WHERE LIES THE EMPEROR'S ROBE? AN INQUIRY INTO THE PROBLEM OF JUDICIAL LEGITIMACY

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There is no greater evil than to make abstract, that which is concrete. – Jean-Paul Sartre

I. Introduction

“Hurricane Katrina took his house . . . and . . . his faith in the way his city treats poor people facing criminal charges.”2 This glimpse of New Orleans’ tattered legal system post-Hurricane Katrina belongs not to a public defender or a professional political activist, but to a judge – Arthur L. Hunter, Jr. Nearly a year after the storm, hundreds of incarcerated defendants “had no access to lawyers . . . because the public defender system . . . [was] desperately short of money and staffing, without a computer system or files or even a list of clients.”3

Hunter, a criminal court judge, responded to the crisis in a way that would, for better and worse, bring him national attention:

[He] let some of the defendants without lawyers out of jail. He . . . suspended prosecutions in most cases involving public defenders. And, alone among a dozen criminal court judges, he . . . granted a petition to free a prisoner facing serious charges without counsel, and is considering others.4

Judge Hunter justified his unorthodox approach to the situation by claiming that it was “his duty under the Constitution” and that his conscience demanded it: “Something need[ed] to be done, it’s that simple. I’m the lightning rod, yes.”5

1 Assistant Professor of Law, University of the Pacific, McGeorge School of Law. For their helpful comments and research support during the completion of this article, I thank Adam Molineux, Jessica Muhleman, Amanda Alley, Kris Kent, Jon Stewart, Lisa Abend, Lisa De Sanctis, and the students in my Spring 2007 Jurisprudence seminar.


3 Id.

4 Id.

5 Id. Among Judge Hunter’s numerous declarations of disgust at the plight of local criminal defendants, one stands out for its passionate conviction: "Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking in the basic professional standards of legal representation and a mockery of what criminal justice should be in a Western civilized nation.” Laura Parker, “New Orleans Judge May Free Dozens,” USA Today, April 1, 2007.
Judge Hunter’s stand, while drawing some support from some fellow jurists, was strongly criticized by others. The local district attorney’s office objected to Hunter’s policy, arguing that it did more harm than good. Said assistant district attorney David S. Pipes, “[t]he proper solution for someone who does not have an attorney is to get them an attorney. Releasing them does not cure anything and does not protect their rights.” Pipes was especially critical of Judge Hunter for considering the release of a man who had been arrested 10 times since 1990 and had “pleaded guilty to previous drug and theft charges.”

Local prosecutors generally viewed Judge Hunter as “being too soft on defendants, and of having too high an acquittal rate in nonjury trials.”

From the standpoint of judicial ethics, how are we to assess Judge Hunter’s conduct? More precisely, do we believe that his behavior enhances or undermines his credibility as a judge and the public’s trust in the judicial system?

We might argue that Judge Hunter is dangerously activist, taking the law into his own hands simply to prove a point and thus creating the appearance of impropriety by failing to comply with his judicial duties (to follow established, if imperfect, procedures) and departing from the ideal of judicial impartiality (by favoring the putative rights of criminal defendants over the safety of a community riddled with crime).

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6 For example, Judge Calvin Johnson, chief judge of the criminal court in New Orleans, applauded Judge Hunter’s position: "You have to have some guy out there rattling the saber, absolutely," Judge Johnson said. "I think the message was loud, clear and necessary." Eaton, “Judge Steps In for Poor Inmates Without Justice,” supra note 2.
7 Id.
8 Id.
9 Id.
10 See Ann M. Simmons, “New Orleans Judge Fights Poor Defense: Arthur Hunter Has Suspended Cases and Freed Suspects in an Effort to Change the System – Upsetting Many Amid Record Violent Crime,” The Los Angeles Times, June 27, 2007 (describing New Orleans as “a city battling record levels of violent crime.” According to Beverly Siemssen, “president of Victims and Citizens Against Crime, whose daughter was murdered in 1990, “[t]he community is in outrage. What's he solving by doing this, other than releasing people to commit crimes again?”)
On the other hand, we might argue that Judge Hunter is, as he insists, acting to ensure the constitutionality of criminal procedures and to do justice under uniquely difficult circumstances, thereby promoting confidence in the judiciary by actually complying with the law and taking an impartial stance by trying to balance defendants’ rights and community safety.

Or we might view Judge Hunter’s conduct from a kind of middle perspective, believing that while he may have pushed the boundaries of rules and standards of judicial ethics, his treatment of criminal defendants in this situation is at least somewhat justified because he is acting out of laudable personal conviction. In short, we might see Judge Hunter as morally admirable despite his civil disobedience.

These three views reflect a spectrum of analytical approaches to judicial legitimacy, the overall product of the public’s confidence in the lawfulness, impartiality, and propriety of the judiciary. Although this general formulation of judicial legitimacy seems straightforward enough, the concept itself, precisely because it is a function of public perception of judicial behavior, proves difficult to define and interpret in social situations of even modest cultural and moral complexity, as the story of Judge Hunter illustrates. Yet the cultural and moral complexity of such judicial dilemmas often is obscured by simplistic, politically polarizing condemnations of the judiciary, a condition of public discourse that precludes thoughtful, nuanced – and much needed – discussion of the rich meaning of judicial legitimacy itself.

Indeed, Judge Hunter has himself been harshly criticized in broad strokes that obscure the complexity of his decision. From one side,

    critics accuse Hunter of grandstanding and using the issue to play politics. “It is improper for a judge to use his position as a judge in a thinly veiled publicity stunt to generate media attention,” said Rafael Goyeneche, president of the Metropolitan Crime Commission, a citizens’ watchdog group in Louisiana. “It is
an inappropriate abuse of his judicial authority to pursue a political agenda in this way.”

From the other side, critics have accused Judge Hunter of abdicating his judicial responsibility to poor, black defendants in the face of an oppressive and racist local legal system. In Ted Duplessis’ harsh words:

African-American judge, Arthur Hunter Jr. of Orleans Parish is a typical African-American token. This idiot judge knows that what they are doing in New Orleans to poor people is wrong and illegal but he does it anyway. Poor black people that look like him are being lynched and held in death cells without so much as a phone call! This judge talks big but dose [sic] not manifest not one drop of constitutional respect or backbone. He keeps making threats to not hold poor people captive when they do not have any public defenders but it never really happens. What are you afraid of Judge Hunter? I mean, you got the Constitution to back you up or . . . [are] you planning on Uncle Tomming it for your entire judicial career? Judge Hunter should know that when these citizens start litigating against the Federal Government it will be his black butt that will get demonized by history. These white judges could care less about poor black people being held in make-shift American concentration camp like Tribunals!

As is clear to anyone who follows the news, Judge Hunter’s public excoriation is representative of a larger phenomenon: nationally, judges are under serious partisan attack.

In politicians’ pious calls for religious retribution in response to controversial judicial decisions (e.g., in the Terri Schiavo case); in recent state ballot initiatives calling for “Jail-4

11 Id.
13 See, e.g., Tim Harper, “Republican Leader Warns Judges: You Will Answer for This,” The Toronto Star, April 1, 2005. The day after 41-year-old Terry Schiavo died from having had her feeding tube removed two weeks earlier, the majority leader of the U.S. House of Representatives, Republican Tom DeLay of Texas, blamed various state and federal judges for her death. These judges had, at various stages of a prolonged battle over control of Schiavo’s life support, either ordered that her feeding tube be removed in accordance with her husband’s decision as Terry’s legal guardian (Florida state judges) or refused to hear appeals of that order (the Florida Supreme Court, the U.S. Court of Appeals for the 11th Circuit, and the U.S. Supreme Court). DeLay claimed that Congress had shirked its responsibility to hold the judiciary accountable. No longer. We will look at an arrogant, out of control, unaccountable judiciary that thumbed their nose at the Congress and president when given jurisdiction to hear this case anew and look at all the facts . . . . The time will come for the men responsible for this to answer for their behavior . . . .
Judges” who don’t render decisions ideologically satisfactory to some groups;\textsuperscript{14} in the embattled and nearly intractable confirmation process for federal judges;\textsuperscript{15} and certainly in the wake of 

_\textit{Bush v. Gore},_ which left many Americans convinced that the judiciary is not the impartial branch it once was, or should be – in all of this we see a national judiciary whose fundamental independence, that precious quality that distinguishes the judicial from the executive and legislative branches of government, is at the center of various highly politicized public battles.\textsuperscript{16}


\textsuperscript{16} Retired Supreme Court Justice Sandra Day O’Connor recently warned of the perils of undermining the independence of the judiciary. In a surprisingly candid speech at Georgetown University on March 9, 2006, O’Connor took aim at Republican leaders whose repeated denunciations of the courts for alleged liberal bias could, she said, be contributing to a climate of violence against judges. Ms O’Connor, nominated by Ronald Reagan as the first woman supreme court justice, declared: "We must be ever-vigilant against those who would strong-arm the judiciary." She pointed to autocracies in the developing world and former Communist countries as lessons on where interference with the judiciary might lead. "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings."

Julian Borger, “Former Top Judge Says US Risks Edging Near to Dictatorship,” The Guardian, March 13, 2006. O’Connor also directly rebuked DeLay for having called for the impeachment of the judges involved in the Terri Schiavo case, arguing that such accusations "pose a direct threat to our constitutional freedom." O’Connor then reminded her audience of the inherent relationship between judicial legitimacy and the public perception of judges: "Statutes and constitutions do not protect judicial independence - people do." Id. See also Blaine Harden, “O’Connor Bemoans Hill Rancor at Judges, THE WASHINGTON POST, July 22, 2005 at A15 (quoting O’Connor’s lament that “[i]n all of the years of my life, I don't think I have ever seen relations as strained as they are now between the judiciary and some members of Congress. It makes me very sad to see it.”); Sandra Day O’Connor, “The Importance of Judicial Independence,” remarks made before the Arab Judicial Forum, Manama, Bahrain, September 15, 2003 (http://usinfo.state.gov/journals/itdhr/0304/ijde/oconner.htm).
Yet examples that demonstrate the embattled cultural status of the judiciary, while plentiful, do little to reveal – and much to obscure – the problem at the root of the situation: that we do not have anything approaching a consensus understanding of what judicial legitimacy means – of what precisely makes courts and judges worth respecting, trusting, and obeying. Moreover, if the embattled status of the judiciary is symptomatic of uncertainty and disagreement about the meaning of judicial legitimacy itself, then that uncertainty also surrounds the principles that constitute judicial legitimacy and thus collectively anchor our judicial system. Among these supporting (and overlapping) principles are legal compliance, impartiality, and – what is largely the product of these first two – avoiding the appearance of impropriety.

In this article, I want to probe the concept of judicial legitimacy by exploring how and why that concept, for all its importance, tends to remain murky and difficult to apprehend clearly, like a stone embedded in the sediment of a deep, rushing river. As I have suggested, to explore the difficulty of defining judicial legitimacy means to discuss the difficulty of interpreting at least three of its key components: (1) judicial compliance with the law; (2) judicial impartiality; and (3) judicial avoidance of the appearance of impropriety. I will argue that two closely related defects, vagueness and indeterminacy, prevent, like the shifting currents of that rushing river, clear apprehension and thus meaningful discussion of judicial legitimacy and its core components. Those components remain vague because generally they are not presented or considered in factual context; they remain indeterminate because, without the grounding of those factual, specific, community contexts, the public always will have difficulty interpreting the meaning of basic terms of judicial legitimacy, and thus the meaning of judicial legitimacy itself.

