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Abstract

When the U.S. Supreme Court in Caperton v. Massey ruled that judicial recusal under the Due Process clause did not depend upon proof of actual bias but required reference to an objective standard, it asserted the importance of appearance as an aspect of judicial legitimacy and brought this aspect of its jurisprudence into line with that of the European Court of Human Rights. The formulations of both jurisdictions reference the same common law tradition of procedural fairness but now draw divergent conclusions concerning the implications for judges who use technical advisors. This paper explores the tension between process and outcomes which this divergence exposes. It takes the view that the current emphasis on appearances represents a repositioning of recusal jurisprudence within the context of a normative tradition to reflect contemporary concerns with a perceived loss of confidence in the integrity of the institutions of public life. It argues that the consequent priority accorded to matters of form as opposed to substance rests on a model of the importance of free-standing or dignitary procedural values which appears to be supported by the empirical findings of social scientific research but pays insufficient attention to the role of correct judicial outcomes as a basis for public trust and is, to that extent flawed. It concedes that courts will be reluctant to base recusal decisions upon popular suspicions which have no factual basis to support them and recognizes the argument that an excessive preoccupation with issues of transparency and accountability may itself have negative repercussions in terms of public trust. Nevertheless, to the extent that there is in the popular imagination at least a disconnect between matters of appearance and matters of institutional integrity upon which legitimacy depends, this paper considers that as a contribution to an emerging jurisprudence of appearances the development represents an appropriate contemporary response.

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Legitimacy, it has been asserted, is "the belief that authorities, institutions, and social arrangements are appropriate, proper, and just."3 According to this view, legitimacy and institutional credibility go hand in hand. Unpopular rulings or decisions which attract widespread hostility can be accepted by citizens who recognize the legitimacy of the institutions which hand them down. Empirical studies which locate the issue of legitimacy at the heart of the law’s authority stress the role of fair institutional procedures in fostering internalized compliance but in this respect what seems to be important is the role of appearance; citizen acceptance of institutional legitimacy depends in large measure on the extent to which the procedures of the institution or decision-making body are perceived to be procedurally fair.4

In the United States it is axiomatic that the due process guarantee of the XIVth Amendment embraces a commitment to fair trial procedures –“a fair trial in a fair tribunal.” 5 In similar fashion Article Ten of the Universal Declaration of Human Rights and Article Six of the European Convention on Human Rights purport to guarantee “a fair and public hearing by an independent and impartial tribunal”, but, as this paper argues, the relationship of appearances to fairness in these formulations is not well understood.6

In the United States the issue has recently presented itself in the context of judicial elections and the question of whether contributions to the campaign expenses of a state judge by a party to proceedings in which the judge subsequently participated compromised the judge’s neutrality.7 Here the fear that appearances may undermine the due process commitment even where no irregularity in fact exists underpins the Supreme Court majority ruling that XIVth Amendment jurisprudence incorporates an “objective standard” whereby issues of judicial bias are to be determined not by a search for actual bias but by reference to appearances.8 The court, it is said, must ask whether “under a realistic appraisal of psychological tendencies and human weakness” there is “such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented”.9

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3 Tom R. Tyler, Psychological Perspectives on Legitimacy and Legitimation, 57 ANN. REV. PSYCHOL. 376, 376 (2006)(hereinafter “Psychological Perspectives”)
4 Tom R. Tyler, WHY PEOPLE OBEY THE LAW (2006). See also Tom R. Tyler, Public Trust and Confidence in Legal Authorities: What Do Majority and Minority Group Members Want from the Law and Legal Authorities?, 19 BEHAV. SCI. & L. 215, 233 (2001) (finding that the public’s evaluations of the police and courts are linked primarily to whether individuals perceive these systems to be procedurally fair
5 In re Murchison, 349 U.S. 133, 136 (1955)
7 Caperton v. Massey 129 S.Ct. 2252 (2009)
8 Id. See also Justice O’Connor in Republican Party of Minnesota v. White, 536 U.S. 765, 788-90 (2002) ( expressing the view that the practice of judicial elections generally undermines public confidence: “Even if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.”
9 Withrow v. Larkin, 421 U.S. 35, 47 (1975)
The ruling appears to bring U.S. due process jurisprudence into line with that of other jurisdictions. In *R. v. Sussex Justices ex p. McCarthy* Lord Hewart C.J. famously asserted that “it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.”\(^{10}\) From this position the European Court of Human Rights now also claims to determine issues of judicial neutrality by reference to the existence of a “doctrine of appearances” but as the dissent in *Kress v. France* has pointed out “case law which places too much emphasis on appearances” can operate “to the detriment of respectable national traditions and […] litigants’ real interests.”\(^{11}\) The context here has primarily been that of the role of court officials but the implications have found their effect in the modification of UK court practice and delayed the implementation of reforms designed to enhance the efficiency of domestic civil procedure.\(^{12}\) Specifically, the role of legal advisors has been called into question while the extended use of assessors as judicial assistants envisaged by Lord Woolf as a means of enhancing the quality of judicial outputs has been stillborn.\(^{13}\)

The “appearance of bias” jurisprudence of both the U.S. Supreme Court and the European Court of Human Rights draws on formulations of due process which are said to derive from or be inherent in the English common law tradition but as the historian Eric Hobsbawm has explained, traditions which appear or claim to be old or well established may on closer inspection turn out otherwise. As he points out, the ceremonial pageantry of the modern British monarchy draws on a rhetoric of traditional practices rooted in an “immemorial past” but these are largely nineteenth and twentieth century developments and the claimed tradition is in the main fictitious.\(^{14}\) Hobsbawm describes the term “invented tradition” thus:

“‘[i]nvented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behavior by repetition, which automatically implies continuity with the past.”\(^{15}\)

It is their “peculiarity” however that this continuity is largely “factitious.”\(^{16}\) They are “responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.”\(^{17}\)

\(^{10}\) *R. v. Sussex Justices ex p McCarthy* [1924] 1 K.B. 256, 259


\(^{15}\) *Id. at 1.

\(^{16}\) *Id. at 2.*
In this paper we examine the “doctrine of appearances” in relation to issues of judicial neutrality as just such an example of the invention of tradition. We take the view that whilst the doctrine is said to rest upon well-established tradition, in terms of its current operation it is in fact a new arrival with a disruptive potential. We locate the development in the context of a growing concern with the importance of procedural transparency in public life and suggest that this is a particular manifestation of the wider late twentieth and early twenty-first century concern with the loss of public confidence in the institutions and operating principles of government.

In her Reith lectures the philosopher Onora O’Neill has suggested that talk of a “crisis of trust” in public life is more accurately formulated in terms of a “culture of suspicion” and that the underlying concern may be directed towards the reliability of outcomes. 18 “[C]laims about a crisis of trust”, she suggests “are mainly evidence of an unrealistic hankering for a world in which safety and compliance are total and breaches of trust are eliminated.” 19 The emerging consensus that we detect on both sides of the Atlantic concerning the importance of appearance as a fundamental aspect of fair procedure rests upon acceptance of the link between legitimacy and public confidence. In the formulation of the European Court of Human Rights “[w]hat is at stake is the confidence which the courts must inspire in the public in a democratic society.” 20 The underlying assumption is that procedures have a value which is independent of outcomes and can be justified on that basis. In Caperton the U.S. Supreme Court appears to have acceded to this view but nowhere is the premise challenged. As Professor Galligan suggests however, the theoretical model underpinning this assumption pays insufficient attention to the issue of accuracy. 21 The empirical research of social science notwithstanding, to the extent that this purports to show that procedures generate their own normative framework but neglects the importance of correct outcomes in shaping the popular confidence from which legitimacy is said to derive, it is, he asserts, fundamentally flawed. 22

This paper is in three main sections. In Section 1 we examine the growing importance of appearances as a determinant of judicial bias by reference to the jurisprudence of the U.S. Supreme Court and the European Court of Human Rights and note that as both the Caperton and Kress dissents have pointed out an appearance test is not easy to apply. 23 The open invitation of Chief Justice Roberts’ parade of the horribles will undoubtedly ensure that the contours of the doctrine will be tested at litigants’ expense but our specific concern in this paper is with the quality (by which we mean accuracy or reliability) of judicial outcomes. 24

In this connection in Section II we take as our example the use of judicial assistants and advisors the purpose of which we suppose is to enhance the accuracy of judicial outcomes.

17 Id.
19 Id, at 19.
22 Id. at 94.
fact-finding and evaluation and thus the reliability of outcomes. An appearance test must have implications here. We frame the issue thus: does the proximity of the relationship between judge and an advisor whose function is to assist her in matters of factual complexity have the potential to generate popular suspicion of influence such as to compromise the appearance of judicial neutrality? Jurisprudence of the European Court of Human Rights now appears to answer “yes”. Current interpretations seem to require a complete ban where the advisor does not form part of the decision-making tribunal. 25 This has had a particular impact in the United Kingdom where courts have been directed to adapt their procedures accordingly. 26

The position in the United States to date has been different. Some circuit courts, notably the Ninth Circuit, have drawn up procedural guidelines to ensure that the advice given by an advisor to the judge is brought onto the record and thus made amenable to appellate review. 27 In so doing they demonstrate some sensitivity to the issue we raise but on the whole we detect a reluctance to problematize these appointments. The general explanation given is that the technical advisor, like the law clerk, is a member of the judge’s personal staff. 28 Trial judges possess “inherent power to provide themselves with appropriate instruments required for the performance of their duties”; 29 the advisor thus appointed becomes part of the machinery of the court and thus outside the mischief of the “appearance” principle. This we consider is a pragmatic and outcome-focused approach but in a climate of increasing sensitivity to the importance of transparency in public life we query the extent to which the analogy with the law clerk can or should be sustained.

We suggest the doctrinal key to the difference lies in the degree of sensitivity which the reviewing court is prepared to display to “insider” perspectives when considering the attributes of the “informed and fair-minded observer”. 30 We suggest that whereas both U.S. federal courts and the European Court formulations manifest a degree of similarity we detect in the latter a greater willingness to attach weight to the perspective of the ordinary man or woman in the street who is unacquainted with the conventions and norms of judicial process and for that reason perhaps more willing to infer bias or impropriety than the review court might be. This approach implies acquiescence to the assumption that in determining the respective balance between procedure and outcomes priority must go to the former, but the effect, we argue, is to ignore the extent to which public confidence in judicial process upon which legitimacy is said to depend requires a similar confidence in the accuracy of the outcomes produced.

