C.J., concurring).

366. *Id.* at 295–96.

367. *Id.* at 294–95, n.15.

368. *Id.* at 296.

369. *See supra* notes 225–51 and accompanying text (discussing flaws in legal analysis of previous orders issued by Justice Benjamin refusing to recuse himself).

370. *Caperton*, 679 S.E.2d at 300 (Benjamin, C.J., concurring); Concurring Opinion of Justice Benjamin, *supra* note 192, at 677a.

371. *Caperton*, 679 S.E.2d at 306; Concurring Opinion of Justice Benjamin, *supra* note 192, at 692a.

fact, at least one noted legal scholar has questioned Justice Benjamin in just this manner:

Could it really be that after four years [Justice Benjamin] just did not “get it” regarding the correct approach to judicial disqualification under the [West Virginia Judicial] Code?

* * *

How could Justice Benjamin have erred so badly under these circumstances? Three explanations seem possible: (1) despite his success, he is not particularly bright or not a good legal analyst; (2) he was so emotionally upset over the perceived attack on his integrity that he was unable to think straight notwithstanding the passage of time and the factors regularly informing him of the errors of his legal analysis; or (3) he committed knowing legal error in order to attempt to justify impermissible favoritism toward a campaign benefactor.”³⁷²

There is, of course, one other possible, even probable, explanation: Justice Benjamin—like Justice Maynard and Justice Starcher and the rest of us—has a Bias Blind Spot. Justice Benjamin was convinced he could be impartial in this case—a result that followed from the strong presumption of judicial impartiality and that he naïvely believed to be an objective and unmediated view of reality of his specific situation. He assumed well-informed and reasonable others would agree with him. When instead they disagreed, Justice Benjamin turned to introspection and—observing no “taint of self-interest” or “traces of guilty bias”—confirmed his conviction of his own impartiality. When presented with other evidence—external facts reflecting his behavior, the surrounding circumstances, and the reactions of third parties—Justice Benjamin dismissed or devalued that extrospective evidence, thereby assimilating it in a way that confirmed his belief in his own objectivity. In addition, he overlooked the other possible explanations for the cognitive dissonance: (1) he was actually influenced by a non-conscious bias; or (2) his “opponents” were not biased against him—they merely saw the situation differently because they evaluated his possible bias based on his behavior, not his internal thoughts, feelings, motives, and beliefs. As a result, Justice Benjamin inferred that there was something wrong—not with his view of himself—but with *them*—his opponents were biased.

Next, Justice Benjamin responded to this perceived bias by acting more aggressively against the Caperton parties and his court colleagues who had already leveled accusations of an appearance of bias against him. If the dispute had continued, the parties likely would have become even more polarized and more aggressive, thereby taking the disagreement to the next level in the Bias Perception Conflict Spiral. Of course, most practitioners—judges and lawyers

372. Stempel, *supra* note 18, at 55, 57.

alike—who have been involved in difficult cases in which disqualification disputes arose know too well the strained relations that can be created when a jurist’s impartiality is questioned—as that challenge goes to the core of judicial identity. In order to avoid this escalation of tensions, we must find a way to refocus recusal reform and make individual disqualification decisions more meaningful and also limit the negative impact on the public’s confidence in the judiciary.

IV. DIFFUSING DISQUALIFICATION DISPUTES BY REFOCUSING RECUSAL REFORM

In short, . . . judges . . . strive for truth more often than we realize, and miss that mark more often than they realize. Because the brain cannot see itself fooling itself, the only reliable method for avoiding bias is to avoid the situations that produce it.

*Daniel Gilbert*³⁷³

The application of naïve realist and other social science theories underlying the Bias Blind Spot to the three disqualification decisions in *Caperton* illustrates the most significant problem with current disqualification practice and illuminates how we should refocus recusal reform. The problem is that when a jurist is asked to be unbiased about his own biases most judges simply are not able to do it—they cannot see their minds fooling them. This is true because, as we have seen, the Bias Blind Spot operates on a non-conscious level and is reinforced by a number of related cognitive illusions that operate below our awareness, too. However, there is one viable and relatively easy solution to this problem: avoid the situation by taking the challenged jurist out of the decision-making process.³⁷⁴ In other words, we should adopt new procedures for deciding disqualification disputes that would no longer permit a man “to be a judge in his own [disqualification] case.”³⁷⁵