I will illustrate the three core components of judicial legitimacy by invoking past and current debates about those components and by scrutinizing several examples of putative judicial
misconduct. As we shall see from these conceptual debates and judicial narratives, however
difficult it is to interpret these three core components of judicial legitimacy, the degree to which
the public perceives that judges honor them largely determines the public’s confidence in the
judiciary and thus the character and meaning of judicial legitimacy in our society.

Finally, beyond diagnosing symptoms of the difficulty of defining judicial legitimacy, I
will offer a partial antidote: discussion of community values and narratives, undervalued aspects
in the calculus of judicial legitimacy. By community values and narratives I mean an emphasis
on the specific ways in which different communities, informed by their cultural, religious,
ecological, racial, ethnic, and other values, function as “the public” in any given judicial
controversy and thus significantly affect the shape and quality of judicial legitimacy in that
context. Given the increasing diversity of cultural values – and thus of interpretive communities
– in American life, it stands to reason that public perception of the judiciary, the most crucial
part of the judicial legitimacy equation, actually is the sum of innumerable perceptions, each
representing a different way of evaluating judicial conduct.

By discussing the impact of this diversity of community values and meanings we can
more accurately and meaningfully address the difficulty of interpreting principles of judicial
conduct (compliance, impartiality, and appearance of impropriety) that tend to remain vague and
indeterminate. In concluding this article, then, I will argue that focusing on community values
and narratives is one concrete way toward developing greater clarity of definition and
interpretive traction about the meaning of judicial legitimacy. While focusing on community
values and narratives for purposes of interpretation is far from a complete or ideal way to refine
public conversation and understanding about judicial legitimacy, it nonetheless provides useful
insight into this challenging hermeneutic situation and enables us to avoid the superficiality that characterizes much of the public conversation about the judiciary.

II. Why Judicial Legitimacy Matters and Why It Is Difficult to Define

Affirmative public perception of the judiciary, of what role judges play (or should play) in American political life, is indispensable to the wellbeing and thus the effectiveness of the judicial branch. Indeed, this all-important collective perception determines – is the very source of – judicial legitimacy, the *sine qua non* of our common law system.\(^{17}\) The concept of judicial legitimacy resides at the center of the constitutional doctrine of an independent judiciary and is, quite simply, the primary reason why people respect and obey the law.\(^{18}\) Thus when the public views the judiciary as legitimate, the legitimacy of the entire legal system is nourished and strengthened. In short, if judicial independence is the lifeblood of our legal body politic, then judicial legitimacy is our immune system.

As I have suggested, given the polarized quality of contemporary public discourse about the judiciary, it is especially important that we define and, to the degree possible, agree beyond a


vague and general intuitive sense\textsuperscript{19} on the meaning of judicial legitimacy; otherwise, we are faced with a public war of unexamined, unsubstantiated, and ideologically coercive intuitions about judicial legitimacy – a polemical situation not unlike the classic (though soberingly relevant in today’s world) epistemological impasse between believers and non-believers.\textsuperscript{20} It may be that diverse public notions of judicial legitimacy do – and should – remain operative in our culture, but we should accept that state of affairs only after we have attempted to understand the concrete implications of such important differences. Such realism is crucial to the health of our legal system because judicial legitimacy represents our confidence, trust, and belief in the judicial branch of our government, which together provide the main reason why we obey the law.\textsuperscript{21}

\textsuperscript{19} A key aspect of my critique of current views of judicial legitimacy is that people tend to feel satisfied with an intuitive sense that “they know it when they see” good or bad – legitimate or illegitimate – judicial conduct. Here I am paraphrasing Justice Potter Stewart’s famous intuitive standard for identifying pornography. \textit{See Jacobellis v. Ohio}, 378 U.S. 184, 197 (1964). One scholarly embrace of this intuitive standard of judicial legitimacy is Jeffrey Rosen’s \textit{The Most Democratic Branch: How the Courts Serve America}, supra note x at 7-10 (arguing that “judges throughout American history have tended to maintain their democratic legitimacy . . . when they have deferred to the constitutional views of the country as a whole”). I will take issue with the vagueness of Rosen’s view later in this article.

\textsuperscript{20} In raising concerns about and examples of the embattled state of the American judiciary, supra notes 13-16, I am suggesting that a kind of cultural-religious fundamentalism has reached a remarkable level in our public discourse. By fundamentalism I mean essentially an ideology or habit of mind that reduces the morality of complex cultural issues to simplistic, binary, us-versus-them terms – a rhetorical strategy that directly affects the cultural legitimacy of those whose values, behavior, beliefs, and lifestyles are at issue. I have discussed this phenomenon at length regarding public rhetoric about Mormon polygamy and gay marriage:

\ldots the phenomenon of “zero sum” legitimacy will operate roughly to the extent that the [moral] narratives in conflict are literal-fundamentalist, binary narratives, leaving little room for hermeneutic negotiation. And although this not need be the case when narratives clash, it seems that the greater the perceived religious stakes, the greater the human tendency to batten down the rhetorical hatches, to ensure a sense of certainty and legitimacy, even if \ldots that rhetorical strategy expresses itself in the cloak of highly figurative language.


\textsuperscript{21} \textit{See generally} Tyler, \textit{Does the American Public Accept the Rule of Law?}, supra note 18.
Thus my concern here is not simply whether people generally believe in the legitimacy of judges (the relative stability of our society suggests that they do, whatever their specific complaints), but for what reasons, with what reservations? What are the actual bases of judicial legitimacy, its necessary components? How do we interpret those basic components, not in the abstract, but in the context of actual judicial situations? As I indicated in the Introduction, I have selected three components that, upon examination, yield some of the inherent difficulties in coming to consensus on the meaning of judicial legitimacy – compliance, impartiality, and the appearance of impropriety. To examine any of these is to encounter those inherent difficulties of consensus interpretation, which reflect the linguistically indeterminate and culturally diverse meanings that invariably affect the stability of public understanding of any of these building blocks of judicial legitimacy.

This complex interpretive problem is compounded by, and reflects, the vague, circular, and overlapping nature of these components of judicial legitimacy. Such conceptual entanglement is evident in two of the most recognized and authoritative sources of explanation of the components of compliance, impartiality, and appearance of impropriety – the ABA Model Code of Judicial Conduct (“Model Code”), which applies to all judges, and 28 U.S.C.A. § 455 (“§ 455”), which applies to federal judges. These sources of authority define – albeit generically – the three components of judicial legitimacy that I have identified and reflect the moral logic of their relationships to each other.

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22 Effectively I am arguing for enriched public conversation and literacy about the deceptively simple idea of judicial legitimacy. Oliver Wendell Holmes, Jr. articulated dramatically this invaluable insight on the rewards of genuine intellectual struggle: “I would not give a fig for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity.” (Cite to Holmes.)
Canon 2 of the Model Code states: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”23 Section A of the Canon adds: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” 24 Echoing these principles, § 455 requires that “[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”25 Officially, the federal statute is binding and the canons of the Code hortatory. Yet given the special responsibilities and expectations that characterize the judge’s role in our legal system,26 the reality that the Code serves as the primary source of illumination on ethical matters for judges (state courts rely on these principles when determining judicial misconduct27), and the shared terminology of the two sources, it makes sense to consider these norms collectively – not because the particular authoritative status of each is not important,28 but because the focus of this article is the meaning of judicial legitimacy, which both informs and is reflected in all existing canons, standards, rules, and statutes regarding judicial conduct.

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24 Id.
26 See, e.g., Cynthia Gray, “Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility,” 28 U. ARK. LITTLE ROCK L. REV. 63, 66 (2005) (arguing the “[t]he code of judicial conduct is not simply a penal provision, threatening judges with the possibility of disciplinary sanction, but an important reminder to them of the ethical foundations of their role in a free society”).
27 Id.
28 Of course the distinction between an official exhortation and a binding rule or statute is significant, and it is relevant to my argument here insofar as it influences how the public perceives judicial conduct and thus judicial legitimacy. Yet that concern is but one of many in the complex calculus of judicial legitimacy; hence my decision to cabin the distinction accordingly. For a fuller discussion of the distinction between binding and aspirational norms, and of the larger problem of the vagueness of both the current ABA Judicial Code and the language of the recent attempt to revise the Code’s rule on the appearance of impropriety, see Ronald Rotunda, Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code, HOFSTRA LAW REVIEW. Forthcoming Available at SSRN: http://ssrn.com/abstract=926437.
To clarify the concerns of my argument, let me rephrase these statements in a way that more straightforwardly expresses their ethics logic. First, if the public perceives the behavior of a judge to be proper (i.e., avoiding even “the appearance of impropriety”), then the public will have confidence in the integrity and impartiality of that judge, and will be inclined to feel likewise toward the judiciary generally. In short, to the degree enabled by that judge’s act, the public will believe that the judiciary is legitimate. Next, in order for a judge to avoid even the appearance of impropriety, let alone impropriety itself (often these are one and the same for the public, which generally is not privy to the judge’s subjective state of mind), the judge must comply with the law and otherwise act in ways that convince the public of his impartiality – by avoiding partisan political or discriminatory affiliations and endorsements, by not maintaining personal interests that may conflict with his work as a neutral arbiter of disputes, and so on.  

It may be helpful to express this in a somewhat syllogistic way, emphasizing both the discrete and overlapping parts of each component of judicial legitimacy. If a judge obeys the law; and if a judge does things, by commission or omission, that show that she is impartial to the extent possible; then a judge will have acted to avoid the appearance of impropriety (and, conversely, to create the appearance of propriety). Each of these three parts, if perceived by the public as such, individually gives the public reason to believe in the trustworthiness of the judiciary, although the compliance and impartiality components seem (in the language of the Model Code) substantially to add up to the appearance of impropriety. The appearance of impartiality in turn seems (given the structure of the Model Code) to be the primary portal

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29 Here I use the term “ethics” mindful of the meaning of its classical Greek root, ethos. In Aristotle’s paradigm of the “three appeals” (including logos, the appeal to reason, and pathos, the appeal to emotion) that constitute the structure of a persuasive strategy by rhetorical means, ethos is generally understood as the appeal to the audience’s sense of the credibility of the speaker – or, to put it in terms of contemporary principles of judicial ethics, the public’s confidence in the integrity, impartiality, and fairness of the judge. See generally Aristotle, Collected Works (W. D. Ross, ed.) (1950).

through which a judge reaches that public trust. And maintaining the appearance of impropriety through its constituent parts is how a judge keeps hold of that public trust, a dynamic rhetorical state of affairs between judge and public that could accurately be called the judicial legitimacy process.

Because this entire process is ongoing and changeable, and because each of the parts of this process both overlaps significantly with every other part and is difficult to define out of factual context, the metaphor of a matrix is useful for referring to this system of conceptual and rhetorical relationships and all of their political, social, and cultural layers. Those political, social, and cultural dimensions are inherently factual, concrete, and embedded within their defining community contexts. Similarly (these extended formulations notwithstanding), a rather simple, common sense logic characterizes this matrix and underscores a coherent, if general, lesson: if the public perceives that judges behave according to the special standards that make judges worthy of extraordinary respect and trust, then judges will enjoy the benefit of a public that generally chooses to obey the law and to defer to judicial decisions.