25 See infra notes 111-129 and accompanying text.
27 Ass’n of Mexican-American Educators v. California (AMAE), 231 F.3d 572, 611 (9th Cir. 2000) (Tashima J. dissenting), applied in Techsearch, L.L.C. v. Intel Corporation, 286 F.3d 1360, 1378, 1379 (opining that these guidelines now formed part of Ninth Circuit law). See also Federal Trade Commission v. Enforma Natural Products, Inc., 362 F.3d 1204, 1215 (9th Cir.2004): “We take this opportunity to join a number of courts that have endorsed Judge Tashima’s recommendations”. In Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 31. n.3 (D.D.C.2002) the court noted that it had been guided “in large part by the extremely thoughtful and oft-cited dissent of Judge Tashima in [AMAE]”.
29 In re Peterson , 253 U.S. 300, 312, 313 (1920).
30 See infra notes 99-106 and accompanying text.
The suggestion has been put that a way to protect the reliability of outcomes from the unwarranted suspicions of the uninformed is to be robust about substituting the perspective of the review court for the lay observer of contemporary formulation.\(^{31}\) However, the suggestion fails to address the argument that the courts should not be exempt from accepting their share of responsibility for engaging in the process of overcoming the disconnect between appearance and legitimacy which continues to exercise the popular imagination. In this connection we bear in mind Baroness O’Neill’s warnings on the dangers of an excessive desire for transparency:

Perhaps the culture of accountability that we are relentlessly building for ourselves actually damages trust rather than supporting it. Plants don’t flourish when we pull them up too often to check how their roots are growing: political and professional life too may not go well if we constantly uproot them to demonstrate that everything is transparent and trustworthy.\(^{32}\)

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

In our final section we revisit the theme of bias in a culture of suspicion. We are attracted to the view that the increased concern with appearances which we claim to detect is largely a function of a loss of confidence in the possibility of neutrality. The great Jerome Frank sitting as a circuit judge in the U.S. Court of Appeals for the Second Circuit asserted: “[d]emocracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness.”\(^{33}\) This should not however be taken to require complete judicial passivity:

If […]’bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper.\(^{34}\)

We endorse the distinction between judicial “bias” and “partiality” or as we prefer to call it “preference” or “predisposition”. The former is impermissible but the latter is now widely understood to be a normal characteristic of the human condition.\(^{35}\) We claim that it is the failure to differentiate between the two that underpins the current concern with transparency and now fatally threatens the use of experts as judicial advisors. As to whether the situation can now be retrieved we are pessimistic. As has


\(^{32}\) O’Neill, *supra* note 18 at 19.

\(^{33}\) Re JP Linahan Inc., 138 F.2d 650, 651 (2d. Cir. 1943).

\(^{34}\) Id.

\(^{35}\) “We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices. Without acquired ‘slants,’ pre-conceptions, life could not go on.” *Re JP Linahan Inc.*, 138 F.2d 650, 651 (2d. Cir. 1943)
been observed: “[p]ublic confidence in the judicial process and the administration of justice is based on trust. Once that trust turns into suspicion, the system of justice begins to unravel.”

Section I

1 The European Court of Human Rights and a “Doctrine of Appearances”: A Late 20th Century Arrival.

Although the European Court has never made the direct claim, the frequent references in its appearance jurisprudence to the dictum “justice must not only be done; it must also be seen to be done” indicate an implicit assumption of a continuity with a tradition that derives from the English common law. However, the case of *R v. Sussex JJ ex p. McCarthy* from which the dictum derives was decided in 1924 and as Justice Scalia has pointed out there was no common law requirement of judicial recusal for bias at the time of Blackstone. In the following section we locate the US Supreme Court’s current concern with appearances in the context of a similar late twentieth century development in European human rights jurisprudence.

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

The so-called “doctrine of appearances” of modern jurisprudence finds its genesis in four early decisions of the European Human Rights Commission and Committee of Ministers which predate the formal law reporting of the Council of Europe and the creation of the European Human Rights Reports. All four cases involved Article 6 challenges to the procedures of the Austrian criminal courts.

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36 Abimbola A. Olowofeyeku *Subjective Objectivity: Judicial Impartiality and Social Intercourse in the U.S. Supreme Court.* [2006] PUBLIC LAW 15, 17

37 See eg Delcourt v. Belgium, (1970) 1 EHRR 355 para 31: “The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum ‘justice must not only be done; it must also be seen to be done’ these considerations may allow doubts to arise about the satisfactory nature of the system in dispute.” This is the earliest reference we have found and is not explicit as to its origin. Cf De Cubber v. Belgium(1985) 7 E.H.R.R. 236.244 para. 26 : “However, it is not possible for the Court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim […] ‘justice must not only be done: it must also be seen to be done’. […] [A]ny judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public […]”

38 R. v. Sussex Justices ex p McCarthy [1924] 1 K.B. 256, 259; Liteky v. United States, 510 U.S. 540, 544 (1994). See John P. Frank, *Disqualification of Judges* 56 YALE L. J. 605,609-610 (1947) (pointing out that Bracton’s attempt to introduce into English law a requirement of judicial disqualification for bias was displaced by Coke’s rule against “interest” and was absolutely rejected by Blackstone).


40 The full text of Art. 6 Eur. Conv. on H.R.( right to a fair trial) reads as follows:
Hopfinger, the Commission and Committee considered the role of the Generalprokurator of the Supreme Court of Austria and specifically whether the latter’s practice of advising the Court’s Rapporteur on a plea of nullity, where that advice was given and the decision reached in the absence of the defendant’s counsel, contravened the principle of “equality of arms”, said to be “an inherent element of a ‘fair trial’” protected by Article 6. In the context of the Austrian criminal code as a whole, and in the particular circumstances of these cases, the Commission was able to conclude that no inequality in the position of the parties existed. In Pataki and Dunshirn, however, Article 6 challenges were sustained where, on an appeal against sentence and despite the potential for the outcome to adversely affect the defendants’ position, the Chief Public Prosecutor addressed the court in private but the defendants themselves were afforded no opportunity to be heard. Observing that Article 6 did not define the notion of a fair trial in a criminal case the Commission adopted an expansive approach; the article’s provisions were not to be interpreted restrictively and a trial may fail to meet the required standard of fairness even though the “minimum rights” guaranteed by paragraphs 3 and 2 have been respected. Specifically the Commission asserted “it is beyond doubt that the wider and general provision of a fair trial, contained in paragraph (1) of Article 6, embodies the notion ‘equality of arms.’”

In these early decisions the basis of the objective and subjective tests of impartiality or bias which later become the “doctrine of appearances” is already discernible. In Pataki and Dunshirn, although the precise term is not used, the Commission

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

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

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

41 Ofner (1963); Hopfinger v Austria, Application 617/59 (1963), 6 Y.B Eur. Conv. on H.R. 676, 680-688.
42 Id.
44 Pataki v Austria; Dunshirn v Austria at 730 [36] (citing Nielsen v Denmark Application 343/57 (1961) 4 Y.B Eur. Conv. on H. R. at 490-593).
45 Pataki v Austria; Dunshirn v Austria at 730 [36]. See JOSPEH M. JACOB, CIVIL JUSTICE IN THE AGE OF HUMAN RIGHTS, (2007),9: (explaining that the term “equality of arms” is “more familiar in civilian jurisprudence than in the common law […]”) and is “an omnibus term embracing a number of separate rights” of a disparate nature arising in connection with issues of access to the courts and the right to be heard).
recognized the importance of external perceptions. Conceding that the absence of any record of the national court’s deliberations would preclude a definitive decision concerning the Public Prosecutor’s actual role, the fact of his physical presence was crucial; the Commission could not ignore the potential effect on the public perception:

Even on the assumption […] that the Public Prosecutor did not play an active role at this stage of the proceedings, the very fact that he was present and thereby had an opportunity of influencing the members of the court, without the accused or his counsel having any similar opportunity or any possibility of contesting any statements made by the Prosecutor, constitutes an inequality which, in the opinion of the Commission, is incompatible with the notion of a fair trial.46

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

1.2 The modern formulation

Some seven years later the early Commission decisions were cited before the European Court of Human Rights in cases involving Article 6 challenges to the procedures of the Belgian Court of Cassation.47 At issue in Delcourt v Belgium (a criminal case) was the role of the Procureur Général in Belgium’s highest court.48 The office heads a multilevel organization whose role and personnel differ between the lower courts and the Court of Cassation. In the latter the representative of the office acts as an advisor to the court in a manner similar to that of the Advocate General of the European Court of Justice but with one important difference: unlike the representative of the Procureur Général, the Advocate General of the European Court does not retire with the judges during their deliberations.49 Clearly reluctant to be seen to be interfering with a long-established national legal system, the court emphasized that the procedure at issue “[…] appears never to have been put in question by the legal profession or public opinion in Belgium”50 and ruled that as that the Procureur Général was not “one of the parties”, then vis-a-vis the defendant, the doctrine of “equality of arms” did not apply.51

Nevertheless, noting that the defendants as persons outside the legal system might see the official as an “adversary” in a way which “insiders” familiar with the system’s practices and norms would not,52 the court continued:

46 Id., at 732 (para 36).
47 Article 6(1) does play a part in the earlier decision of Neumeister v Austria (No. 1) (1968) 1 E.H.R.R. 91 but the court decided that article 6(1) was not engaged in requests for provisional release from incarceration. Id 132 (para 22). Elsewhere, Article 6(1) is invoked, though unsuccessfully, in the context of the timeliness aspect of a fair trial rather than partiality which is what concerns us here. See Neumeister 1 E.H.R.R. 91, 130-131 (paras 17-21).
49 Delcourt at 359-60.
50 Id., at 371 [36].
51 Delcourt, 1 E.H.R.R. at 368 [29].
52 Id. at 368 [30].
The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum “justice must not only be done; it must also be seen to be done”, these considerations may allow doubts to arise about the satisfactory nature of the system in dispute.  

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

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

> even appearances may be of a certain importance. [...] [...] [A]ny judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. **What is at stake is the confidence which the courts must inspire in the public in a democratic society** (emphasis added).