The addition of other procedural safeguards—such as requiring full disclosure by the jurist and the parties, applying standard adversarial procedures to the finding of facts, and developing a body of disqualification law by requiring written opinions explaining disqualification—may be

373. Daniel Gilbert, *I’m O.K., You’re Biased*, N.Y. TIMES (Apr. 16, 2006), <http://www.nytimes.com/2006/04/16/opinion/16gilbert.html?pagewanted=all> (Daniel Gilbert is Professor of Psychology at Harvard University who researches and writes about hedonic psychology, including affective forecasting and is the author of the New York Times Bestseller “*Stumbling on Happiness*”).

374. Jennifer K. Robbennolt, JD, Ph.D., & Matthew Taksin, JD, *Can Judges Determine Their Own Impartiality?*, 41 MONITOR ON PSYCHOL. 24, 24 (2010) (suggesting that, given the “limitations inherent in judging one’s own biases,” a necessary recusal reform is to “avoid leaving the recusal decision solely to the discretion of the challenged judge”).

375. *In re Murchison*, 349 U.S. 133, 136 (1955).

appropriate and even necessary to address other problems with disqualification decisions. Also, changes in the substantive standard may be advisable—but there appears to be no consensus on the rule of law for disqualification at this time.³⁷⁶ So, the most effective and reliable way to address the problems created by the Bias Blind Spot and the resulting Bias Perception Conflict Spiral is to refocus our recusal reforms so as to entirely remove the challenged jurist as a decision maker; or at least, not permit the jurist to be the sole or final arbiter of the dispute and provide meaningful appellate review.

There are several ways that courts could reform the procedures used to decide disqualification disputes that would avoid the problems created by the Bias Blind Spot—including some procedures already in use in the state courts.³⁷⁷ First, the courts could adopt the use of a limited number of preemptory challenges—either with or without factual substantiation. Second, the challenged jurist could be removed from the disqualification decision entirely—by referring the decision to another judge, justice, or panel of decision makers. Third, the challenged judge may be permitted to make an initial decision regarding disqualification, but would be removed as the sole or final arbiter by providing for prompt *de novo* review if the initial decision is not to recuse. Each of these modified procedures has clear benefits—notably the removal of the challenged jurist as the final arbiter of his own disqualification decision. However, there are some costs as well, which must be evaluated by the federal and state courts as they decide which specific solution to adopt³⁷⁸ for each level or type of court.

This idea of requiring that the challenged jurist step aside certainly is not new³⁷⁹ and may even seem obvious³⁸⁰ to others—at least those who do not sit

376. See *supra* note 65 and accompanying text.

377. Gabriel D. Serbulea, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1151 (2011) (including appendix summarizing recusal practice in all fifty states).

378. It is entirely possible that, if the courts do not themselves adopt some type of procedural solutions, state legislatures or Congress will mandate changes. See, e.g., Supreme Court Transparency and Disclosure Act of 2011, H.R. 862, 112th Cong. (1st Sess.). However, whether any of those attempts to legislate in this area would be valid exercises of legislative authority or otherwise effective remains to be seen. See Louis J. Virelli, III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181 (2011) (arguing that Congressional attempts to define the recusal standards for SCOTUS violates the constitutional Separation of Powers and offends federalism principles).

379. Note, *Disqualification of a Judge on Grounds of Bias* 41 HARV. L. REV. 78, 81 (1927) (“A biased mind rarely realizes its own imperfection and would normally prevent that perfect equipoise so desirable in our system of trial.”).

380. Stempel, *supra* note 80, at 794 (“The solution is obvious: recusal motions should be heard and decided, even in first instance, by another trial judge in the relevant district. Where a challenge targets an appellate judge, it should be heard and decided by other members of the panel or, if necessary, by the court as a whole. Where the challenge targets a United States

on the bench and make such decisions.³⁸¹ In fact, several commentators and academics have called for this precise type of procedural reform in the past³⁸² and some commentators who have questioned the practice have even derisively referred to the custom as “ironic”,³⁸³ “bizarre”,³⁸⁴ and “nonsensical.”³⁸⁵ These criticisms have not been limited to a handful of legal academics—but are part of an increasingly bitter public dialogue surrounding disqualification decisions in high profile cases.³⁸⁶ In fact, “[o]ne of the most criticized features of recusal practice is the fact that in many states [and at SCOTUS], the judge subject to a recusal request has the unreviewable last word on whether to step aside from a case.”³⁸⁷ Thus, it seems likely that implementing this single procedural safeguard would go a long way toward addressing much of the public criticism of current disqualification practices in specific cases and restoring confidence in the judiciary as a whole.