Yet once again, this basic logic of judicial legitimacy (and the complex matrix that it stands for) requires concrete demonstration in order to be accessible and meaningful to the public. In other words, examples of judicial conduct – narratives of judicial legitimacy, so to speak – are necessary to address the persistent problem that the terms of this matrix of judicial legitimacy (compliance, impartiality, appearance of impropriety), regardless of how frequently the Model Code invokes them, remain largely vague and indeterminate. As I have observed, they remain vague because they are not presented or considered in factual context; they remain indeterminate because, without those factual, specific, community contexts, the public always
will have difficulty in trying to accurately interpret the meaning of the basic terms of judicial legitimacy, and thus the meaning of judicial legitimacy itself.

One possible step toward making the concrete distinctions that can help clarify the vague and indeterminate terms of judicial legitimacy is included implicitly in the commentary to Canon 2 of the Model Code. That segment of the commentary elaborates on the special, uniquely burdensome ethical standards to which judges must conform if they are to maintain public confidence:

A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.\(^{31}\)

The notion that judges must live\(^{32}\) by higher ethical standards than the rest of us is a step toward defining specifically what constitutes judicial legitimacy because it circumscribes the conduct of judges and thus gives us a kind of focus by comparison to general behavior.

Still, this comparative ethical perspective amounts to shifting the same indeterminate standards to a different conceptual plane; this framing of the obligations of judicial conduct as uniquely demanding provides little if any further understanding of what the components of judicial legitimacy – the ideals that guide that conduct – actually mean in factual context. We – the public – further impair our ability to articulate concrete meanings of the components of judicial legitimacy because we tend to think, as with many abstract ideals, that we “know judicial legitimacy when we see it.”\(^{33}\) However, what may seem to each of us intuitively clear about the meaning of judicial legitimacy is perforce illusory insofar as each of us is informed by a different configuration of background, experience, belief, cultural identity, and so on.

\(^{31}\) Id. at 320.

\(^{32}\) The commentary to the Model Code makes clear that Canon 2 applies “to both the professional and personal conduct of a judge.” Id.

\(^{33}\) See Jacobellis v. Ohio and my related comment, supra note 19.
III. Narratives of Problematic Judicial Conduct

To demonstrate the diversity of perspectives on the meaning of judicial legitimacy and its components, I want to examine several brief narratives of judicial misconduct. These stories, along with the case of Judge Hunter, will help show that judicial legitimacy is more accurately understood as a nuanced continuum of perspectives than a fixed categorical concept.

i. Roland Admundson

In 2001, Minnesota Court of Appeals Judge Roland “Rolly Admundson” was convicted of taking $400,000 over several years from a trust fund he oversaw for a woman with severely limited mental capacity – “money he spent on marble floors and a piano for his house as well as model trains, sculpture and china service for 80, all bought on eBay.”34 For his crime, Admundson received an extended prison sentence of 69 months. The trial judge imposed the unusually harsh sentence in part because of Admundson’s own judicial record of imposing tougher-than-recommended prison sentences, regardless of any mitigating personal circumstances in the felon’s background.35

Since completing his sentence, Admundson has devoted himself to improving the quality of rehabilitation policy and efforts in prisons. Additionally, Admundson “wants to create homes for men coming out of prison, giving them a place to live and help with other hurdles to successful re-entry.”36 Admundson has offered various explanations for his crime, including “suffer[ing] from bipolar disorder,”37 even though as a judge Admundson “had written an opinion rejecting psychological factors as mitigating.”38 Admundson also has suggested that “he

35 Id.
36 Id.
37 Id.
38 Id.
wanted to be caught. ‘I was tired of being Rolly Admundson, tired of being at everybody’s beck and call, just tired. . . . This was my vehicle to end it all.’”

Admundson’s critics believe that he has not truly changed in prison. Admundson, however, claims that he has gained transformative insight from his experiences: “Judges can say they have no idea what’s going on in prison. . . . But if you know what’s going on and you still are callous, God help you.”

ii. Sol Wachtler

Sol Wachtler is famous in part because of the extraordinariness of his fall from grace:

In November 1992, he was New York state's chief judge and a rising star in the Republican party, famed for his monstrous ego, his political ambition, and his jousts with Gov. Mario Cuomo. Then he was arrested for stalking his former mistress, Joy Silverman, and charged with extortion, interstate racketeering, and blackmail, among other crimes. Wachtler had written her harassing letters in the guise of a fictional alter ego, and mailed a condom to her young daughter. The judge claimed mental incapacitation: Jilted by Silverman, he'd succumbed to a manic depression that was exacerbated by an addiction to prescription amphetamines. Wachtler pled guilty to sending threats through the mail. In September 1993 – less than a year after he'd presided over New York's Court of Appeals – the 63-year-old first-time offender began serving an 11-month term in federal prison.

Like Admundson, Wachtler has devoted much of his time since being released from prison trying to rehabilitate his image and to atone, on the public stage, for his criminal acts. Also like Admundson, Wachtler has argued that his behavior was substantially caused by mental illness, and has linked this fact to his hope for forgiveness:

One would assume that now that my depression, manic behavior, and causal toxicity (caused by the drugs I was taking) have been evaluated and confirmed by the government's own medical experts here at Butner [prison], there would be some understanding by the public – not forgiveness, but some understanding. That will not happen. There will always be those who will refuse to accept the fact that

39 Id.
40 Id.
a person can function in what appears to be a normal fashion in his or her job, and still suffer from a mental disorder.\textsuperscript{42}

iii. Walter Steed

Until 2005, Walter Steed had served for roughly 25 years as a judge in the town of Hildale, Washington County, Utah. Appointed by the Hildale City Council in 1980 to the part-time job of municipal court justice, Steed’s primary judicial duties consisted of handling class B misdemeanors, such as DUI and marijuana possession cases. Unlike state district court judges, Steed did not face retention elections; rather, he was periodically reappointed by the Hildale City Council.\textsuperscript{43} Steed belongs to the Fundamentalist Church of Jesus Christ of Latter-Day Saints, a fringe Mormon sect that, unlike the mainstream L.D.S. church, continues embraces the 19\textsuperscript{th}-century Mormon practice of polygamy.\textsuperscript{44} In 1965, Steed legally married one woman; in 1975 and again in 1985, he was “sealed in religious ceremonies” to two other women. “All were adults and entered the situation knowing the subsequent relationships would not be recognized as state-sanctioned marriages.”\textsuperscript{45}

Notwithstanding Steed’s illegal conduct, “neither the Utah attorney general nor the Washington County attorney chose to prosecute” him.\textsuperscript{46} However, in February of 2005, the Utah Supreme Court affirmed the Utah Judicial Conduct Commission’s recommendation that Judge Steed be removed from the bench.\textsuperscript{47} Steed has never tried to hide his polygamy, arguing that “he has taken three wives as a religious practice and that his lifestyle has no effect on his

\textsuperscript{42} Quoted in Plotz, \textit{id.}
\textsuperscript{44} See Richard S. Van Wagoner, \textit{Mormon Polygamy: A History} (2d. ed. 1989) (1986) (defining polygamy, or more precisely polygyny, as the marriage of two or more women to one man.) As in most states, the Utah statute that Steed violated prohibited bigamy, literally the marriage of one man and two women; however, anti-bigamy laws generally are used to prosecute all plural marriages.
\textsuperscript{45} Thomson, “Justice May Be Disbarred,” \textit{supra} note x.
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} \textit{Id.}
fairness as a judge.” Further, Steed contends that, unlike the hypocrisy of married people who do not remain faithful to their spouses, he practices plural marriage devotedly: “Which is worse, a monogamist who doesn’t monog or a polygamist who really polygs?” Janet Jessop, one of Steed’s three wives, has “described Steed as a wonderful husband and father and [has] said that ‘everyone likes to live their religion and do what they think is right.’”

iv. Roy Moore

Moore, the former Chief Justice of the Alabama Supreme Court, was removed from office by “Alabama's judicial ethics panel . . . for defying a federal judge's order to move a Ten Commandments monument from the state Supreme Court building” in which he presided. The panel, consisting of judges, lawyers, and non-lawyers, concluded that “Moore put himself above the law by ‘willfully and publicly’ flouting the [federal court] order . . ..” Moore was supported by a strong majority of the national public, and his battle to keep the 10 Commandments in the courthouse and to remain a judge became a conservative Christian rallying point.

Moore argued that his civil disobedience was justified – even required – because America is a country based on Judeo-Christian values, notwithstanding the First Amendment’s doctrine of separation of church and state: "[t]he issue is: Can the state acknowledge God?" If this state can't acknowledge God, then other states can't. ... And eventually, the United States of America will not be able to acknowledge the very source of our rights and liberties and the very source

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48 Manson, “Court Gets to Rule on Polygamy, Judgship,” supra note 43.
49 Id.
50 Id.
52 Id.
53 Moore claimed that "God has chosen this time and this place so we can save our country and save our courts for our children." Id.
Unlike Steed, Moore believed his judicial conduct was perfectly legal; he asserted that the federal court ordering him to remove the monument was violating the law: "When a court order departs from the law and tells you what you can think and who you can believe in," he said, the judge issuing that order is "telling you to violate your oath. And he can't do that. Judges simply don't have that power."55

v. Antonin Scalia

Supreme Court Justice Antonin Scalia has created controversy in recent years for a number of actions and statements that have seemed to characterize his growing stridency as a member of the Court. For example, when asked at a Boston church whether his religion affects his judicial decisions, he “placed his fingertips under his chin and flicked them outward” – a gesture many consider undignified if not obscene.56 Speaking to a meeting of the Federalist Society, Scalia “dismissed those who believe that the Constitution is a living document that evolves over time. ‘You would have to be an idiot to believe that.’”57

He has defended his controversial decision not to recuse himself from a case involving Vice President Dick Cheney after having gone on a hunting trip with Cheney. During a visit to the University of Connecticut, Scalia remarked that “I think the proudest thing I have done on the bench is not allow myself to be chased off that case.”58 He has made seemingly partisan statements about the result in Bush v. Gore. During a speech in Switzerland, Scalia remarked that if all the votes the democrats wanted counted in the 2000 presidential election “were indeed

55 Id.
56 Adam Cohen, “Reining In Justice Scalia,” the New York Times, April 26, 2006. Peter Smith, who took the now-famous photo of the gesture, “said that when Justice Scalia made the gesture he also uttered an obscenity in Italian.” Id.
57 Id.
58 Id.
counted, ‘[t]hey would have lost anyway’”; responding in the same speech to a question about the legitimacy of the Court’s ruling that gave George W. Bush the presidency, Scalia retorted, “Oh God. Get over it.”