Here the doctrine has assumed recognizable shape and the phrases emphasized appear more or less verbatim in subsequent judgments. By 1993, in _Borgers v Belgium_, the third element of the court’s modern jurisprudence was in place. Commenting that the concept of a fair trial had undergone considerable evolution the court, justifying a new importance to be attached to appearances, referred to an “increased sensitivity of the public to the fair administration of justice”. The supporting citations derive from _Piersack_ to the effect that “what is at stake is the confidence which the courts must inspire in the public in a democratic society” but the _Borgers_ justification goes further than previous versions in its assertion of an underlying public concern which the court must address. At no stage did the court provide evidence to substantiate this claim and indeed in subsequent cases involving the Belgian, French or Portuguese “Courts of Cassation” or their equivalents the court appears to have gone out of its way to record that the national system under scrutiny commands considerable respect

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53 _Id_. at 369 [ 31].
54 _Id_. : “The Court continued : Looking behind appearances, the Court does not find the realities of the situation to be in any way in conflict with (the Article 6 right)”.
57 _Id_ at 179 [ 30].
58 _See_ Sramek v Austria (1985)7 E.H.R.R. [42]; De Cubber v Belgium, (1985) 7 EHR 236,244.
60 _Id_ at para 24.
Amongst the public and profession alike.\textsuperscript{62} At this point we continue to record doctrinal development but we return to these issues in our conclusion.

Thus by the 1990s the three elements of the court’s jurisprudence: the Delcourt concern with appearance, the Piersack subjective/objective juxtaposition and the Borgers assertion of public sensitivity to which the court must respond have come together in the modern formulation which the court now either spells out in full or, as in Kress v. France, refers to in shorthand form as the court’s “doctrine of appearances”, binding on national courts in both criminal and civil cases although not necessarily in precisely the same way.\textsuperscript{63}

\section{Appearance Jurisprudence in the U.S. Supreme Court}

\subsection{Recusal before Caperton}

Despite the absence in pre-20\textsuperscript{th} century English common law jurisprudence of a requirement of judicial recusal for bias, in the United States federal statutes have compelled district judges to recuse themselves on the grounds of interest or prior involvement since 1792.\textsuperscript{64} Recusal on the grounds of generalized bias was not required until 1911.\textsuperscript{65} The current provisions applicable to U.S. judges are found in Sections 144 and 455(a) of Title 28 of the United States Code.\textsuperscript{66} Section 144 provides a procedure whereby a party may challenge a district judge on the grounds of “personal bias or prejudice” by way of affidavit.\textsuperscript{67} 28 U.S.C. § 455(a) applies to all


\textsuperscript{63} Kress v. France, Application 39594/98 (7 June 2001) at [81]. Cf. Micallef v Malta, (2008) No. 17056/06 15/1/2008 at [71]: “According to the Court’s constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behavior of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.”

\textsuperscript{64} See Liteky v. United States, 510 U.S. 540, 533-544 (1994) (recounting the history of judicial recusal). See also John P. Frank, Disqualification of Judges, 56 YALE L.J. 605, 609-611, (1947) (discussing English common law disqualification and concluding: “In short, English common law practice at the time of the establishment of the American court system was simple in the extreme. Judges disqualified for financial interest. No other disqualifications were permitted, and bias, today the most controversial ground for disqualification, was rejected entirely.” Id. 611-612.

\textsuperscript{65} See also Peter W. Bowie, The Last 100 years: An Era of Expanding Appearances, 48 S. TEX. L. REV. 911 (2007) (outlining the development of attempts to regulate the federal judiciary.)

\textsuperscript{66} Liteky, 510 U.S. at 533-544 ; Frank, supra note 64 at 627.

\textsuperscript{67} 28 U.S.C. § 144 and § 455(a).

28 U.S.C. § 144: Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such
justices, judges, and magistrates and puts the onus on the particular individual to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Section 455 underwent considerable revision in 1974 designed to bring it into conformity with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974) by replacing a subjective “in his opinion” standard with an objective test with the aim of improving public confidence in the judicial system. The U.S. Supreme Court considered the scope of the current provision on two occasions in 1988 and 1994 and confirmed that this is indeed an appearance test: "what matters is not the reality of bias or prejudice but its appearance." The perspective is that of a "reasonable observer who is informed of all the surrounding facts and circumstances," but the Court has yet to give detailed guidance concerning the application of the test in particular circumstances.

28 U.S.C. § 144 and § 455(a) apply to federal judiciary only. The position of the state judiciary is usually determined by reference to state codes and the Due Process clause of the XIVth Amendment but whether the latter incorporated an appearance test was, prior to Caperton v. Massey, by no means clear. Caperton concerned the election of a member of the state judiciary and at a narrow level represents the Supreme Court’s attempt to tackle the potential of what Justice O’Connor has termed the “judicial arms race” generated by state judiciary election practices to undermine public confidence in the judiciary. At a broader level Caperton can be located in the context of a developing emphasis on the importance of the appearances generally irrespective of whether concerns of impropriety are sustained by an underlying substance.

affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

71 Liteky, 510 U.S. at 548. See also Liljeberg v. Health Services Acquisition Corp., 486 U.S. at 860 "[T]he goal of section 455(a) is to avoid even the appearance of partiality".
73 U.S. CONST. amend. XIV §1. The ABA’s Codes of Judicial Conduct have been adopted by forty–nine of the states in one form or another. See Leslie W. Abramson, Appearance of Impropriety: Deciding when a Judge’s Impartiality “Might Reasonably be Questioned” 14 GEO. J. LEGAL ETHICS 55,55 (2000) (arguing that “[t]he American Bar Association’s Codes of Judicial Conduct are the foundation for judicial discipline and disqualification in American courts).”
75 See Sandra Day O’Connor, Fair and Independent Courts, 137 DAEDALUS 8, 9 ( FALL 2008) (expressing the view that the absence of a “fundraising ceiling in state judicial races” is contributing to a “judicial arms race” undermining public confidence in the neutrality of judges and indicating that “the level of anger directed towards judges today exceeds that of the past”.)
2.2 Appearances and the Due Process Clause

The facts of Caperton are by now well-known. Newly elected to the West Virginia Supreme Court of Appeals Justice Benjamin voted with a 3:2 majority to overturn a jury verdict awarding victory to Caperton in his action for punitive damages against A.T. Massey Coal Company (Massey) a competitor, whose CEO, Don Blankenship had made substantial contributions to the judge’s election campaign expenses. The contributions exceeded those of the rest of Benjamin’s donors combined and were three times greater than the sum spent by Benjamin’s own campaign committee. Justifying at length his refusal to recuse himself, Justice Benjamin rejected what he termed “apparent or political justice” in favor of “actual justice” as the touchstone of judicial propriety. The former was dependent upon “the manipulation of appearances or the vagaries of sensationalism” but the latter depended upon “actualities” and should be measured in terms of “the quality of the court’s legal reasoning.”

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

His conclusion that Due Process required recusal “only in those rare cases wherein a judge or justice has a direct, personal, substantial [or] pecuniary interest in the outcome of the case” was not accepted by the Supreme Court majority which opted for an “appearance” test. The emphasis on “actualities” was not the “proper

See Pamela S. Karlan, Electing Judges, Judging Elections, and the Lessons of Caperton 123 HARV. L. REV. 80 (2009) (commenting that in the context of Shaw v Reno, 509 U.S. 630 (1993) : “[W]e believe that reapportionment is one area in which appearances do matter.” Shaw, 509 U.S. at 647-648 and Crawford v. Marion County Board of Elections 128 S. Ct. 1610, 1620 (2008 (the State’s “interest in protecting public confidence” was a factor supporting the imposition of voter ID requirements which did not depend upon evidence that such requirements actually prevented voter fraud ), the decision in Caperton “involves a complex jurisprudence of appearance.” Karlan, id. at 98 )

Caperton, 129 S. Ct. at 2257.

Id.

Justice Benjamin pointed out that Canon 2A, of the W. Va. Code of Judicial Conduct, which prohibits judges from engaging in activities which are improper or which give the appearance of impropriety was not applicable here. His “activities,” i.e. running for office, were perfectly legitimate. The activities complained of were those of third parties over whom he had no control. Id., at 293.n.13.

Caperton, 679 S.E.2d at 294.


inquiry.” On “a realistic appraisal of psychological tendencies and human weakness” the campaign contributions posed “such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.”

Chief Justice John Roberts’ dissent in which Justices Scalia, Thomas and Alito joined spelled out forty grounds for potential challenge but essentially amounted to an attack on workability; an appearance test, the Chief Justice asserted, “cannot be defined in any limited way” and “provides no guidance to judges and litigants about when recusal will be constitutionally required.” The “probability of bias” standard articulated by the majority failed “to provide clear, workable guidance for future cases,” and raised far more questions than it answered. The Court’s decision, he predicted, would “inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be.” Justice Scalia, picking up this point, asserted that far from promoting confidence in the judicial system, an “appearance test” with its opportunities for “lawyerly gambits” which reinforce the perception of litigation as “just a game” and “incapable of delivering real-world justice” would have the opposite effect. In this respect we find echoes of the criticisms of the appearance jurisprudence of the European court made by the Borgers dissent. Jurisprudential changes, claimed the latter, which prefer form over substance and seek justification in the need to respond to changes in popular perceptions require “a proper basis in fact.” In this area at least American courts may be more vulnerable than their European counterparts and we return to this point below. At this stage we comment on the tensions between legalism and policy which find their reflection in the Caperton dissent and constitute, we suggest, a fundamental dilemma of recusal jurisprudence.