In spite of these concerns and the clear calls for procedural reform of recusal practices, the practice of allowing one to be a judge, in his own disqualification case, still prevails in the majority of federal and state courts.³⁸⁸

Supreme Court Justice or a judge or justice of any other jurisdiction’s highest court, the disqualification decision should be made by the entire court.”)

381. Of course, the suggestion that this proposed solution is obvious may—itself—be a naïve realist expression of the “objective” reality perceived by those who believe this procedural reform is the reasonable answer.

382. *See, e.g.*, Frost, *supra* note 10, at 555–66 (arguing that having neutral judges make the disqualification decision will create greater confidence in the judicial process); Geyh, *supra* note 40, at 690–713 (suggesting that, given lack of consensus on substantive disqualification standards, procedural reforms are needed); Stempel, *supra* note 80, at 804–05 (arguing that disqualification decisions made by the challenged jurist are suspect given a host of biasing influences and a professional culture that creates reluctant recusants); ADAM SKAGGS & ANDREW SILVER, BRENNAN CTR. FOR JUSTICE, PROMOTING FAIR AND IMPARTIAL COURTS THROUGH RECUSAL REFORM (2011), available at http://www.brennancenter.org/sites/default/files/legacy/Democracy/Promoting_Fair_Courts_8.7.2011.pdf.

383. Ross E. Davies, *From the Bag: The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG LIT. 79, 79 (2006).

384. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 242 (1987).

385. Bassett & Perschbacher, *supra* note 10, at 197.

386. *See, e.g.*, Robert Barnes, *Health-care Case Brings Fight Over Which Supreme Court Justices Should Decide It*, WASH. POST, Nov. 27, 2011, http://www.washingtonpost.com/politics/health-care-case-brings-fight-over-which-supreme-court-justices-should-decide-it/2011/11/22/gIQAwrWb2N_story.html (describing how House and Senate Democrats and Republicans called for both Justice Kagan and Justice Thomas to step aside in appeal of the Affordable Care Act and providing links to over 1,301 public comments on the subject).

387. SKAGGS & SILVER, *supra* note 382, at 3 (“It flies in the face of fundamental notions of disinterested, impartial decision-making to allow a judge accused of bias to be the only one who decides whether he or she should be disqualified.”).

388. FLAMM, *supra* note 17, at §17.6, 499–500; *see also* Leslie W. Abramson, *Deciding Recusal Motions: Who Judges the Judges?* 28 VAL. U. L. REV. 543, 545–58 (1994) (“In a

This is due to resistance by judges and justices to the idea that the challenged jurist should be removed from the disqualification decision-making process. The reasons given are somewhat varied, but can be reduced to three that require serious responses. First, many jurists continue to strongly believe that judges and justices are capable, because of their integrity, experience, and intellect, to make the right decision when their impartiality is challenged.³⁸⁹ Second, others point to the availability of appellate review as a check on incorrect disqualification decisions.³⁹⁰ Third, concerns are sometimes expressed regarding the administrative burden of such procedural reforms.³⁹¹ However, not one of these concerns should stand in the way of recusal procedure reforms because the price to individual litigants' rights and damage to the reputation of our judiciary is simply too great.

First, the conviction, no matter how genuine, that jurists are capable of making unbiased decisions about their own biases simply is not supported by the scientific evidence.³⁹² Unfortunately, jurists at even the highest levels of the judiciary continue to believe they and their brethren are immune.³⁹³ However, the existence and affects of the Bias Blind Spot have not been seriously challenged in any of the cognitive or social psychology studies done to date.³⁹⁴ Also, there is no scientific evidence to support the belief that more intelligent persons are less prone to the Bias Blind Spot. In fact, what little evidence does exist on the subject supports the contrary conclusion and explains that because these types of biases are non-conscious cognitive

majority of states, the decision of whether to grant or deny a motion to recuse is within the sound discretion of the challenged judge.”).