IV. The Problem of Interpreting Components of Judicial Legitimacy

I now want to consider vagueness and indeterminacy problems in interpreting the compliance, impartiality, and appearance of impropriety components of judicial legitimacy. To do so, I will draw on the examples of judicial conduct described above, including the narrative of Judge Hunter, as well as a relevant classic argument about neutrality and a current argument about the appearance of impropriety. As we shall see, each component presents the interpretive challenges of vagueness and indeterminacy in unique ways, making the sum of those components – judicial legitimacy – a concept of potentially rich instability.

i. Compliance With The Law

The compliance component of judicial legitimacy would seem to be the least susceptible of problems of understanding (vagueness) and interpretation (indeterminacy): either a judge complies with the law or she does not. In terms of judicial legitimacy, compliance, the notion that judges must themselves obey the law in order to credibly adjudicate allegedly unlawful conduct within the general population, is arguably the most basic and broadly agreed upon component of judicial legitimacy. Indeed, this component seems intuitively obvious, as conveyed in clichés like “practice what you preach.” Moreover, as the Model Code makes clear, we hold judges strictly to this standard of conduct; it may well be that we genuinely

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59 Id.
60 Id.
expect more of judges than we do of members of the executive and legislative branches of

government, who frequently and with significant impunity “do as I say, not as I do.”

In many situations all of this is true, of course; the judge’s violation of the law is patent
and undeniable. For example, Admundson (fraud), Wachtler (harassment), and Steed
(polygamy) each indisputably violated the law. Yet in more complex situations, we reasonably
can raise questions from both sides of the compliance standard. For example, Moore was
removed from the bench for violating a federal court order, which could rightly be considered a
violation of the law, albeit meaningfully distinct from the straightforward illegality of
Admundson or Wachtler.

Yet in assessing Moore’s legitimacy as a judge, the public might consider it less
problematic that Moore violated a court order and was removed by an ethics panel than if he had
broken a legislatively enacted statute, since ostensibly the latter more directly reflects public
values. Conversely, consider that although Steed clearly violated Utah’s anti-bigamy statute,
local prosecutors chose not to bring criminal charges against him, deciding instead to rely on the
state supreme court to affirm the state Judicial Conduct Commission’s recommendation that
Steed be removed from the bench. Public feeling about Steed’s departure from the bench

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62 See, e.g., Rosen, supra note 17 at 13-14. Insofar as this anecdotal impression is accurate, to expect judges to
comply strictly and fully with the law as writ – whether the Constitution, federal and state laws, or model rules of
judicial conduct – is implicitly to affirm the transcendent role of the judiciary in our democracy. Yet even so
straightforward a component of judicial legitimacy as legal compliance is not seamless as to either aspect of the
problem I posit, vagueness and indeterminacy.

63 For purposes of this discussion, I will not specifically address the fact that, presumably, all judges and elected
officials take an oath to uphold the law. Were this not a universal requirement of members of all three branches of
government, it would make sense to my discussion to analyze that distinction.

64 Thomson, “Justice May Be Disbarred,” supra note x (noting that “laws against bigamy and, by extension,
polygamy, have rarely been enforced [in Utah] for the past 50 years”). The fact that “neither the Utah attorney
general nor the Washington County attorney chose to prosecute Steed” (id.) reflects the cultural dilemma faced by
prosecutors in a state dominated by one religion (Mormonism) with a rich and controversial history of polygamy.
See, e.g., Jan Shipp, Mormonism: The Story of a New Religious Tradition (1987); Van Wagoner, Mormon
Polygamy: A History, supra note x; Armand L. Mauss, “Assimilation and Ambivalence: The Mormon Reaction to
Americanization,” 22 DIALOGUE: A J. OF MORMON THOUGHT 30 (1989); Sarah Barringer Gordon, The Mormon
Question: Polygamy and Constitutional Conflict in Nineteenth Century America (2002); Jon Krakauer, Under the
would depend on several factors, including the perceived gravity of a judge’s clearly breaking a law and the more relative, negotiable legitimacy of an ethics disciplinary action versus a criminal prosecution.

More complex still, Hunter appears to have violated no specific positive law about dealing with criminal defendants. Thus we must assess Hunter’s compliance under more ambiguous, open-ended laws, such as the Fourth and Fifth Amendments of the Constitution and the “appearance of impropriety” standard expressed in 28 U.S.C.A. § 455. Except in settled areas of clear precedent, these laws are more difficult to interpret and apply to the facts than, say, a law against shoplifting. Much of this ambiguity stems from the greater factual complexity of constitutional conflicts or accusations of the appearance of judicial impropriety than of simple criminal questions.

As this discussion suggests, analyzing judicial compliance alone is not always a straightforward matter, and probing the relationship between judicial compliance and judicial legitimacy is more complex still, because legitimacy depends on more than mere compliance; legality and legitimacy are not coterminous. Beyond this threshold ambiguity, other factors further complicate and add nuance to any assessment of judicial compliance as a building block of judicial legitimacy.

First, for example, we must distinguish between a judge’s professional conduct that violates the law, such as when a judge refuses to adhere to congressionally mandated federal sentencing guidelines, and a judge’s personal conduct that violates the law, such as when a judge exceeds the speed limit while driving. We see a rough parallel in the difference between Admudson’s abuse of his judicial position in misappropriating a trustee’s funds as compared to

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Wachtler’s personal (and ultimately criminal) vendetta against his former lover. More precisely, we see this distinction when comparing Moore’s refusal to remove the Ten Commandments monument, an act of non-compliance made in his capacity as Chief Justice of the Alabama Supreme Court, and Steed’s clear violation of Utah’s anti-bigamy statute, an ongoing crime that he continued to commit outside of his judicial role.65

Both kinds of non-compliance present challenges to the judge’s legitimacy, but in importantly different ways. If a judge refuses to adhere to federal sentencing guidelines in, say, imposing a sentence on a convicted drug dealer, then the public will rightfully conclude that the judge is unwilling to uphold her oath to faithfully *administer* the laws of the land; if a judge refuses to drive within the established speed limit, then the public will perceive that the judge is unwilling to uphold her oath to faithfully *obey* the laws of the land. Allowing for inevitable differences in the degree to which various communities that constitute the public may interpret these two actions to be judicially illegitimate, in any event the first situation exemplifies a kind of professional misconduct; the second, a personal exercise of illegal behavior, though both are examples of a judge’s non-compliance with the law.

Next, *why* a judge chooses illegal behavior may well affect public perception of a judge’s non-compliance. For instance, when a judge refuses to impose a rigid but congressionally mandated prison sentence because the judge believes the sentence to be significantly

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65 Again, Canon 2 makes clear that judges are to maintain all standards of judicial conduct, which would include compliance, in both their personal and professional lives, *supra* note 32. But because the purpose of this article is to probe components and factors that collectively substantiate the Model Code’s broader provisions, I emphasize this and other distinctions. And of course these distinctions are integral to my argument that the Code’s broad standards are not nearly specific enough to provide sufficient interpretive traction for purposes of assessing judicial legitimacy. See also Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, *supra* note 28. But see also Cynthia Gray, “Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility,” 28 U. ARK. LITTLE ROCK L. REV. 63, 65-66 (2005) (arguing that “the [appearance of impropriety] standard is not too vague to follow and . . . given their power and prestige, requiring judges to consider the implications of their conduct for public confidence in the judiciary is not too much to ask and, indeed, is a responsibility most judges readily assume”); Kozinski, “The Appearance of Impropriety,” *infra* note 95.
disproportionate to the crime committed and thus not in the interests of justice, then the public may perceive that the judge is engaging in a kind of civil disobedience on moral grounds – non-compliance of the sort that many people may tolerate or even respect, especially given the moral legitimacy that history has conferred on noble law-breakers such as Thoreau, Gandhi, and Martin Luther King, Jr. Steed violated criminal law and both Steed and Moore defied judicial ethics standards in order to serve their own religious principles; some parts of the public (the small fundamentalist polygamist part in Steed’s case; a majority of Americans in Moore’s) would consider the two judges’ civil disobedience admirable.

Still, it is arguably more problematic for a judge to engage in civil disobedience, however noble the cause, than it is for a social or religious activist to do so, largely because the latter ostensibly serves a cause higher than the law of the state, while the judge, while privately entitled to her personal non-legal ideals and convictions, must nonetheless make compliance with the law, a component of judicial legitimacy, her primary loyalty. Thus judicial legitimacy is not identical to moral legitimacy: if a judge behaves morally but illegally, the judge’s legitimacy as a judge, whose job it is to both exemplify and evaluate the legality of human conduct, is undermined, notwithstanding the fact that the judge’s conduct may be otherwise morally laudable. This general distinction becomes particularly clear from the perspective of what is perhaps its most challenging exception – that a judge’s moral legitimacy is itself a function of the

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66 Supra note 56.
67 In affirming the Utah Judicial Conduct Commission’s recommendation that Judge Steed be removed from the bench, the Utah Supreme Court stated:

Civil disobedience carries consequences for a judge that may not be applicable to other citizens. The dignity and respect accorded the judiciary is a necessary element of the rule of law. When the law is violated or ignored by those charged by society with the fair and impartial enforcement of the law, the stability of our society is placed at undue risk.

judge’s correct conduct as a judge, in which case the judge’s moral and judicial legitimacy are in fact one and the same. 68

Notwithstanding these important complicating factors, as a general matter a judge’s non-compliance with the law will be perceived as an illegitimate act, just as, conversely, a judge’s compliance with the law typically will serve to enhance the judge’s judicial legitimacy. But as I have suggested (and as the complicating situations described above illustrate), even this most straightforward basis for judicial legitimacy suffers from the dual problem of vagueness and indeterminacy.

As I have mentioned, two kinds of judicial non-compliance are administrative disobedience (e.g., a judge’s not following mandated federal sentencing guidelines) and general legal disobedience (e.g., a judge’s exceeding the speed limit while driving). We might characterize these two kinds of outright non-compliance as explicitly abusing judicial power or authority – judicially not complying with the law – and simply failing to live by standards required of the general public. Additionally, I have suggested that in the eyes of the public, there may be important moral differences between a judge’s breaking the law for selfish or malicious reasons and a judge’s breaking the law because of personal conscience. Thus we have at least two axes of evaluation of the morality of a judge’s illegal conduct: one axis determining whether the illegal conduct is judicial or personal conduct; the other axis determining whether the illegal

68 This conflation of two kinds of legitimacy is closely analogous to the argument, commonly put forth in discussions of legal ethics, that attorneys who represent their clients aggressively but within the rules of professional conduct are acting morally, because our adversarial system yields the greatest justice for the most people when every attorney plays her role as a zealous advocate. In this “role morality” view, the morality of the individual attorney is based on the morality of the larger system in which the attorney properly plays her part, despite public distaste for the idea that attorneys act as hired guns, and even though other moral considerations may have to be sacrificed. See, e.g., Alan Donagan, Justifying Legal Practice in the Adversary System, in The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics 130 (David Luban ed., 1984).
conduct is morally indefensible or arguably morally justifiable.\textsuperscript{69} I mentioned earlier that a matrix is a useful metaphor for identifying and organizing different aspects and problems of judicial legitimacy. To illustrate that concept in partial form, consider how several of the judicial narratives detailed above are situated on the matrix of non-compliance mapped below:

<table>
<thead>
<tr>
<th>Non-Compliance Without Moral Justification</th>
<th>Non-Compliance With Moral Justification</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Judicial Non-Compliance</strong></td>
<td></td>
</tr>
<tr>
<td>Judge Roland Admundson:</td>
<td>Judge Roy Moore:</td>
</tr>
<tr>
<td>Abusing judicial power by stealing funds from a vulnerable person’s trust fund and spending the money on personal goods</td>
<td>Refusing to remove a stone replica of the Ten Commandments from his courthouse because of religious convictions about America’s Christian foundations.</td>
</tr>
<tr>
<td><strong>Personal Non-Compliance</strong></td>
<td></td>
</tr>
<tr>
<td>Judge Sol Wachtler:</td>
<td>Judge Walter Steed:</td>
</tr>
<tr>
<td>Harassing a former lover</td>
<td>Refusing to stop practicing polygamy because of personal religious convictions</td>
</tr>
</tbody>
</table>

Of these four categories of judicial non-compliance, Judge Hunter’s contested approach to releasing criminal defendants belongs under “Judicial Non-Compliance With Moral Justification,” in that Hunter’s controversial conduct was judicial rather than personal and was driven by Hunter’s moral convictions about the representation and treatment of prisoners.