2.3 Legalism versus Policy in Appearance Jurisprudence

82 Id at 2263
83 Id., (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)) (internal quotation marks omitted).
84 Caperton v. Massey, 129 S.Ct. 2252, 2269 (2009). See also Ronald Rotunda, Judicial Ethics, The Appearance of Impropriety and the Proposed new ABA Judicial Code, 34 Hof. L. Rev. 1337, 1341 (2006) (describing the ABA Code appearance of impropriety test as a clumsy weapon with the potential to encourage unwarranted attacks on a judge’s reputation which themselves to much to undermine public confidence in the judiciary: “Hurling the charge of “appearance of impropriety” […] is like using a blunderbuss. Nowadays, we might describe a blunderbuss as a weapon of terror. It was not a very precise weapon, and marksmen never used it. Instead, it was good for crowd control, when the goal was to shoot multiple balls simultaneously in the hope of hitting something. The ABA has chosen to arm any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge by giving its imprimatur to a charge of violating the “appearances of impropriety.” The attack on the judge's ethics seldom results in discipline or disqualification, but it does serve to besmirch and tarnish a judge's reputation.”)
85 Id., at 2274-75 (Scalia J. dissenting).
86 Id.
88 Id.
90 Infra, Section III.
In his analysis of the role of appearance discourse in the context of official impropriety, Andrew Stark has observed that an appearance test may be open to objection on the grounds that it is inherently anti-legalistic but this is usually countered by considerations of policy expressed in terms of the need to preserve public confidence in the structures of public life.91 Two arguments sustain the “legalistic attack”: a) the test involves an element of “anti-legalistic” factual prejudgment of behavior and b) it violates the principle against legal retroactivity.92 The factual prejudgment is that of the public whose reaction is to be estimated. As Professor Stark explains:

[... no trier of fact weighs all the evidence, exculpating and mitigating as well as incriminating, against a legal standard of proof, in order to establish that an act of [...] impropriety has been committed. Instead the task [...] is to estimate the (more or less) incomplete level of the public’s factual knowledge of the case and the (more or less) prejudiced inferences the public will draw from that knowledge. If the public so imagined would believe that an act of official impropriety has occurred, [the conclusion must follow] that a violation of the appearance standard has taken place. [The review body] may then impose sanctions. Hence, viewed legalistically, appearance proceedings entail “punishment without crime”.93

The charge of “legal retroactivity” is a function of the vagueness or uncertainty which accompanies the distinction between “actual” impropriety and “apparent” impropriety. The argument goes like this: by definition the circumstances in which an appearance test is in issue are those in which there is no clear act of “actual” impropriety. The act complained of is not one which has been expressly identified as within the range of legislatively prohibited conduct but is wrong because it looks wrong by reference to perceptions which arise only after the act has occurred.94 Moreover the fact that the act has not been expressly targeted for prohibition must indicate that there is no moral consensus regarding its inherent impropriety:

To say that an official did something that looks wrong is to enter a realm of normative uncertainty in which citizens more or less disagree [...] whether a given act is or should be deemed “official impropriety”. Notwithstanding the formal existence of the appearance rule, then, the term “appearance of official impropriety” is arguably so vague that the rule’s application, in a given situation, is nothing the officeholder could have anticipated. The standard thus becomes retroactive for all intents and purposes. A law ‘so vague that [people] of common intelligence must necessarily guess at its meaning and differ as to its application [may begin to] violate the first essential of due process’.95

92 Id.
93 Id., at 213.
94 Id. at 217-220.
Taking these two challenges together, the argument then is that an appearance test violates what Professor Stark terms the basic principle of legality that there should be “no punishment without crime […] and no crime without law.”

In the context of judicial recusal, what this criticism amounts to is essentially a point about standards; judges must be able to identify danger situations in advance so that they then can avoid the kind of circumstances which will give rise to negative perceptions, specifically those having the effect of undermining public confidence. In the absence of clear criteria to ground recusal decisions an appearance test will not only be difficult to apply but in so far as it will require judges to recuse themselves in situations where they feel that they have done nothing wrong and on the basis of a popular perception which may be difficult to ascertain and in terms of its factual basis misguided, it runs the risk of offending fundamental intuitions of what constitute the basic norms of legal process and procedure.

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

[the ‘fair-minded and informed observer’ is probably not an insider […]
Otherwise she would run the risk of having the insider’s blindness to the

96 Id., at 1556 (quoting JUDITH N. SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 152 (1964)).
97 See United States v. Greenough, 782 F.2d 1556 (11th Cir.1986) (noting: “There are twin, and sometimes competing, policies that bear on the application of the § 455(a) standard. The first is that courts must not only be, but must seem to be, free of bias or prejudice […] A second policy is that a judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation. If this occurred the price of maintaining the purity of the appearance of justice would be the power of litigants or third parties to exercise a veto over the assignment of judges.” Id. at 1558).
98 See Re Mason, 916 F.2d at 386; see also Sullivan v. Conway, 157 F.3d 1092, 1096 (7th Cir.1998), United State v. Owens, 902 F.2d 1154 (4th Cir. 1990), In re Mann, 229 F.3d 657, 658 (7th Cir.2000).
99 See e.g. Gillies v. Secretary of State for Work and Pensions [2006] UKHL 2,[6], [18]-[19]. See Olowofoyeku, supra note 31 (discussing formulations of the observer in Anglo-American jurisdictions).
faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded.100

The sort of person “who always reserves judgment on every point until she has seen and fully understood both sides of the argument”, [s]he is not unduly sensitive or suspicious […] but neither is she complacent:

She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.102

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

She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.103

“Gender-neutral and possessed of attributes to which many might struggle to attain,” it is trite observation that this “newcomer to the legal village” of characters by reference to whom courts justify their narratives of rational behavior is a legal fiction.104 The role of the informed observer in reconciling the competing claims of popular perception upon which public confidence in the integrity of the judicial system is said to depend and the desire to protect judges from unwarranted accusations which interfere with the efficiency of judicial process may be well-understood but the danger is that when too much weight is accorded to the latter, as the Seventh Circuit has observed, “the appearance of impropriety standard […][collapses] into a demand for actual impropriety”105 and a mismatch opens up between recusal decisions and the perceptions of the ordinary person in the street. As the Seventh Circuit admonished, courts must bear in mind that the “reasonable well-informed observer of the judicial system” may be “less inclined [than themselves] to

100 Gillies v. Secretary of State for Work and Pensions [2006] UKHL 2,[6], [18]-[19] (Lady Hale).
102 Id.
103 Id.
104 Id. See also Microsoft Corp. v. United States, 530 U.S. 1301, 1302 (2000) (citing Liteky v. United States, 510 U.S. 540, 548) : “what matters under § 455(a) ‘is not the reality of bias or prejudice but its appearance.’ This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.” Accord Liljeberg v. Health Services Acquisition Corp, 486 U.S. 847, 861 (1988).
105 Re Mason 916 F.2d at 386.
credit judges’ impartiality and mental discipline”.

The nature of the exercise then shapes the unsatisfactory nature of the outcome, an “appearance” jurisprudence which demonstrates reluctance to engage as the European Court now seems willing to do with the perspective of ordinary people who are unfamiliar with the mysteries of court proceedings but upon whose approbation legitimacy depends. We consider these issues now in relation to the use of technical advisors and comment further in our conclusion when we return to the growing importance of appearances in public life.

Section II Appearances and Technical Advisors

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

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

The increasing complexity of specialized evidence in civil litigation coupled with trial efficiency pressures raises the prospect of an increased role for technical advisors as judicial assistants on both sides of the Atlantic. In the United States the extended “gate-keeping” duties which the Supreme Court now requires in cases of scientific or technical complexity render the matter topical but federal courts generally and the Supreme Court in particular have yet to take cognizance of the “appearance” implications which such appointments might entail. The United Kingdom,

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106 Id., at 386. The Supreme Court made a similar point in Liljeberg v. Health Services Acquisition Corp, 486 U.S. 847, 864(1988); “The problem is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges.”
107 Kress v. France, Eur. Ct H.R. (Application No 39594/98), (unreported) (7 June 2001) at para 81. See Olowofoye, supra note 31 -
109 Id. Counsel later informed the judge that the Claimants had decided not to persist with the evidence.
however, as a member of the Council of Europe is bound by the jurisprudence of the European Court, specifically the decision in *Kress v. France* which we consider next. The effect of the decision has been interpreted by the U.K. courts in such a way as to require modification of existing civil procedure regarding the use of technical advisors but as we argue these modifications probably do not go far enough to address the European concerns. We compare the position of U.K. courts with that adopted by U.S. federal courts and comment that the preference for substance over form which we detect in the latter, whilst it may promote the efficiency of judicial process, pays insufficient attention to the growing importance of popular perceptions in public life and sooner rather than later will need to be revisited.

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

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

Rather, the doctrine of appearances was called into play; “[i]n publicly expressing his opinion on the rejection or acceptance of the grounds submitted by one of the parties, the Government Commissioner could legitimately be regarded by the parties as taking sides with one or other of them.” Thus for “*a litigant not familiar with the mysteries of administrative proceedings*” (emphasis added) the apparent neutrality of the proceedings would be compromised. This perception would be reinforced if the litigant, having heard him make submissions unfavorable to his case at the end of the public hearing, then sees the Commissioner “withdraw with the judges of the trial bench to attend the deliberations held in the privacy of chambers” where “if only to outward appearances” he would have “an additional opportunity to bolster his submissions in private, without fear of contradiction.”

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112 Id.

113 *Id.*, at para 78.

114 *Id.*, at para 80.

115 *Id.*, at para 78.

116 *Id* at para 81.

117 *Id* (citing Delcourt v. Belgium, (1970) I EHHR 355, (internal references omitted)).
that context to the importance to be attached to appearances, the court concluded by 10 votes to 7 that there had been a violation of Article 6 § 1 of the Convention.\textsuperscript{118}

The implications of the European Court’s approach for court officials who act as judicial advisors or assistants have yet to be fully worked out. In Vermeulen and Lobo Machado, the court was unmoved by arguments to the effect that the presence of government officials at the deliberations of the national courts was in the capacity of advisor and was necessary to help ensure the consistency of case-law or to assist in the final drafting of the judgment.\textsuperscript{119} As the court explained in Kress, “the benefit for the trial bench of this purely technical assistance is to be weighed against the higher interest of the litigant, who must have a guarantee that the [national official] will not be able, through his presence at the deliberations to influence their outcome.”\textsuperscript{120}

In the United Kingdom Article 6 concerns in relation to the role of the legal advisor to the justices in magistrates courts proceedings arose before the Human Rights Act 1998 came into force and led to the issue of a practice direction requiring that any advice given to the justices in private should be repeated in open court and that the parties should have an opportunity to make representations on it.\textsuperscript{121} In the unreported case of Mort v United Kingdom\textsuperscript{122} however, the European Court, noting that the role of the justices’ clerk was confined to assisting the lay magistrates, distinguished the position from that of officials such as the Procureur-Général, Avocat-Général or Commissaire du Gouvernement, “who make submissions to the courts concerning their personal views on the outcome of particular cases.”\textsuperscript{123} There being “no question of the justices’ clerk enjoying any role in the proceedings independent of the justices, or in having any duty with regard to influencing a decision in any particular direction” then, “assuming the clerk fulfils the role provided by law, his or her presence during the deliberations of the justices must be regarded as part of the ordinary functioning of the court.”\textsuperscript{124} In Clark v. Kelly\textsuperscript{125} the Privy Council, following this lead, noted the “essential role” of the legal advisor to lay magistrates and raised, but did not satisfactorily answer “the underlying issue”, of the court’s independence and impartiality from the perspective of appearances.\textsuperscript{126} In the words of Lord Hope “a balance must be struck” between the demands of process and the

\textsuperscript{118} Id. at para 82 (citing Borgers v. Belgium (1993) 15 E.H.R.R. 92 (internal references omitted)).