389. Abramson, *supra* note 388, at 546–56.

390. *Id.* at 553–58.

391. *See* Serbulea, *supra* note 377, at 1145.

392. *See supra* notes 91–95 and accompanying text.

393. *See, e.g.,* CHIEF JUSTICE ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY, available at <http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> (“I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court’s vital role as an impartial tribunal governed by the rule of law.”).

394. Perhaps it would be helpful if all state and federal jurists were educated about the Bias Blind Spot—though research demonstrates that while such efforts might increase awareness of the existence of this cognitive illusion there is no scientific support for the idea that education can overcome the effects of the Bias Blind Spot. *See* Pronin & Kugler, *supra* note 127, at 566–67 (describing an experiment in which participants who were educated about the pitfalls of relying on introspection as an effective method to determine our own biases tended to cease claiming they were less prone to bias, but noting no actual impact on decision making); *see also* Frantz, *supra* note 338, at 157 (discussing backfiring effect of efforts to educate others about unconscious bias and correct for liking or disliking somebody).

processes intelligence will have little or no impact.³⁹⁵ Moreover, the conviction that judges are somehow immune to the cognitive processes that produce the Bias Blind Spot simply does not resonant with the common sense views.³⁹⁶ In other words, this naïve conviction that jurists are less prone to the Bias Blind Spot is belied by a review of those disqualification disputes for which we do have written reasons why the jurist did not step aside—cases like *Caperton*. Thus, procedural reforms that prohibit the challenged jurist from being the sole or final arbiter of his own biases should not be further stymied by this misplaced confidence in a judge's allegedly unique ability to clearly see through the Bias Blind Spot and be unbiased about his own biases.

Second, the additional roadblock that has been erected is the claim that those few mistakes in disqualification decisions that are made can be reviewed and rectified on appeal. However, that presupposes the aggrieved party has the necessary resources—time, energy, and money—to appeal the erroneous decision. In addition, given the generous “abuse of discretion” standard used for appeals from denial of disqualification, the likelihood of reversal is rather low and certainly lower than would be the case if a *de novo* review standard were applied.³⁹⁷ Also, plenty of disqualification disputes arise in the federal appellate courts and state supreme courts—as happened in *Caperton*. As acknowledged in *Caperton*, the likelihood of review of such decisions by SCOTUS is remote and will only occur in extreme cases and even then often will address only the “constitutional floor” imposed by minimal Due Process standards.³⁹⁸ In other words, when a real probability or even actual bias is present and the jurist does not step aside, the wrong will be rectified in only the

395. The idea that superior intellect may ameliorate the effects of the Bias Blind Spot on certain cognitive functions has been the subject of recent scientific study. At least one such study found that the Bias Blind Spot effect is “unmitigated by increases in intelligence” and this result is “consistent with the idea that the mechanisms that cause the bias [blind spot] are quite fundamental and not easily controlled strategically” because the cognitive mechanisms at work are “evolutionary and computationally basic.” Richard F. West et al., *Cognitive Sophistication Does Not Attenuate Bias Blind Spot*, 103 J. PERS. & SOC. PSYCH. 506, 515 (2012).

396. See Serbulea, *supra* note 377, at 1111–12, 1148, 1150. This is just another way to say that those who believe that judges are immune from the effects of the Bias Blind Spot may be honest in their belief, but we can only infer that they are not informed, not intelligent, or not impartial on this subject. In other words, those who disagree and believe in the super human ability of jurists to be unbiased about their biases “just don’t see the world the way it really is.” Of course, this is exactly what a Naïve Realist would think.

397. Stempel, *supra* note 80, at 804–05 (arguing that abuse of discretion and harmless error standards should be replaced by a *de novo* review because disqualification decisions made by the challenged jurist is suspect given a host of biasing influences and a professional culture that creates reluctant recusants).

398. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (“The Due Process Clause demarks only the outer boundaries of judicial disqualification.”).

most extreme cases when the litigants are able to invest in prosecuting an appeal.