Judges Admundson and Wachtler’s type of non-compliance would surely be condemned by the public (as the prosecutors in those judges’ trials rightly gambled) as abuses of judicial

\textsuperscript{69} This analysis applies only to non-compliance defined as illegal conduct; obviously there are many instances of judicial conduct that could be argued to violate non-legal (or at least non-binding legal) norms and standards of ethical behavior. One of the difficulties in evaluating Judge Hunter’s conduct is that it seems to fall on this border: one could argue that it is strictly illegal because it violates the “appearance of impropriety” standard of 28 U.S.C.A. § 455; that it is possibly illegal because it violates Canon 2 of the Model Code of Judicial Conduct, which, while not binding law, is a source of legal authority; or that it is legal, but possibly unethical under the standards of the Model Code or the norms of public sentiment.
power and would thus unequivocally undermine judicial legitimacy. The misconduct of Admundson and Wachtler, which included violations of the law driven by lust, revenge, and greed, could be considered a kind of “external” non-compliance – external to arguably acceptable public values or beliefs and thus not viable in any sense as bases for judicial legitimacy. It is useful to think of such cases of external non-compliance as two-dimensional, in the sense that they are morally binary, easily evaluated for their essential wrongness, and thus unequivocal detractors as to judicial legitimacy.

By comparison, Judges Moore and Steed’s species of non-compliance is more complex relative to public sentiment: both Moore’s Christian militancy and Steed’s open practice of polygamy are strongly if not overwhelmingly supported locally, as the judges’ communities share their religious values and thus admire them for their civil disobedience. In at least this local sense, then (and well beyond the local in Moore’s case, since devout Christian America extends well beyond Alabama’s state lines), the judges’ outright illegal conduct probably did not undermine, and possibly enriched, their judicial legitimacy within their geographic and culturally interpretive communities. Here we see a kind of “internal” non-compliance: legal transgression motivated by personal religious conviction, a quality that in itself many people admire and thus internal in the sense that such non-compliance reflects basic personal values that are enmeshed within the larger moral matrix of most Americans, however differently each person’s matrix may be configured. Extending my spatial metaphor representing various kinds of non-compliance, it is useful to think of cases of internal non-compliance as morally three-

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70 Of course, even some fervent moral or religious supporters of Moore and Steed probably feel some ambivalence about their injudicious actions, feeling loyalty to personal religious values in tension with loyalty to their general respect for the rule of law, a loyalty that, as both Rosen and Tyler remind us, runs deep in the American character. This supports my point that rich indeterminacy (here in the form of moral ambiguity within and between interpretive communities) characterizes the components of judicial legitimacy – the rule of law, in this instance.

71 This general assumption is, however, limited by any number of exceptions that run counter to mainstream American values, such as the personal convictions of Satanists, atheists, and so on.
dimensional – complex and ambiguous regarding values and loyalties, both personal and communal.

Justice Scalia’s acts of non-compliance, to the extent that they qualify as such, represent a kind of middle ground on the spectrum of judicial legitimacy-as-impacted-by-judicial-non-compliance that I have sketched in this discussion. It is worth noting that Scalia’s alleged violations of federal statutory and judicial ethics rules have to do with the highly ambiguous, contested notion of “the appearance of impropriety,” a concept that lies at the heart of judicial ethics and is especially susceptible of diverse linguistic and cultural community interpretations – though one might argue that this particular ethical parameter is the most directly concerned with public perception of the character of judges, and thus is most relevant to the idea of judicial legitimacy.

I have explored the conceptual contours and interpretive complexities of the component of compliance in order to demonstrate the difficulty of defining satisfactorily even the most straightforward of the three components of judicial legitimacy that I have identified. The other components, impartiality and appearance of impropriety, are even more difficult to interpret cleanly, our intuitions about them notwithstanding. Rather than anatomize these components as I have compliance, I will explore them in the context of important past and present debates about their meaning and value.

ii. Impartiality

The impartiality component of judicial legitimacy is especially difficult to define as a standard, in part because, as with the appearance of impropriety, it is defined in terms of what judges should not do. Moreover, impartiality is a more amorphous ideal than compliance; most claims of impartiality are debatable, while many claims of non-compliance are straightforward.
As a way of substantiating the ideal of impartiality in a familiar context, I want to discuss briefly the difficulty of interpreting and applying the kindred ideal of neutrality, using Herbert Wechsler’s famous argument for comparison. Although neutrality has been debated more in the realm of judicial interpretation than judicial ethics, I think the analogy is apt, because both a judge’s impartiality in the ethics context and his neutrality in the constitutional interpretation context inform our sense of his legitimacy.

Wechsler initiated a debate about the promise and possibility of judicial neutrality in his provocative 1959 article Toward Neutral Principles of Constitutional Law. From the start, the seminal scholarly dialectic over Wechsler’s argument for neutral principles was driven by the critique that neutrality was simply too vague to provide meaningful traction for judges attempting to find stable principles of constitutional interpretation. Consider, for example, Arthur Miller and Ronald Howell’s early critique of Wechsler’s argument:

[Neutrality,] if it means anything, can only refer to the thought processes of identifiable human beings. Principles cannot be neutral or biased or prejudiced or impersonal – obviously. The choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives, if given empirical reference.

Wechsler himself had largely avoided the formidable task of defining what constituted neutral principles, though in one instance he responded to his critics with a caveat “that he had no intention of denying that constitutional provisions protected certain values.”

Wechsler’s point was that those values should

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75 Id. at 606.
be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim. So too, when there is conflict among values having constitutional protection . . . I argue that the principle of resolution must be neutral in a comparable sense . . . . Issues of federalism, for example, such as those involved in the interpretation of the commerce clause, may not be made to turn on the material interest that is affected, be it that of labor or of management, producers or consumers, or whatever other faction is at bar.\textsuperscript{76}

Wechsler’s response reflects a kind of amorphous truism of judicial interpretation, his labor-management example notwithstanding. That is, few if any judges would deny that they hew to the ideal of neutrality generally, but neither would most deny that, for better or worse, values play an indisputable role in adjudication.

As Walter Murphy and Herman Pritchett point out,

Wechsler’s formula finds heady support in the rhetoric of judicial opinions. All judges like to think themselves neutral between the parties to a case, though few would be so naïve as to claim neutrality between those values they see the law as protecting and those they think it condemns. Yet . . . there is no doubt that judges, while speaking Wechsler’s script, have often acted according to Miller and Howell’s scenario. To seek is not always to find.\textsuperscript{77}

Exactly where a particular judge resides on the continuum running from the “romantic appeal”\textsuperscript{78} of absolute judicial neutrality to the conviction that courts are utterly political\textsuperscript{79} (“naked power organs,” in Wechsler’s phrase\textsuperscript{80}) is difficult, if not impossible, to know. But in the end, precisely because of the romantic appeal of judging – and being seen to judge – neutrally, many judges tend to evade “facing how determinations of this kind [political and value-driven] can be asserted to have any legal quality.”\textsuperscript{81} And Wechsler’s famous answer, for all its debated

\textsuperscript{76} Id. at 606-07 (quoting Herbert Wechsler, \textit{Principles, Politics, and Fundamental Law} xiii-xiv (1961).
\textsuperscript{77} Id. at 607.
\textsuperscript{78} Id. at 606.
\textsuperscript{79} Id. at 606.
\textsuperscript{80} Of course, the idea that judges and courts, and more generally the law, are to some degree political is arguably the primary theme that has characterized Legal Realism and its progeny, such as Critical Legal Studies, feminist legal theory, Critical Race Theory, and postmodern legal theory. \textit{See generally} David Kairys, ed., \textit{The Politics of Law: A Progressive Critique} (rev. ed. 1990).
\textsuperscript{81} Wechsler, \textit{Toward Neutral Principles}, supra note 72 at 1.
\textsuperscript{81} Id.
limitations, is useful in returning us to the problem of indeterminacy in deciding what a principle is or means: “[t]he answer, I suggest, inheres primarily in that . . . [judges] are – or are obliged to be – entirely principled.”

This brief discussion of the Wechslerian neutrality debate illustrates several points that are closely related to the difficulty of interpreting the ideal of impartiality in the context of judicial ethics. First, Wechsler’s claim for the possibility of neutral principles met immediately with charges of vagueness and indeterminacy. As Murphy and Pritchett observed, all judges embrace the vague ideal of being neutral, a great virtue generally articulated in abstract form. Yet as with impartiality, neutrality, notwithstanding its tremendous appeal as an ideal, remains in fact in the eye of the beholder, and it behooves us to accept this reality and move to the more useful task of trying to refine and situate the meaning(s) of the ideal in the contexts of specific community and cultural situations. This does not take away from the value of the ideal; rather, it more genuinely respects that ideal by attempting to give it real meaning rather than lofty but relatively unusable appeal.

Second, and especially relevant to my argument for the factual grounding and context-sensitivity of community standards, Wechsler’s argument lacked factual context, remaining a seductive abstraction. To be fair, Wechsler does argue that “when there is conflict among values having constitutional protection . . . I argue that the principle of resolution must be neutral in a

\[\text{82 Id. (emphasis mine).}\]
\[\text{83 Murphy and Pritchett, Courses, Judges, & Politics, supra note 74 at 606.}\]
\[\text{84 See Gregory C. Pingree, “Afterword: Toward Stable Principles and Useful Hegemonies,” 78 Chi.-Kent L. Rev. 807, 808 fn. 3. I address this point squarely in that discussion:}\]

To view skeptically the dogma of pure neutrality is crucially different from recognizing, relying on, even embracing the ideal of neutrality (along with other jurisprudential ideals such as objectivity, truth finding, etc.) as a necessary fiction for purposes of achieving a social order that is as just, fair, and democratic as possible. Vital to consequential legal analysis, it seems to me, is the quality of one’s self-consciousness about this difference . . .
comparable sense." But Wechsler, much like the Model Code, at best offers generic hypotheticals, not actual conflicts within actual cultural communities, to buttress his standard. I will have more to say on this point when I discuss the promise of community standards in Section V.