\textsuperscript{121} Practice Direction (Justices: Clerk to Court) [2000] 1 WLR 1886, 1886-87 The Human Rights Act 1998 Act which came into force in October 2000 in effect made the provisions of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights directly enforceable in English courts.


\textsuperscript{124} Id.

\textsuperscript{125} Clark v. Kelly [2004] 1 A.C. 681.

\textsuperscript{126} Id. at 697.
requirements of expediency. In similar vein the English Court of Appeal has now directed that admiralty and patent courts which have traditionally used technical assessors must modify their procedures in such a way as to require disclosure of the advice received and to afford to the parties an opportunity to contend that it should or should not be followed. This remains the current position but is vulnerable to the criticism that these modifications address “equality of arms” issues but not appearances and the problem raised by Kress remains, namely the potential for an appearance of injustice where a litigant sees an advisory relationship between the deciding judge and a court official who has made representations inimical to her case.

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

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

First, the technical advisor translates and interprets for the court the technical language used in the case. Second, he offers an exposition and delineation of the technical disagreement between the parties. Third, he relates this disagreement to the broader principles of the science or technical art involved. Fourth, he presents his own opinion on the technical facts and related matters at issue. Finally, he may conduct

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127 Id., at 701.
130 Fed. R. Evid. 706(a)
131 Fed. R. Civ. P. 53(a) allows for the appointment of a “special master” defined to include a “an assessor”. See Hart v. Community School Board, 383 F. Supp. 699 (E.D.N.Y. 1974), (Weinstein J. concluding ‘The rule is broad enough to allow appointment of expert advisors’. Id. at 764.) See also, Reed v. Cleveland Bd. of Educ., 607 F.2d 737, 746 (6th Cir.1979) (authority to appoint “expert advisors or consultants” derives from either Rule 53 or court's inherent power) and Reilly v. U.S., 863 F.2d 149, 155 (1st Cir. 1988) (“we need not analyze the suggestion (eschewed by all of the parties to this case) that Fed. R. Civ. P. 53, which deals with the naming of masters, may be a fertile source of judicial power to retain necessary technical assistance.”).
132 In re Peterson, 253 U.S. 300 (1920).
pertinent experiments, either on his own or in co-operation with others.

However a study conducted by Federal Judicial Center researchers in 1993 found little evidence of extensive use of these appointments and a corresponding "paucity of published opinions dealing with the exercise of this authority." In so far as they have considered the matter federal courts have rationalized the appointment of a non-testifying technical court advisor as a member of the judge's staff equivalent to "a specialized law clerk" and thus apparently unproblematic. There are however indications that some circuit courts now recognize the limits of the analogy. In a class-action challenge to the use of the California Basic Educational Skills Test (CBEST) as a requirement for certification to teach and for other employment in California public schools where the judge had required the assistance of a court-appointed expert advisor, Ninth Circuit judge Tashima noted a general consensus to the effect that the "law should in some way effectively use expert knowledge wherever it will aid in settling disputes" but observed:

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

The thrust of Judge Tashima's concern however was to bring advice received onto the judicial record. This is in line with the general approach to date of federal courts which has been to conceptualize problems in connection with the use of a technical advisor in terms of the risk of actual judicial impropriety or lack of neutrality on the part of the advisor. In so far as the problem exists, the solution then lies in procedural safeguards designed to ensure transparency. In Judge Tashima's formulation:


137 AMAE, 231 F.3d 572, 591 (9th Cir. 2000).

138 Id., at 613-614.

139 Id., at 610-611.
The use of a technical advisor is not without risks. First, whenever a court appoints a technical advisor, there is a danger that the court will rely too heavily on the expert's advice, thus compromising its role as an independent decision-maker and the requirement that its findings be based only on evidence in the record. This risk is especially salient if the contents of the communications between the trial judge and the advisor is hidden from the parties (and appellate review), and where the parties have no opportunity to respond to the advisor's statements. […] Second, experts in the relevant field, particularly if it is a narrow and highly-specialized one, may be aligned with one of the parties; therefore, the district court must make every effort to ensure the technical advisor's neutrality, lest the advisor develop into, or give the appearance of being, an advocate for one side. Without some safeguards, the parties' confidence in the fairness of the trial will erode.¹⁴¹

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

1) utilize a fair and open [appointments] procedure […], 2) address any allegations of bias, partiality or lack of qualification; 3) clearly define and limit the technical advisor’s duties; 4) make clear to the technical advisor that any advice he gives to the court cannot be based on any extra-record information; and 5) make explicit, either through an expert’s report or a record of ex parte communications, the nature and content of the technical advisor’s advice.¹⁴²

Judge Tashima’s recommendations were designed to bring evidence of assistance received by a judge onto the judicial record and thus amenable to appellate review but the focus on what might be termed “adversarial” issues fails to engage with the “appearance” issues which we argue arise here. The Seventh Circuit decision in Edgar v. K.L. et al ¹⁴³ represents possibly the closest that federal courts have so far come in recognizing the potential for technical advisor appointments to raise problems of apparent bias. Here the court considered that where a judge in a mental health case had private meetings and engaged in ex parte communications with a panel of court-appointed experts who were known to be partisan, he had compromised his impartiality. 28 U.S.C. § 455(a) “appearance” issues arose because the judge made no secret of the confidence that he reposed in his advisors,¹⁴⁴ the relationship had become “excessively cozy”,¹⁴⁵ with the result that a reasonable observer would have had concerns about the court’s ability to conduct the trial impartially.¹⁴⁶ Closer reading however indicates that what really seems to have

¹⁴¹ Id.
¹⁴² Id., at 611.
¹⁴⁴ See Edgar 93 F.2d at 260.
¹⁴⁵ Edgar, 93 F.2d at 260.
¹⁴⁶ Id.
troubled the Seventh Circuit in *Edgar* was the substantive issue that the judge had in fact and impermissibly accepted contestable conclusions which had not been tested in court.\(^{147}\) Thus where the district judge had blocked discovery and declined to state on the record his own memories of what had happened, his claim of judicial privilege invited the inference of impropriety.\(^{148}\)

Two recent Ninth Circuit decisions evidence a similar preference for substance over form. In *A & M Records v. Napster Inc.*\(^{149}\) the appellate court dismissed a challenge where the technical advisor did not “displace the district court's judicial role” nor “unilaterally issued findings of fact or conclusions of law regarding [defendant Napster’s] compliance”.\(^{150}\) In *Federal Trade Comm’n v. Entforma Natural Products, Inc.*\(^{151}\) a similar challenge did however succeed where the court found that although the record was sparse, there was evidence of actual improper reliance.\(^{152}\) In neither judgment is there concern that the fact of the relationship per se might raise “appearance” issues.

Clearly there is scope for this type of allegation to be opportunistic in character and this may be a partial explanation for the lacuna we detect here. In *Reilly* itself where there was no evidence to suggest that the district court had “allowed the boundaries to be overrun”\(^{153}\) but the judge had failed to provide written instructions and the advisor had submitted no written report the First Circuit was unwilling to sustain a challenge motivated by opportunism.\(^{154}\)

Similar considerations may apply where the challenges have been generated in a context of a history of opposition to the authority of the court, clearly a factor in two decisions from the desegregation era, *U.S. v. Yonkers Board of Education*,\(^{155}\) a housing case and *Bradley v. Millikin*, a school case.\(^{156}\) In *Yonkers*, where the district court had appointed an outside housing advisor to provide expert advice and assistance regarding the implementation of the court's orders and to coordinate the activity of various parties, including government agencies, the Second Circuit concluded that the judge’s ex parte contacts were “merely part of the performance of (the judge’s) prescribed duty and did not create an appearance of partiality on the part of the district court judge.”\(^{157}\) Moreover his refusal to disclose the content of communications with his advisors was upheld: “a degree of confidentiality [was] justifiable in light of attempts to block implementation of [the consent decree] by the City and other groups”.\(^{158}\)

\(^{147}\) *Id.*
\(^{148}\) *Id.*, at 258-260.
\(^{149}\) *A & M Records v. Napster Inc.*, 284 F.3d 1091 (9th Cir. 2002).
\(^{150}\) *A & M Records*, 284 F.3d at 1097.
\(^{151}\) *Federal Trade Comm’n v. Entforma Natural Products, Inc.*, 362 F.3d 1204 (9th Cir.2004).
\(^{152}\) *Entforma*, 362 F.3d at 1214, n 10: “The district court judge indicated that “If the court-appointed expert agrees with the defendants, I suspect I’m going to agree with him. If he agrees with the plaintiffs, I suspect I’m going to agree with him”.
\(^{153}\) *Id.* at 158.
\(^{154}\) *Id.* at 161.
\(^{156}\) *Bradley v. Millikin*, 620 F.2d 1143 (6th Cir.1980).
\(^{158}\) *Id* at 185.
Similarly, in *Bradley* the Sixth Circuit upheld Judge DeMascio’s refusal to recuse himself on the grounds that his ex parte contacts and discussions with court-appointed experts and community groups violated Canon 3A(4) of the Code of Conduct for United States Judges where the remedial phase of the litigation had been protracted and arduous, the judge had conducted himself in an exemplary manner and the court’s authority to utilize experts was not in issue. The Sixth Circuit asserted simply: “We do not believe Judge DeMascio’s use of experts, or his receipt through them of community and expert views, required recusal.” The court did however express its concern about the absence of a documentary record and required that all future expert assistance should be recorded in written reports, with copies to all parties.