Third, the administrative costs of the proposed reforms of recusal procedures are far outweighed by the actual benefits in terms of denial of litigants' Due Process and the negative impact on public confidence in the judiciary. Since a challenged jurist, like the rest of us, cannot be impartial about his own impartiality, the risk of biased decisions is not limited to "extraordinary circumstances"³⁹⁹ like those presented in *Caperton*. Rather, it is a systematic error with which litigants (and their lawyers) must deal each and every day in courts where the challenged jurist is the sole or final decision maker in a disqualification dispute.⁴⁰⁰ Given the enormous number of opportunities for this error throughout the federal and state court systems,⁴⁰¹ erroneous disqualification decisions have the potential to create a serious impact in actual cases decided throughout the United States every single day. Moreover, when a jurist who reasonably appears to be biased erroneously decides he or she need not step aside, that error negatively impacts public confidence in the justice system as a whole. In fact, the appearance of an unfair process may do more harm than the actual results reached in the particular cases as people are more likely to accept unfavorable or unexpected results if the decision making process is perceived as fair.⁴⁰² Thus, preservation of

399. *Id.* at 884 (describing the timing, amount, and relative size of the campaign support offered to Justice Benjamin as making it an "exceptional case.").

400. About one third of the states, a total of nineteen, permit parties to use preemptory challenges to remove one judge per proceeding. JAMES SAMPLE ET AL., FAIR COURTS: SETTING RECUSAL STANDARDS, BRENNAN CTR. FOR JUSTICE 7 (2008) available at <http://www.brennancenter.org/publication/fair-courts-setting-recusal-standards>; see also FLAMM, *supra* note 17, at §26.1, 753 (noting that "a substantial minority of states have adopted statutes or court rules that permit a party to seek judicial disqualification on a preemptory basis."). However, in most of those states, if the newly assigned jurist is biased the litigant must seek disqualification using the usual methods, which include directing the request for recusal to the challenged jurist. *Id.*

401. Various state courts handled a total of 18,980,531 new civil and 20,437,849 new criminal cases in 2010. *Civil Caseloads Fell 3 Percent in 2010*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Civil/20121Civil.aspx> (last visited Apr. 19, 2013); *Criminal Caseloads Continue to Decline*, COURT STATISTICS PROJECT, <http://www.courtstatistics.org/Criminal/20121Criminal.aspx> (last visited April 19, 2013). Of that number, 9,707,108 cases were instituted in one of the 19 states that permit litigants to use preemptory challenges to remove a judge. See SAMPLE ET AL., *supra* note 400, at 7. However, that leaves 29,711,272 cases brought in the state courts that year in which parties' rights to a fair trial before a fair tribunal were in the hands of a jurist who could not be unbiased about his own biases if they were challenged.

402. Kees van den Bos et al., *Evaluating Outcomes by the Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J. PERS. SOC. PSYCHOL. 1493, 1494 (1998) ("One of the most important discoveries in research on procedural and distributive justice has been the finding that perceived procedural fairness positively affects how people react to outcomes. This instance of the fair process effect has been one of the most replicated findings in social psychology.").

public confidence in the judiciary demands that we refocus recusal reforms and adopt procedural protections that remove the challenged jurist as the decision maker—that is the best and perhaps only way we can ensure the litigants, the press, and the public will perceive the process as fair and increase the chances that actual justice is done.

V. CONCLUSION

In recent years, there has been increasing concern regarding the impartiality of jurists—especially in controversial or otherwise high-profile cases. This growing skepticism—by litigants, members of the bar and bench, as well as the press and general public—poses a real threat to the legitimacy of our court system, which derives its authority from the public confidence in judicial integrity and impartiality. Therefore, the need to reform recusal practice is real.

Accordingly, the underlying causes of such discontent must be identified and addressed with the goals of individual justice and preservation of judicial integrity in mind. As amply demonstrated in recent cases—including the *Caperton* caper—one important cause of problem disqualification decisions is the Bias Blind Spot. This cognitive illusion introduces systematic error that results in seemingly incorrect disqualification decisions—which in turn lead to a lack of confidence in the impartiality of individual jurists and the judiciary as a whole. Thus, we must better understand the Bias Blind Spot and other cognitive illusions that affect disqualification decisions and use those new insights to reshape recusal reform. That means recusal reform must be refocused on new procedures that remove the challenged jurist from the disqualification decision—as that is the only sure way to counter the effects of the Bias Blind Spot. While there may be other ways to help protect individual litigants' fundamental rights to a fair trial before a fair tribunal and preserve public confidence in our courts—no other reform will as effectively address the real problem and restore common sense to a system built on the maxim: “no man shall be a judge in his own cause.”