And third, Wechsler formulated a proxy for judicial legitimacy – “principledness” – that, for all of its intuitive appeal and jurisprudential longevity, serves to defer the hard question of what exactly judicial legitimacy means – or can mean – to the public. What is it to be principled? Doesn’t this term, both grammatically and conceptually, require an object – i.e., principled about what? Similarly, in defining (and only implicitly at that) judicial legitimacy, the Model Code offers general ideals but little in the way of concrete understanding, exhorting judges to act in ways that promote “[p]ublic confidence in the judiciary” and “[m]aintain[] the prestige of judicial office . . ..” Thus I view Wechsler’s primary achievement as managing to reframe and thus defer the question he raises – are neutral principles possible and identifiable? – in so sophisticated and engaging a way that a sense of interpretive perspective, if not grounding, seems to emerge. But as many legal scholars have since wondered, what grounding did Wechsler really offer? As I shall argue in the next section, a more concretely developed approach to community standards is one step toward making good on the promise of interpretive traction that Wechsler offers.

iii. Avoiding the Appearance of Impropriety

As I have suggested, the appearance of impropriety standard is the great catch-all standard among many catch-all standards in the regime of legal ethics. This makes sense in light

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85 Supra note 76.
86 Id.
of the centrality of judicial legitimacy within the judicial ethics enterprise, for the appearance of 
impropriety standard concerns itself entirely with what the public perceives about judges. Thus 
it should not be surprising that this component of judicial legitimacy suffers more than any other 
from problems of vagueness, indeterminacy, and the public temptation to simply trust general 
intuitions about what it means for a judge to behave properly.

Of course, I am not alone in arguing the difficulty of getting interpretive traction as to this 
component of judicial legitimacy. Here I want to consider a current example from the eminent 
legal ethicist Ronald Rotunda. Although Rotunda does not focus expressly on the issue of 
judicial legitimacy, his concern about the ease with which the appearance of impropriety 
standard can be abused because of its vagueness and indeterminacy certainly implies a deep 
interest in how the public perceives judges. Thus his perspective will help clarify my argument, 
both by comparison and distinction.

Rotunda recently has written on the problem of the indeterminacy of the language of the 
Model Code:

We sometimes think, loosely, that ethics is good and that therefore more is 
better than less. But more is not better than less, if the “more” exacts higher 
costs, measured in terms of vague rules that impose unnecessary and excessive 
burdens. Overly-vague ethics rules impose costs on the judicial system and the 
litigants,\(^{89}\) which we should consider when determining whether to impose ill-
defined and indefinite ethics prohibitions on judges.\(^{90}\)

Rotunda urges vigilance about the dangers of vagueness in the language of the Model Code, 
especially in the Code’s open-ended articulation of the broad appearance of impropriety 
standard. In Rotunda’s view, such a generically expressed but central standard invites from 
many quarters excessive, unfair accusations against judges, accusations that damage judges’

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\(^{89}\) Rotunda, Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code, supra note 28 at 102 (citing, \textit{inter alia}, Simonson v. General Motors Corp., 425 F. Supp. 574, 578 (E.D. Pa. 1976) (discussing a judicial obligation not to recuse without valid reason because of the burden such recusal places on fellow judges).

\(^{90}\) \textit{Id.}
reputations and open them to all manner of charges that, for the invocation of the general phrase “appearance of impropriety,” carry the feel of legitimacy. In linking the vagueness of the appearance of impropriety standard to the broad phenomenon of attacks on judges’ character (from the bar, from litigants, from the media, and from political factions of the public), Rotunda’s argument is consonant with mine: he is especially concerned with dynamics of public perception of judges and rightly identifies the appearance of impropriety standard as being susceptible of great abuse and thus potentially very dangerous to judicial legitimacy.

That is, Rotunda argues that vague, imprecise standards of judicial conduct enable disgruntled political voices to attack judges in ways that undermine judicial legitimacy:

Today, any lawyer or member of the media can flippantly accuse a judge of violating “the appearance of impropriety” in either his or her private or official capacity because the title of Canon 2 of the ABA Model Code of Judicial Conduct boldly tell[s] us that the judge must avoid such appearances.

Rotunda illustrates his point by drawing a useful distinction between the amorphous appearance of impropriety standard and the equal protection doctrine. He observes that “[w]hat is true of equal protection is not true of judicial ethics” in that the equal protection doctrine can legitimately be applied broadly because, even though “[a]ll laws make distinctions and so the lawyer can always allege that the distinction violated equal protection,” “[t]he Court responded to the problem by defining equal protection with care, and creating types of equal protection.”

Thus Rotunda argues that the appearance of impropriety standard ought to be a doctrine made up of specific rules and categories of conduct, which would give the judicial ethics system concreteness and traction in order to deal fairly and precisely with diverse questions of judicial misconduct – questions that under the current regime fit indiscriminately under the floppy

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91 Id.
92 Id. at 103.
93 Id.
umbrella of “appearance of impropriety.” Rotunda’s critique of the appearance of impropriety standard of the Model Code comes in the wake of the ABA’s decision, after much deliberation and despite great concern about the embattled condition of the judiciary on the public stage, not to make the standard any more specific.

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, appointed in 2003, focused on the objective of introducing “explicit rules as benchmarks for conduct, in place of general statements either admonishing against forms of misconduct or exhorting judges to behave in certain ways.” The Commission’s proposals, presented for consideration in February 2007 to the ABA House of Delegates, were “intended to provide clear guidance for judges regarding their professional and personal conduct and to assure the public that effective standards exist to regulate that conduct.” However, the proposals met with “[a] flurry of controversy over the appearance-of-impropriety standard,” which “threatened to derail the project just one week before the delegates met.” Approval of the entire revised Code “appeared in doubt . . . until proponents agreed to a last-minute amendment preserving from the previous code an enforceable standard directing judges to avoid conduct that has the appearance

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94 Id. at 103-108. Rotunda’s offers an especially useful metaphor to characterize the current situation:

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.

95 See notes 13-16, supra.
97 Id.
of impropriety”\textsuperscript{99} that is, a general, hortatory standard, rather than the concrete rule that the Joint Commission had originally envisioned and drafted.

It is worth noting that, over the seemingly cogent arguments of several proponents of the new, more specific standard,\textsuperscript{100} on February 6, 2007, “the National Conference of Chief Justices . . . voted to oppose the commission’s report unless the appearance-of-impropriety language was returned to its \textit{enforceable} status.”\textsuperscript{101} This dialectic raises crucial questions about the relationship between appearance of impropriety and judicial legitimacy – and how both judges and the general public conceive of that relationship. Beyond the standard argument for precedent and tradition, for example, former ABA president Michael S. Greco argued that to delete the [old] provision – over the clear objection of the Conference of Chief Justices – would send the wrong signal to the public. Many groups work under standards of conduct that are similarly imprecise, he said, mentioning prohibitions against conduct “prejudicial to the administration of justice” or “unbecoming an officer.”\textsuperscript{102}

What exactly the “wrong” message would be is unclear from Greco’s statement, although it seems to suggest that a shift from general exhortation to specific requirements would imply that somehow judges’ usual conduct needs to be reined in. As I have argued, the fear of facing realistically the limits – and virtues – of general ideals is the posture most likely to entrench the problems of vagueness and indeterminacy that I object to.\textsuperscript{103} Why not a more affirmative

\textsuperscript{99} \textit{Id.}

\textsuperscript{100} Representing the Association of Professional Responsibility Lawyers, Ronald Minkoff of New York argued that eventually the appearance-of-impropriety standard would be eliminated from the code so that judges will be protected against vague standards. “A well-defined set of rules will be the wave of the future,” he said.

Joining Minkoff in opposition [to returning to the prevailing, broad appearance-of-impropriety rule], Lawrence J. Fox of Pennsylvania asked what the appearance of impropriety means, adding, “It’s too indefinite to be a standard for discipline.” \textit{Id.}

\textsuperscript{101} \textit{Id.} (emphasis mine).

\textsuperscript{102} \textit{Id.}

\textsuperscript{103} So does Rotunda, \textit{supra} note 89.
practical approach to tackling the challenge of interpretation judicial ethics standards, rather than the reactionary, defensive posture that seems to prevail among both judges and the ABA?

Invoking what seems a condescending comparison of judicial to public understanding of the notion of appearance of impropriety, Laurie D. Zelon, “a California court of appeal justice as well as a member of the ABA Board of Governors, has argued that judges understand what appearance of impropriety means. ‘Lawyers judge by outcomes; the public by whether they were treated fairly,’ she stated.”104

Judge Zelon’s remark is resonant of an argument made by Judge Alex Kozinski of the United States Court of Appeals for the Ninth Circuit. Addressing the appearance of impropriety standard, Kozinski effectively concludes that we simply have to trust judges to do what’s right:

I know there’s a growing tendency to distrust judges – to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges’ private lives – all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we’d all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life – obligations that each judge has the unflagging responsibility to police for himself.105

Kozinski’s candor is admirable, and clearly he shares Rotunda’s concern that general rules concerning judicial ethics pose risks of abuse, in Kozinski’s view risks of intrusion into judges’ privacy. Yet more relevant to my argument is Kozinski’s implicit suggestion that “a more clear-cut understanding” of ideal-standards such as impartiality is preferable to more rules. In his way, Kozinski seems to be gesturing (perhaps unwittingly) toward the notion that the vague intuitive standards to which we hold judges would be more meaningful were they more “clear-cut,” a state

104 Id. This seems yet another “I know it when I see it” position on a component of judicial legitimacy.
of affairs that would be enabled by a better understanding of the values and circumstances of the particular community in which the judge serves. Developing more concrete standards would, Kozinski seems to imply, would at least give judges more to stand on than “you’ll have to trust us” when questions of judicial legitimacy arise.

V. The Promise of Community Values and Narratives in Defining Judicial Legitimacy

Thus far, I have focused on the difficulty of defining and understanding judicial legitimacy, which in large part turns on the difficulty of interpreting clearly and concretely several key components of judicial legitimacy – compliance, impartiality, and appearance of impropriety. I have suggested that the vagueness and indeterminacy that characterize our attempts to achieve interpretive traction and broad consensus about the meaning of these terms, individually and collectively, contribute significantly to the cultural symptoms of these interpretive difficulties – both the public’s reliance on unexamined, intuitive notions of judicial legitimacy and the related phenomenon of polarized, ideologically mediated politicization of the judiciary.

Throughout my analysis, I have emphasized the slippery circularity (and the consequent vulnerability to facile political manipulation) of central judicial ethics concepts like impartiality and the appearance of impropriety. In so doing, I have suggested that while there is no way to completely or reliably “fix” the inherent indeterminacy of public discourse generally, there is the possibility of giving some greater degree of determinate substance and grounding to these standards by which we judge our judges. My belief is based on the assumption that the better we understand and account for the cultural values specific to the particular interpretive communities in which judges serve, the greater is our capacity to achieve some kind of provisional, working
consensus about the meaning of the unifying concept of judicial legitimacy. To put it perhaps more provocatively, by thinking relatively, we can achieve at least a provisional kind of universality.

Specifically, then, one important step toward a coherent public sense of judicial legitimacy is a coherent understanding of the particular values and concerns of each community, each piece of that larger public, for in our increasingly pluralistic democracy there is no coherence of values sufficient to produce reliable consensus on what makes a particular judge, under particular circumstances, legitimate. Indeed, the further we move beyond any particular cultural community – defined by some combination of geography, religion, race, ethnicity, socio-economic status, and so on – the more diffuse becomes our vision of judicial legitimacy.