More recently, the D.C. Circuit has considered the extent to which a reasonable and informed observer would have questioned the impartiality of a district judge who had regular meeting with a special master and a court monitor who acted as his agents over a four-year period. Noting that the litigation was “contentious and complicated” the court accepted the judge’s unequivocal assurance that no substantive information had been improperly obtained.

Judge Tashima’s attempt to formulate procedural guidelines for judges using technical advisors which now appears to form part of Ninth Circuit law had been anticipated by the First Circuit in *Reilly* and but the underlying purpose is far from clear. The *Reilly* Court spoke of “prophylactic measures” and of “fundamental fairness” but did not explain whether the prophylaxis was directed towards substance or appearance or both. Subsequent Ninth Circuit endorsement has stressed

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159 *Bradley*, 620 F.2d 1143, 1158. Canon 3A(4) of the Code of Conduct for United States Judges prohibits a judge from initiating or considering ex parte communications from ‘persons who are not participants to the proceedings’. The provisions of the Code are advisory and failure to comply does not necessarily attract sanctions.

160 *Bradley*, 620 F. 2d at 1158. See also Jackson v. Fort Stanton Hosp. and Training School, 757 F. Supp. 1231, 1239-1240 (D.N.M. 1990) (District judge refused to recuse himself on the grounds of ex parte communications with his court-expert where the judge stated that he had not been influenced by nor relied on the expert’s findings or opinions, a reasonable person would not have doubted the judge’s impartiality and the challenge was an attempt to avoid the consequence of an anticipated adverse decision.,). But cf U.S. v. Craven, 239 F.3d 91, 101-103 (1st Cir. 2001) (In a criminal case ex parte communications with court-appointed psychologist prior to sentencing constituted error; the sentence would be vacated and the case remanded to another judge for sentencing).

161 *Bradley* v. Millikin, 620 F.2d 1143, 1158 (6th Cir. 1980).

162 *Bradley*, 620 F. 2d at 1158. In relation to 28 U.S.C. § 455(a) the court ruled that the judge’s activities were judicial and thus outside the scope of the statute (620 F. 2d at 1157). Post Liteky v. United States, 510 U.S. 540 (1994), these arguments no longer stand.


164 In re Brooks, 383 F. 3d 1036, 1041-1043.

165 231 F.3d at 611 Judge Tashima dissenting; applied in Techsearch, L.L.C. v. Intel Corporation, 286 F.3d 1360, 1378-1379 (Fed. Cir. 2002) (predicting that these guidelines now formed part of Ninth Circuit law). See also Federal Trade Commission v. Enforma Natural Products, Inc., 362 F.3d 1204, 1215 (9th Cir.2004): “We take this opportunity to join a number of courts that have endorsed Judge Tashima’s recommendations”. In Conservation Law Found. v. Evans, 203 F. Supp. 2d 27, 31, n.3 (D.D.C. 2002) the court noted that it had been guided “in large part by the extremely thoughtful and oft-cited dissent of Judge Tashima in [AMAE]”.

the importance of procedure in facilitating appellate review suggesting that the target is substantive impropriety rather than appearances but as the Third Circuit has pointed out fairness-as-appearance itself has two aims and the requirements of § 455 address “not only fairness to the litigants but also the public’s confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears to be tainted.” Procedural safeguards designed to prevent substantive impropriety or to facilitate correction on appellate review address the first of these aims but not the second.

Moreover it is difficult to understand how either prophylaxis or justification can have much of a role within an analytical matrix which purports to make no ontological distinction between appearance and substance. As Professor Stark points out, the fact that a process appears improper ought in principle to make it actually improper. If as the cases suggest, appellate courts are willing to sanction occasional judicial forays outside the confines of adversarial process on the grounds of the particular circumstances of the case, the answer must be that they have done so pragmatically and because they recognize with Judge Tashima that the role played by a technical advisor is “unique”. The question is whether in so doing they have succumbed to the temptation to “look into the mirror” of their own experience and understanding and in so doing moved too far from the perceptions of the ordinary members of the public upon which confidence in the administration of justice must ultimately depend. If, as we suggest, the reluctance of courts today to conceptualize relations between judge and advisor in impropriety terms stems from pragmatic grounds, what is at issue is the relative priority to be accorded to the reliability of outcomes over the norms of adversarial process.

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

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167 Enforma Natural Products, Inc., 362 F.3d at 1215: ‘On remand, the district court should consider safeguards implementing some or all of these safeguards [regarding the use of technical advisors] to assure the parties that the court is proceeding openly and fairly. Employment of these standards will aid in appellate review if such review becomes necessary’.

168 28 USC § 455.


170 See Stark, supra, note 91 at 21-35 (explaining that ‘appearance’ standards, as opposed to ‘conflict of interest’ prohibitions should not be regarded as prophylactic).

171 AMAE v. California, 231 F.3d 572, 614 n.18 (9th Cir. 2000).

172 R v. Secretary of State for the Environment ex parte Kirstall Valley Campaign [1996] 3 All E.R. 304, 316 (Sedley J.) discussing the test formulated by the UK House of Lords in R. v. Gough [1993] 2 All E. R. 724 at 737-738: “The House also eliminated from the process of adjudication the imaginary reasonable man, recognizing that in imputing to him all that is eventually known to the court and asking him for his impression, the court is looking into a mirror.”

173 See Siegel, supra note 110 at 196 (citing Bradley v. Millikin, 620 F.2d 1143 (6th Cir. 1980), Jackson v. Fort Stanton Hospital and Training School, 757 F. Supp. 1231 (D.N.M. 1990) and United States v. Bonds, 18 F.3d 1327 (6th Cir. 1994). See also Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999): ‘[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.’ Kumho Tire, 526 U.S. at 152 and ‘The trial court must have the same kind of latitude in deciding how to test an expert’s reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether that expert’s relevant testimony is reliable’. Id., at 152.
It has been recently asserted that “[t]he sound administration of justice is grounded in rectitude of decision by the tribunal of fact.” For Jeremy Bentham rectitude, by which he meant accurate outcomes, or the correct application of the law to the facts, was dictated by the principle of utility and procedure was to be its servant. It followed for him that the integrity of the end result or outcomes should not be compromised by extraneous considerations such as, for example, the desire to provide procedural protections for defendants in criminal trials. For this reason, asserts Galligan, “we can be sure that [Bentham] would have disapproved” of the raft of procedural devices such as the “right to silence, the privilege against self-incrimination, the rules requiring voluntary confessions and a general doctrine of fairness” to which, in one form or another and to a greater or lesser extent, the modern common-law world has now become accustomed, despite the obstacles that such protections might place in the way of successful prosecution of a guilty defendant.

Extrapolating into the wider context, the insight that legal processes serve social goals which can be expected to change over time generates a model of procedural justice in which procedural norms can be linked to the values of the social and moral matrix within which they operate. If the behavior of legal officials is governed by legal standards which are normally ascertainable in accordance with the norms of positivist legal method, it is nevertheless to be expected that these legal standards will be reflexive with and responsive to the wider social context and specifically to the expectations of the wider public concerning legal outcomes. Two points follow from this. The first is about change: “[s]ometimes a new normative standard will be adopted by officials reflecting their concern to advance a particular social goal or moral value.” We suggest that the current enthusiasm for what we have termed the “doctrine of appearances” is best understood when seen in this light and we take up this point later.

The second point concerns the relationship between procedure and outcomes, specifically Galligan’s contention that the fair treatment of individuals is directly bound up with the accurate application of law or rectitude of decision-making so that models of so-called “dignitary” or “process” values arising out of the principle of respect for persons which purport to offer a non-instrumental or non-outcome-dependent account of procedural fairness are misconceived. Laws may be made in pursuit of social goals and for the common good but the consequence is to generate normative entitlements for those individuals who come within the scope of the law when properly applied. If, as Galligan claims, fairness “rests on the general principle that a person is treated fairly if he is treated in a way to which he has a justifiable claim” it follows that a mistaken decision which produces an incorrect outcome constitutes a denial of those rights and the link between procedures and outcomes is

175 See Galligan, supra note 21 at 9-12.
176 Id., at 12.
177 Id., at 17.
178 Id.
179 See infra notes 233-250 and accompanying text.
established. The purpose of procedures is to guarantee not only that the legal standards are properly applied but that people will be treated “in accordance with their normative expectations” [a principle which] “is at the very foundation of fair treatment and procedural fairness.”

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

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

An appearance of bias test however is consistently defended on the basis of the asserted need to maintain public confidence in the integrity of legal process but here again as Professor Galligan points out confidence in procedures and confidence in their outcomes go hand in hand: “[c]onfidence that the law has been properly applied […] depends to a significant degree on confidence in the procedures as a means to those outcomes” and “confidence in the result is bolstered by employing procedures which reduce as far as possible the risks of error.” On this logic and in relation to the technical advisor at least, the conclusion would then be that rules relating to bias should not be interpreted so as to put obstacles in the way of a judge who seeks expert help as a means of maximizing the accuracy of her decision-making. In this respect then the U.S. courts would seem to have it right, and the appearance jurisprudence of the European Court as presently interpreted within the U.K. rests on shaky foundations.

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

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

181 Galligan, supra note 21 at 52.
182 Id., at 32.
183 Id., at 92.
184 Id., at 66.
185 Id., at 68.
186 Id., at 55.
187 Galligan, supra note 21 at 93.
This then forms the basis of Professor Galligan’s criticism of the conclusions of Professor Tyler with which we began this paper.\textsuperscript{188} To the extent that his studies purport to show empirically that people value procedures independently of outcomes, the link he seeks to make between the appearance of fairness and legitimacy rests on flawed theoretical assumptions.\textsuperscript{189} Professor Tyler’s study “Why People Obey the Law” was based on the results of interviews conducted in Chicago 1984 in which people were asked about their views of police and the courts.\textsuperscript{190} It articulates a conception of the relationship between authority and citizen in which the legitimacy of the former derives from popular consent but this in turn stems from the citizen’s experience and is shaped by the perception that the treatment received has been procedurally fair.\textsuperscript{191} In this analysis what is important are not outcomes but rather psychological factors reflecting what are termed “relational criteria” because they “provide people with feedback about the quality of their relationship with authorities and institutions”.\textsuperscript{192} These criteria, claimed to be non-instrumental in character because they arise independently of concern with the quality of outcomes include:

- Assessments of the quality of interpersonal treatments, (are people treated with dignity and respect? are their rights respected?) and evaluations of the trustworthiness of authorities, as well as judgments about the neutrality of decision making and the degree to which opportunities to participate are provided.\textsuperscript{193}

What is missing however, is Galligan’s insight that satisfaction of these criteria alone is unlikely to produce a confidence vote where the respondent considers that the ultimate outcome was incorrect. Rather than praise for the fairness of the procedures the suggestion is that he is more likely to conclude that “the procedures failed in their primary purpose and, therefore, despite appearances, are inadequate and defective.”\textsuperscript{194}

Nevertheless, as Professor Galligan has also observed, “[e]ach generation argues anew about where the line between rectitude and competing values should be drawn.”\textsuperscript{195} In the following section we consider the suggestion that notwithstanding the logic of the position that we have outlined the majority decision in \textit{Caperton} represents a commitment to the view that the significance of appearances in public life is a matter that the court should take cognizance of, that this is so irrespective of whether the suspicions that have generated the appearance of impropriety are justifiable, ie borne out by the underlying facts and as such is best seen as an addition to what may be a developing and complex “jurisprudence of appearances”\textsuperscript{196}.

\textbf{Section III The Increasing Importance of Appearances in Public Life.}

\textsuperscript{188} Supra, notes 3 and 4 and accompanying text.
\textsuperscript{189} See Tyler, Psychological Perspectives, supra, note 3; See also Tyler, Why People Obey the Law and other works noted supra note 4.
\textsuperscript{190} See Tyler, Why People Obey the Law supra note 4.
\textsuperscript{191} Id., at 272-278.
\textsuperscript{192} Id., at 276 (internal reference omitted).
\textsuperscript{193} Id.
\textsuperscript{194} Galligan, supra note 21 at 93.
\textsuperscript{195} Id., at 35
\textsuperscript{196} Caperton v. Massey 129 S.Ct. 2252 (2009). See Karlan supra note 75 at 98
The refusal of Justice Benjamin to step down in *Caperton* was not the first time a recusal decision had attracted widespread publicity. In 2004 Justice Scalia took the unusual step of issuing a statement to explain his refusal to recuse himself in a case brought by the Sierra Club challenging the secrecy surrounding an energy task force headed by Vice President Cheney in circumstances in which his refusal had attracted considerable public attention and widespread criticism in the national press. This was the third in a series of high profile “recusal dilemmas” involving members of the Supreme Court. In *Laird v. Tatum*, Justice Rehnquist’s rejection of a recusal motion that was based on his professional experience at the Department of Justice has been described as “one of the most serious ethical lapses in the Court’s history” while Justice Black’s decision to participate in a case where the litigant twenty years before had been Black’s law partner triggered a thinly veiled criticism from Justice Jackson and newspaper reports of a feud in the court.

*Cheney* memorandum noted the Sierra Club’s argument that public opinion “as reflected in the nation's newspaper editorials,[had] unanimously concluded that there [was] an appearance of favoritism,” with “8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest” calling him to step aside, but rejected robustly the conclusion that from the perspective of the objective observer his neutrality had thereby been compromised. The implications of the argument that he should bow to the demands of the press claiming to represent the American public were, he wrote, “staggering” but as Justice Breyer, who voted with the *Caperton* majority, observed extra-judicially in 2008 “the judicial system, in a sense, floats on a sea of public opinion.” The Justice’s remarks were prompted by poll results indicating an “alarming” decline between 2001 and 2004.

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


200 John P. Mackenzie, The Appearance of Justice, 209 (1974). Justice Rehnquist conceded: “[r]espondents are substantially correct in characterizing my appearance before [a Congressional sub-committee] as an ‘expert witness for the Justice Department’ on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case. Respondents’ reference, however, to my ‘intimate knowledge of the evidence underlying the respondents’ allegations’ seems to me to make a great deal of very little.” Laird v. Tatum, 409 U.S. at 825-826 (Rehnquist J.) (denying motion to recuse).

201 Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897, 897 (1945) (Jackson J. concurring). See Frank, supra note 64 at 606 n.2.


203 Cheney, 541 U.S. at 923 (quoting Motion to Recuse 3-4).

204 Id.

205 Stephen Breyer, Serving America’s Best Interests. 4 DAEDALUS 137,139 (2008).
and 2005 in public confidence in judicial impartiality.\textsuperscript{206} Polled in 2001 two-thirds of the respondents indicated their support for the view that judges decided cases impartially. By 2005 approximately half the respondents appeared to believe that judicial decision-making reflects the personal predilections of the judge. This apparently “skeptical view of judging” wrote Justice Breyer:

is not shared by the judges. We believe when we decide a case that we exercise not subjective preference but our judgment based on law. […] A serious discrepancy between our own view of our own efforts and the view of a large segment of the public is cause for concern in a democracy. \textsuperscript{207}

Sir Jack Jacob, commenting on the transformation that took place in English civil procedure in the years following 1800, has observed that whilst the “intellectual trigger” was Jeremy Bentham and the influence of new ideas driven by rapidly developing social and economic forces had prepared the ground, the legal profession and judiciary, complacent in a Blackstone-engendered “euphoria”, generally defended the status quo. \textsuperscript{208} Change when it came owed much to the “force of public opinion” expressed then as now through the columns of the press:

“the striking characteristic of the British revolt against the apotheosis of legal formalism was its popular origin and support. […] One is amazed by the violence of the attack which the public directed and maintained for at least two generations through the press. It was not only a war against legal abuses, but a class struggle against a profession which was believed to be responsible for them.”\textsuperscript{209}

It has been argued that a “fully informed, fair-minded, and knowledgeable observer” would understand the distinction between suits against officials in their official capacity and suits against government employees as private individuals and thus would agree with Justice Scalia’s decision that his neutrality in the \textit{Cheney} case had not reasonably been compromised.\textsuperscript{210} This may be so but to pose the question in these terms is to fail to engage with the requirement for the connection between legal formulations of ethical principles and a “common sense understanding of fairness” which may not directly engage with the connection between procedures and outcomes

\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{208} SIR JACK I.H. JACOB THE REFORM OF CIVIL PROCEDURE LAW AND OTHER ESSAYS IN CIVIL PROCEDURE, 205-207 (1982) (quoting 4 Blackstone Commentaries 443, and citing 3 Blackstone Commentaries 268 : [the Bench and Bar][…] basked in the euphoria engendered by Blackstone’s extravagant eulogies of the prevailing system and his resounding phrases extolling “its solid foundations […] its extensive plan […] the harmonious concurrence of its several parts […] the elegant proportions of the whole”)
\textsuperscript{209} Id., at 206 (quoting EDSON R. SUNDERLAND, THE ENGLISH STRUGGLE FOR PROCEDURAL REFORM (1921-26), 39
as Professor Galligan might wish but which nevertheless recognizes and responds intuitively to the unacceptable when it sees it. 211

Similar arguments may be made about the recent UK “furore” surrounding the issue of MPs’ expenses. An Ipsos-MORI poll carried out for the BBC and published in June 2009 revealed that 76% do not trust Members of Parliament in general to tell the truth, 68% believe that half or more MPs use power for their own personal gain, 68% think that most MPs make a lot of money by using public office improperly (46% thought this in 1985, and 64% in 1994), and only 37% believe that most MPs have a high moral code (and 58% disagree that they do). The report concluded that “[t]his is nevertheless more positive than in 1994, when 28% felt that most MPs have a high moral code.” 212 The point is, and here the parallel lies, that from a strictly legal point of view it is doubtful whether many of the MPs who have been vilified in the national press in respect of their expenses claims have actually “done anything wrong”. From the standpoint of popular perception however the issue of “legal niceties” was of no concern. What mattered was the judgment of the “court of public opinion”.

2  Prejudice, Bias and a “More Recent Humility”

In 1947 John P. Frank, reviewing then current judicial disqualification practices commented on Justice Jackson’s criticism of Justice Black’s refusal to recuse in the Jewell Ridge case 213 and asserted that whereas disqualification for bias represented “a complete departure from common law principles” nevertheless despite Blackstone’s denial, “a more recent humility” has prompted recognition of the possibility that “human judges” may succumb to “less tangible prejudices” and thereby deny justice. 214 In the classic model of judicial neutrality as envisaged by Justice Cardozo the issue of objectivity is not problematic. A judge must simply

\[
\text{disengage himself, so far as possible, of every influence that is personal or comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.} \quad 215
\]

In this formulation elimination of conscious prejudice is a sine qua non of neutrality but this is seen as something that is within the power of the judge to recognize and control. Recusal jurisprudence generally reflects these assumptions but the model is undermined by developments in social psychology, specifically the rise of social cognition theory which sees unconscious or innate bias as an aspect of cognitive development, arising in response to social mechanisms of which individual actors are

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212 The report is available at http://www.ipsos-mori.com/researchpublications/researcharchive/poll.aspx?oItemId=2349
213 Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers, 325 U.S. 897 (1945) Mr. Frank a former law clerk to Justice Hugo L. Black in the October 1942 term acknowledged the potential for “author disqualification”: “That relationship bred affections which may be reflected in this article”. Frank, supra note 38 at 605 n. 1.
214 Frank, supra note 38 at 618.
themselves largely unaware.\textsuperscript{216} The distinction we attempted in our introduction between “bias” (impermissible) and “partiality” (innate) draws on these insights, but the extent to which the law should or indeed can take cognizance of them is difficult to assess. Linda Hamilton Krieger’s work on unconscious bias in employment discrimination represents an attempt to find a legal forum for this research as does a recent study into the way judges and jurors remember the facts of cases which argues that the effect of unconscious or implicit racial bias on case outcomes “raises concerns about the legal system’s ability to achieve social justice”.\textsuperscript{217}

In cases involving judicial recusal it is commonplace that actual bias or conscious prejudice is rarely the issue. We suggest that the negative response to Justice Scalia’s refusal to recuse in \textit{Cheney}\textsuperscript{218} reflected an acceptance of something much more sophisticated, namely an intuitive understanding of the connection between association and influence on the part of a public which has become accustomed to modern advertising industry attempts to manipulate its consumer spending with techniques including those of celebrity endorsement aimed at tapping into or shaping the unconscious values and desires which will influence the desire for the advertised product. Writing in 1957 Vance Packard described the growth of a new manipulative approach to advertising which instead of providing information about the product attempted “to channel our unthinking habits, our purchasing decisions, and our thought processes by the use of insights gleaned from psychiatry and the social sciences.”\textsuperscript{219} Packard called these efforts at persuasion “hidden” because, typically, they “take place beneath our level of awareness” but fifty years on when it is widely known that the moral peccadilloes of celebrities such as Tiger Woods or Kate Moss threaten their product sponsorship contracts it is reasonable to assume that the public now has a reasonably sophisticated awareness of the reflexive potential of subliminal influence or influence by association as we now term it.\textsuperscript{220}

In the context of judicial decision-making, the recent work on “panel effects” suggesting that the composition of the court can have an effect on outcomes bears out


\textsuperscript{218} \textit{Cheney} v. United States Dist. Court, 541 U.S. 913, 928 (2004).