Therefore it is imperative that before concluding whether the judge in question has complied with the law, not acted impartially, or failed to avoid the appearance of impropriety, and – above all – before determining whether the judge is to us, as member of the public, legitimate, we (1) scrutinize the facts and the cultural context of each act of alleged judicial misconduct, (2) we consider carefully the difficulties inherent in interpretation as a necessary but culturally mediated process, and (3) we develop some useful, realistic sense of the notion of community. I will briefly discuss each of these challenges before putting them in real context by returning to the case of Judge Hunter.

i. Facts

As with Wechsler and neutrality-impartiality, here I want to resuscitate a classic analysis - and a deceptively simple exercise – of the relationship between facts and law. In 1930, Arthur Goodhart wrote an influential essay106 about how to ascertain the principle of a case for purposes of following judicial precedent, an exercise foundational to both judicial decision-

making and legal education. What is especially relevant here is Goodhart’s deductive validation of the essential role of facts in the judicial process and the implication that certain facts matter more than others. As part of my argument for a greater legal awareness of the facts of particular interpretive communities, I think it worth including Goodhart’s insightful analysis here, for it illuminates some of the interpretive difficulties that tend to prevent deep understanding of the importance of facts in understanding how people assess judicial legitimacy.

Many jurists and scholars have tried to elucidate compact, universal principles for deriving from a judicial opinion the singular principle of that case for purposes of guiding judges in future cases. Codifying the basis of this interpretive enterprise, sometimes called the ratio decidendi, has proved ever difficult. In attempting to anatomize precisely the best steps for discerning the principle of a case, Goodhart set forth five rules: (1) The principle of the case is not found in the reasons given in the opinion. (2) The principle is not found in the rule of law set forth in the opinion. (3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge’s decision. (4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them. (5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion.

It is striking that, at least from the perspective of the average reader, Goodhart’s first two interpretive rules for extracting the principle of a case exclude the two most obvious sources of that principle. According to Goodhart, the principle of the case is to be found neither in a

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107 Given the context and purpose of his analysis, Goodhart properly focuses on material facts, while I argue for a greater sensitivity to cultural facts. But the difference is not a problematic one, and is actually useful to my argument, because my concern, like Goodhart’s, is that we attend to the facts that matter in any given situation — such as the facts of certain racial and socio-economic communities in New Orleans in the wake of a devastating storm and an inadequate system of criminal representation.

108 Id.
judge’s reasons explaining her decision nor in her expression of the applicable rule of law to be applied in reaching that decision. If this is so, then perforce Goodhart must consider the language of a judge’s opinion a somewhat unreliable indicator of the judge’s intended meaning, making Goodhart a prescient advocate of two tenets of postmodern literary and legal theory: the assumption that language is inherently indeterminate, and the belief that meaning is constructed by and within specific interpretive communities. 109 It is worth noting that these two notions effectively represent the two aspects of the problem I ascribe to the challenge of defining judicial legitimacy – vagueness and indeterminacy.

Moreover, Goodhart’s first two interpretive rules imply that what he sees as abstract formulations – a judge’s given reasons for her decision and a legal rule that the judge believes is most relevant to the facts of the case and thus most appropriate for resolving the dispute therein – cannot alone yield the principle of the case. Goodhart’s logic suggests that the facts of the case are the critical ingredient for understanding the case’s principle. Yet Goodhart’s third step limits this inference, asserting that “all of the ascertainable facts of the case,” even when read in light of the judge’s final decision, will not reveal 110 the principle of the case, which seems to become more mysterious with each step. 111

In his fourth rule, however, Goodhart finally states his key point: that only by scrutinizing the relationship between the judge’s decision and the material facts of the case (ironically,  

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109 See generally Stanley Fish, Is There A Text In This Class? The Authority of Interpretive Communities (1978) (establishing the notion of interpretive communities and the “Reader-Response” school of literary criticism).

110 Here I use the term “reveal” to suggest that, notwithstanding his arguably postmodern reading assumptions, Goodhart seems to hold the view that the principle of a case is a buried treasure waiting to be discovered through correct, precise digging, rather than a creation of the reader’s interpretive apparatus. I conclude this because of Goodhart’s search-for-the-holy-grail style of characterizing the problem of finding the principle of a case.

111 I am reminded of an insight from the contemporary playwright David Mamet. Mamet refers to the “through-line” of a play – the real message, the truly intended subtext beneath the highly mediated written text: what we mean rather than what we say. Responding to an interviewer’s observation that in Mamet’s plays “the through-line is so strong that the characters can be saying things that are very, very different from what is really being communicated in the subtext,” Mamet observed, “That’s why theatre’s a lot like life, don’t you think? No one really says what they mean, but they always mean what they mean.” David Savran, In Their Own Words: Contemporary American Playwrights 136-137 (1988).
perhaps, facts deemed material by the judge) can the reader find the principle of the case. This
precisely narrowed interpretive relationship – i.e., a carefully circumscribed set of facts tied in a
taut, direct line to a singular resolution of the case’s conflict – suggests that the reader’s
interpretive task in determining the overarching principle of a case consists of examining, with
exquisite care, the judge’s rendering of the material facts. In other words, the reader must
interpret the judge’s interpretation of what facts are material, then must gauge exactly how the
judge then frames those facts in order to construct her decision in the case. By any assessment of
this process, there are several interpretive operations at work here, such that the reader’s
provisional understanding of the judge’s intended principle of the case is, at best, a significantly
refracted representation. Again, even factoring in my own postmodern interpretive predilections,
it is hard not to notice the postmodern feel of Goodhart’s protocols of reading judicial opinions,
for Goodhart directs us to pry open the reading process to get a sense of the multiple kinds and
levels of mediation at work in the achievement of a judicial decision.

As if to reinforce my hunch, in his fifth rule Goodhart seem to foreshadow one of
postmodernism’s most salient concepts, Derrida’s notion of differance 112: Goodhart provides in
this last rule that “the principle [of the case] may depend as much on exclusion as it does on
inclusion.” 113 Thus in rules four and five Goodhart emphasizes the preeminence of the
relational nature of meaning – the powerful postmodern notion that nothing means except by
reference to something else. 114 In rule five, Goodhart applies this notion to the judge’s specific
sifting of material from non-material facts; in rule four, he embodies this notion in the

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113 Goodhart, *Determining the Ratio Decidendi*, supra note 106.
114 See Derrida, supra note 112. See also Umberto Eco, *The Role of the Reader: Exploration in the Semiotics of
requirement that the reader scrutinize the judge’s interpretation of the relationship between those carefully selected material facts and the final decision in the case.

In all of this, the rich rhetorical analysis that Goodhart compresses into his five rules is resonant of Roland Barthes’ pithy – and quite postmodern – characterization of the act of reading as the quintessential human cognitive activity: “And no doubt that is what reading is: rewriting the text of the work within the text of our lives.” 115 To move from Arthur Goodhart’s Legal Realist analysis of the fact-law relationship in determining the principle of a case to postmodern concepts of meaning and textuality 116 is not the conceptual stretch it may seem, for both perspectives (though I am hesitant to refer casually to a cluster of postmodern voices as “a perspective”) privilege, in their own way, the inductive process of close reading of facts as a prerequisite to the formulation of broader meanings. 117 This axiom of the relationship between

116 Id. at 1-49.
117 To those skeptical of postmodern perspectives on the indeterminacy of language and the instability of meaning outside specific cultural contexts, my prescription may seem no different from a “totality of the circumstances” or “case by case” basis for evaluating judicial conduct. In one sense, I would agree; both of these conventional legal tests share with my more postmodern narrative approach an emphasis on facts over abstractions, on contextual interpretation over deductive imposition of universal rules.

Yet I cannot agree that the difference is merely semantic, for in another sense semantics is all: it is within the textuality of things that we achieve meaning at all, particularly when it comes to articulating different cultural values and experiences for purposes of arriving at some common idea of what makes judges legitimate. Still, from a more conventional standpoint one might argue that my search for grounded meanings of judicial legitimacy is much like the jury’s search for the “reasonable prudent person” in a negligence action; both legitimacy and reasonableness are in the eye of the beholder but must be treated as objectively recognizable in order to make necessary decisions with actual consequences – such as the case dispositions that judges must make all the time.

Again, I think this only strengthens my point. Both reasonableness and legitimacy are, in law and the world it serves and regulates, necessary fictions. But whether we are after a workable definition of reasonableness or of legitimacy, the “necessary” – i.e., pragmatic – part these concepts requires that we consider concrete facts, individual narratives, and community values and standards in order to construct their definitions. It is not that a judge and jury cannot simply impose universal abstractions in a specific case without regard to the cultural connotations of the facts of that case; surely happens all the time, and that is largely the problem I am addressing in this article.

Rather, my point is that the meaning of the outcome of a case will carry greater legitimacy to the relevant “public” when a judge and jury have carefully considered cultural context and the community standards that reside there. Indeed, the comparison between reasonableness and legitimacy is a useful one, because both seem intuitively clear, are impossible to define out of specific context, yet are crucial to the practical operation of the law. Moreover, reasonableness is something of a token of legitimacy, since parties in, say, a negligence action will be more likely to honor the outcome (i.e., believe the disposition of the case is legitimate) if they feel confident that the judge and jury
facts and principles – such as compliance, impartiality, and avoiding the appearance of
impropriety – inexorably raises questions about the interpretation of those facts and principles.

ii. Interpretation

A crucial but somewhat implicit component – we might call this a fourth component – of
the rhetorical production of judicial legitimacy is interpretation. Given that the prerequisites
articulated in the components discussed above are functions of public perception, it is imperative
to consider how that public perception – or, more precisely, how those public perceptions –
work. What are the interpretive conditions under which the public perceives and evaluates
judicial conduct for purposes of determining legitimacy? To address this broad question, we
must acknowledge that diverse interpretive communities constitute the larger public upon whose
collective belief the general legitimacy of the judiciary rests.118

These various interpretive communities are fluid as to their identities, just as people are,
distinguishing themselves in some respects here while overlapping in other ways there,
depending on complex factors such cultural values, religious beliefs, political ideologies, social
status, race, ethnicity, gender, sexual orientation, life experience, and so on. Thus in attempting
to identify or develop precise meanings of judicial legitimacy, we must take into account the
increasingly diverse plurality of interpretive perspectives from which people and groups view
law and justice generally and courts and judges in particular.

For example, Judge Steed would likely be viewed by most of the American public as
illegitimate for both his non-compliance (violating anti-bigamy laws) and his morally troubling
personal lifestyle (having multiple wives), although there would probably more diversity of
opinion on this second point, since, say, many libertarians or same-sex marriage advocates would

118 See generally Fish, supra note 109.
sympathize with Steed’s desire to construct his family as he sees fit.\textsuperscript{119} Within Utah, the fact that many citizens’ ancestors sacrificed liberty in order to practice polygamy in nineteenth-century America as part of the mainstream Mormon religion would certainly create some sympathy for Judge Steed, if not acceptance of his lifestyle.\textsuperscript{120} And finally, the citizens of Hildale, a small, entirely fundamentalist polygamist community in southern Utah, would surely embrace Steed’s polygamous conduct and would possibly consider him especially legitimate as a judge because of his courage and religious devotion in the face of legal punishment redolent of the punishments faced by their ancestors a century ago.