\textsuperscript{219} VANCE PACKARD, \textit{THE HIDDEN PERSUADERS}, 3 (1957).

\textsuperscript{220} Id. See also Rudman, supra note 216 at 139 (asserting that one of the conclusions of the research into cognitive causes of implicit bias is that “it is an axiom that proximity leads to attraction”).
these intuitions and indeed the terminology of recusal jurisprudence in its appearance formulations has gone some way to recognizing the complexities of human motivation and behavior. In *Lawal v Northern Spirit Ltd* the U.K. Privy Council decision that an advocate who was a part-time member of the Employment Appeal Tribunal could not act as counsel in a case where the tribunal included lay members with whom he had previously sat tackled the issue head-on. A fair-minded and informed observer would conclude there was a real possibility of subconscious bias on the part of the lay member or lay members.

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

**Conclusion: Appearance and Tradition in a Normative Universe**

Justice Scalia justified his refusal to recuse by reference to precedent, citing in particular Justice Byron White’s friendship with Robert Kennedy and his family (which included skiing vacations) and Justice Robert Jackson’s socializing with President Franklin D. Roosevelt. In response to the argument that “times have

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224 *Id.*, at paras 21-24.

225 In similar fashion a recent decision of the UK’s highest court was unmoved by the suggestion that a judge’s decision-making is reflective of the opinions of an organization of which she is a member. *See Helow v. S of S for the Home Dept.* [2008] 1 W.L.R. 2416 ,2418-2420 (Lord Hope of Craighead) (finding that a decision of the Lord Ordinary not to give permission to appeal against a notice of removal in respect of a woman of Palestinian ethnicity who claimed asylum on the basis that she had been politically involved with the Palestinian Liberation Organization was not vitiated by bias on the grounds that the judge was a member of the International Association of Jewish Lawyers and Jurists and a founder member of the Scottish branch of that association. A fair-minded observer would not have concluded that the Lord Ordinary was biased. Judges could be assumed to be capable of detaching their minds from things contained in reading material that they did not agree with.)

226 *Caperton v. Massey*, 129 S. Ct. 2252, 2264 (2009): “we conclude that Blankenship’s campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case.”

227 *Id.*, at 2262.


changed” and that for example Justice Marshall, judged by modern standards, could not have sat in *Marbury v. Madison* \(^{230}\) the justice was only partially persuaded but as John P MacKenzie, making a plea for the judiciary to “look more deeply into the interests of the consumers of justice as perceived by them” has argued:

> In an age when images – televised or conjured up by molders of public opinion and taste – often blend so confusingly with reality, does not the appearance of justice have something to do with the reality of justice? If justices and judges would pay more attention to appearances, would there not be more hope that they are performing their tasks justly? If the “consumers” of the judicial system perceive it as just on the basis of fair disclosure of its actual operations, what more can they ask of the system? […] [T]he appearance of justice is an indispensable element of justice itself.\(^{231}\)

Justice Scalia himself has recognized that notions of disqualification have evolved over time but in *Cheney* he drew the wrong conclusion and did damage not only to his reputation but to the reputation of the Court.\(^{232}\) Just as recusal jurisprudence is no longer limited by the practical difficulties of finding substitute judges prevailing in the time of Blackstone so now, we argue, the jurisprudence of contemporary courts should not detach itself from but must engage with the uneasy relationship between appearance and reality, arguably the defining problem of the modern age.\(^{233}\)

For Justice Benjamin in *Caperton* the “fundamental question” was “whether, in a free society, we should value ‘apparent or political justice’ more than ‘actual justice’”\(^{234}\). The former is “subject to the manipulation of information and opinion via innuendo, half-truths, suggestive claims, and so on.”\(^{235}\) Public confidence in the judicial system however depends upon the latter measured not by reference to the acceptability of outcomes to “partisan constituencies” or those with vested interests in specific outcomes in given cases but by reference to “the accuracy of justice”.\(^{236}\) In so far as the judge means here the accuracy of judicial outcomes, then as we have argued, we have some sympathy with this view. An account of the relationship between procedures and appearances which fails to take account of the connection with accurate outcomes rests, as we have explained, upon thin theoretical ground, but the relationship between trust and appearances is not so easily disposed of. Trust as Onora O’Neill has noted is “valuable social capital”, “hard earned”, “easily dissipated” and “not to be squandered.”\(^{237}\) An appearance test which stigmatizes where there is no impropriety may be counter-productive: “[d]ecisions […][t]hat reinforce subjective

\(^{230}\) *Marbury v. Madison*, 5 U.S.137 (1803) (Chief Justice Marshall wrote the opinion of the Court although he had been personally involved as the Secretary of State who had failed to deliver the warrants in issue).

\(^{231}\) Mackenzie, *supra* note 200 at 241.


\(^{234}\) *Caperton*, 679 S.E.2d 223, 286 n.1.

\(^{235}\) Id.

\(^{236}\) O’Neill, *supra* note 18 at 6-7.
standards of adjudication on matters of judicial impartiality simply squander the
remaining vestiges of the social capital of trust, and fan the flames of suspicion."

However, as Justice Benjamin himself recognized the judicial system does not exist in
a vacuum and in the United States where courts at both state and federal level are
already seen as highly politicized the balance of considerations changes. We
consider that it is one of the ironies of our discussion that in the United Kingdom
where the distrust of politicians has not yet transmuted into a perception of a
politicized judiciary the high priority accorded to appearance principles rules out the
use of technical advisors and with them the potential for enhanced accuracy of
djudicial outcomes, but in the United States where judges are with some justification
seen as political actors the opposite conclusion prevails. Be that as it may, what
then is or should be the significance of a doctrine of appearances in modern
jurisprudence?

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

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

238 Olowofeyeku, *supra* note 36 at 34.
239 *Id.*, at 293.
240 See *Trust in Doctors 2009* (Ipsos MORI 2009) available at http://www.ipos-mori.com/researchpublications/publications/publication.aspx?oItemId=1305 (survey on trust in the professions finding that judges’ ratings for telling the truth have fallen below 70% on only one occasion since 1983). Cf. http://www.rdglobaladvertising.com/trusted-brands/results/tables/community.shtml (a Readers Digest survey of trusted brands covering 16 European countries (including the UK) found that levels of confidence in all professions had declined since 2005 and between 2007 – 2009 trust in judges was down about 3%. The survey put the level of trust in UK judges at around 10% lower than the Ipsos Mori findings but this may reflect differences in the formulation of questions and categorization of responses).
243 SIR PATRICK DEVLIN, *TRIAL BY JURY* 164 (1956).
[w]e inhabit a nomos – a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. […] No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”

The point about a narrative of tradition is that it both shapes and limits our thinking and in so doing generates a legitimizing force. Lawyers need authority and the ability to position that authority within a historical narrative is an important aspect of the way in which they can use tradition as the basis of successful legal argument. Tradition indicates “quality and endurance” but it is commonplace that the form may outlive the substance or even as Hobsbawm reminds us in the passage that we cited earlier impose itself de novo in a way that bears little resemblance to the historical fact upon which it claims to draw. Ultimately however appeals to tradition are about continuity and change; they offer a way of thinking about the concerns of the past in relation to the needs of the present and in so doing provide a framework of parameters within which change can take place.

In the Privy Council decision of Lawal Lord Steyn commented that “[w]hat the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards than was the case even a decade or two ago.” Higher standards or different standards? We suggest that the modern sensitivity to the importance of appearances represents more than a loss of innocence concerning the limits of neutrality. It represents an acknowledgement of the importance now generally accorded to attempts to explain the relationship between government and governed in terms of a commitment of respect for the value of individual human dignity and equality. From the perspective of Western political history these commitments are relatively new, hence the importance of formulations emphasizing continuity of tradition within which what are in effect new rights and new doctrines can claim to be born and now find legal expression. Seen in these terms the emergence of a jurisprudence of appearances represents not so much the invention of a new tradition as we initially suggested but rather a reformulation, an attempt to refashion the jurisprudence of the past as common law method has always permitted in such a way as to respond to and reach accommodation with the needs of the present.

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

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246 Hobsbawm, supra, note 14.
249 See generally Jerry L. Mashaw, DUE PROCESS IN THE ADMINISTRATIVE STATE, 158-221 (1985) (arguing that the attraction of a dignitary theory of due process which emphasizes “values inherent in or intrinsic to our common humanity” is not merely a matter of intuitive appeal but enables both “a conversation about public values that is both relevant to our real concerns and consistent with our constitutional tradition” and a theoretical and historical grounding for the articulation of due process values, and a methodology of adjudication that can address the crucial issues of legitimacy in the administrative state.” Id., at 162,169).
Let no-one underestimate the deep and abiding sense of justice which permeates and inspires the ordinary people of the land. In all countries, in all cultures, in all ages, men have striven to find the pathway to justice on the basis of their own social order, and it must not be thought that we in our time have reached the end of the road. The search for justice, as the social ideal which mankind should seek to obtain, remains as elusive and controversial as it has ever been, […]\textsuperscript{280}

\textsuperscript{280} Jacob, supra note 208 at 2.