As this brief example shows, interpretation, this procedural component of judicial legitimacy, is especially important because the key terms and phrases of the components of judicial legitimacy are vague and indeterminate, and thus context-sensitive. For example, given the diversity of interpretive communities as to Steed’s polygamy, what (and where) exactly is “the appearance of impropriety”? By whose notion of what is proper? Is it always clear what it means to “comply” with the law? Does it matter if compliance is different from, even in conflict with, one’s moral or ethical perspective? What is “impartiality,” what kinds of judicial behavior give the public “confidence” in that impartiality, and under what circumstances might that impartiality “reasonably be questioned”? The difficulty of answering these fundamental questions with meaningful precision represents, in the aggregate, the difficulty of articulating with meaningful precision the central idea of judicial legitimacy.

\textsuperscript{119} See, e.g., Steven Chapman, “Two’s Company; Three’s A Marriage,” SLATE.COM (June 5, 2001) (arguing that “[w]ith divorce rates high, out-of-wedlock births rampant, and most kids fated to spend at least some of their childhood in single-parent homes, the American family obviously has some serious problems. [Polygamist] Tom Green is not one of them”); Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 129 (1993) (observing that “the dominant culture” always has “rid itself” of “marginalized and violent dissenters”).

\textsuperscript{120} Of course, this could go the other way as well, since the hugely successful mainstream Mormon church has publicly rejected polygamy – and as standard policy ex-communicated polygamists – since the early 20\textsuperscript{th} century. See Mauss, “Assimilation and Ambivalence,” supra note 64.
The interpretation component of judicial legitimacy, then, is actually a problem that mediates our understanding and treatment of the other components. Indeed, while it is challenge enough to define in principled, accessible ways components of judicial legitimacy such as compliance, impartiality, and the appearance of impropriety, the component of interpretation amounts to the *process* by which we address that challenge. While the constitutive components of judicial legitimacy are explicit in the language of the Model Code and the federal statute, the component of public interpretation of judicial conduct is heavily implied therein and is essential to any and all parts of the equation of judicial legitimacy articulated in Canon 2 of the Model Code.

This hermeneutic relationship between judge and public is a complex thing, an ongoing act of collective reading structured by a rich matrix of rhetorical operations and cultural values. Thus in order to get at a precise, useful definition of judicial legitimacy, we must scrutinize the moveable parts and dynamics of this relationship: the judge (the “speaker” or “actor”); the public (the “audience” or “reader”); and the forms of discursive mediation that shape the rhetorical relationship between the two – in the media, by judges themselves, by legal scholars, legal practitioners, and the public at large.

iii. Community

The legal and literary critic James Boyd White has done much to explore what we might call the rhetoric of judicially created community – the ways in which judges create rhetorical and cultural community through the highly symbolic and practically consequential explanations that they construct to justify their decisions. As White describes it:

In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life – one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority – or another. Whether or not the process is conscious, the judge seeks to
persuade her reader not only of the rightness of the result reached and the propriety of the analysis used, but to her understanding of what the judge – and the law, the lawyer, and the citizen – are and should be, in short, to her conception of the kind of conversation that does and should constitute us. In rhetorical terms, the court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses – the lawyers, the public, and the other agencies in government. It creates by performance its own character and role and establishes a community with others. I think this is in fact the most important part of the meaning of what a court does: what it actually becomes, independently and in relation to others.121

White’s thoughtful, influential vision of the ethos – the normative community – that judges create through their opinions is, if appealing in the abstract, problematic in its rather sweeping, essentialist premises about what constitutes a community.

Indeed, various legal scholars, particularly feminist and critical race theorists, have criticized White’s analysis of how judicial discourse creates community, primarily for his tendency to generalize about a phenomenon that, by definition, requires attention to difference and nuance in terms of culture, race, gender, ethnicity, and so on. For example, Angela Harris has objected to White’s claim that the “voice” of the Declaration of Independence is “not a person’s voice, . . . but the ‘unanimous’ voice of ‘thirteen united States’ and of their ‘people’” as being essentialist:

Despite its claims, however, this voice does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silent.122

Another example of the difficulty of interpreting components of judicial legitimacy is Jeffrey Rosen’s popular book *The Most Democratic Branch*.123 Rosen argues that people’s confidence in the Supreme Court rests primarily on its reflecting popular moral sentiment, which itself, he argues, invariably includes the idea that the justices should make their decisions in a

121 JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 101-102 (Univ. of Chicago Press 1990) (emphasis added).
constitutionally principled way.124 Rosen’s analysis is singularly coherent and has much to recommend it, but I see in his analysis of the dynamics of judicial legitimacy the same flaw I identified in Wechsler’s argument for neutral principles: an absence of clear, concrete definition. Indeed, Rosen embodies what I have been working to critique in this article, namely, the notion that the public knows judicial legitimacy when it sees it.125

Indeed, Rosen’s argument rests on the assumption that the reader can clearly interpret what he means when he offers his prescription for judicial legitimacy:

judges throughout American history have tended to maintain their democratic legitimacy in practice when they practiced what might be called democratic constitutionalism; in other words, when they have deferred to the constitutional views of the country as a whole.126

What Wechsler did with “principled neutrality” Rosen does with “democratic constitutionalism”: he relies on it (heavily and often) as a proxy for what enables judicial legitimacy. I say this not because it is not possible to argue that the notion of democratic constitutionalism is the way to better understanding of judicial legitimacy,127 but rather that using this (or any) particular formulation without digging deep into its meaning in specific factual contexts does not solve the

124 Id.
125 Supra note 19.
126 Rosen, supra note 17 at 8.
127 On the contrary: Rosen’s thorough discussion of democratic constitutionalism is engaging and persuasive as far as it goes. But in my view Rosen ends up championing a circular argument:

My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible.

Id. at 13. Thus in order to answer the question “What does the public find judicially legitimate?” Rosen answers, “Just ask them.” This presumption that there exists some clear national consensus on what counts as principled in the context of democratic constitutionalism – on what counts as judicial legitimacy – suffers from the same weakness as does White’s otherwise appealing concept of community. Both fail to take on the Herculean but utterly necessary task of accounting for the diversity of cultural values within the many interpretive communities that constitute the larger public – a public that both White and Rosen presume, quite confidently, to speak for.
problems of vagueness and indeterminacy in defining judicial legitimacy, but instead simply
defers them, albeit in impressively erudite fashion.

The late postmodern pragmatist philosopher Richard Rorty articulates the concept of
community in ways that address the problems inherent in both White’s essentialist and Rosen’s
vague paradigms – ways I view as helpful to formulating more useful and meaningful definitions
and interpretations of judicial legitimacy. Rorty seems an ally of White’s in that he argues for
the practical, community-forming consequences of a writer’s discursive decisions – such as a
judge’s rhetorical, public-oriented ones.128 Indeed, Rorty suggests that in creating and
articulating the law, American judges operate, as White too suggests, as poets, whose ultimate
role it is to help us know who we are.129

Yet true to his project of justifying a coherent postmodern vision of who we are, Rorty
rejects the kind of essentialist view of shared knowledge and understanding upon which White’s
paradigm of judicial ethics rests; for Rorty, what is most important for the writer – the judge, the
poet – to countenance in her representations of the human world is not some universal set of
values or qualities. Indeed, Rorty eschews “the pre-Nietzschean [essentialist] philosopher’s
story,” in which “the particular contingencies of individual lives are unimportant”130 and “the
mistake of the poets is to waste words on idiosyncrasies, on contingencies – to tell us about
accidental appearance rather than essential reality.”131 Rather, Rorty argues for a view of
language and interpretation that not only accounts for individual human differences of
circumstance and experience, but embraces those contingencies as the stuff of genuine, authentic
representation – the closest thing to any meaningful truth that we are going to achieve.

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128 See generally Richard Rorty, Contingency, Irony, Solidarity (1989); Take Care of Freedom and Truth Will Take Care of Itself (2006).
129 Rorty, Contingency, Irony, Solidarity 26. See also Nussbaum, Poetic Justice, supra note 17 at 79-121.
131 Id.
iv. Judge Hunter Revisited

To return to the initial inquiry of this article, how do assess Judge Hunter’s conduct in seeking to release incarcerated criminal defendants because of his anger over the inadequacy of the public defense in post-Hurricane Katrina New Orleans? Stated in a way more suited to the discussion in this Section, how do get interpretive traction in discussing both the components of judicial legitimacy and the question whether Judge Hunter satisfied those components?

First, we should consider carefully the specific facts that shaped the context of this instance of possible judicial misconduct. These facts are not just physical, such as whether a courthouse was damaged by the hurricane, but more importantly cultural and political, material in the largest sense – such as who ended up in jail, why they did not receive timely legal representation, and what a judge should do in the face of such a situation. Such normatively mediated facts are more difficult to interpret than merely physical ones, but these are the facts that actually matter to the public perception of the judge and thus to the legitimacy of the judiciary. Moreover, such facts exist not isolated and discrete, but as embedded parts of larger narratives, shared by judge and public, that give context and perspective to every decision a judge makes.

What was the history of the decay of the criminal defense system in Judge Hunter’s jurisdiction? Why had there been such decay? Who, if anyone, benefited from this state of affairs? Was this situation the product of the immorality of certain kinds of people who just seem to look for trouble (one narrative explanation), or was it the product of the political and financial power of certain communities that tend to create oppression and helplessness within other communities? In what ways is our judgment of Judge Hunter informed by our affinity for one of these narratives? By paying close attention to such facts and narratives, we can develop a
more meaningful, realistic sense of whether, say, Judge Hunter complied with the law (both binding and aspirational), and whether his actions increase our faith in the judicial system.

Next, and related to the importance of facts, we must consider the interpretive complexity of the entire calculus of judicial legitimacy. For example, how and why did Judge Hunter interpret the political facts of his situation such that he decided he had to act as he did? How do we factor in the diverse levels and kinds of criticism he received for his actions? Given the facts of Judge Hunter’s situation, can we arrive at some sense of consensus about the character—however provisional and negotiated—of his choices? Certainly we, the public, have a choice about how we interpret Hunter’s actions, and if we look closely at the facts of the situation, the cultural and political realities that faced Judge Hunter, we will be less likely to impose categorical ideological interpretations (i.e., naturalized moral narratives) on questions of Hunter’s impartiality.

Rather, we will see him, as Rorty suggests, as a person on the one hand constrained, as we all are, by the contingencies of his background and experience, and on the other, a relatively autonomous actor who must take a significant portion of responsibility for his actions. Moreover, whether the judge appeared to behave properly, as vague as that standard tends to be, is nonetheless a question we can answer with greater precision if we take the time to circumspectly interpret the facts of the entire situation in these ways.

Finally, we should be mindful of both the homogeneity and heterogeneity of individual and overlapping communities—and the virtues and dangers of each. For example, it may be easier to take an essentialist view of the situation and argue that, regardless of differences in life experience and opportunity, everyone must bear the same level of responsibility for their actions in the community of law-valuing people. Or we might apply Harris’ critique of essentialist
community ideology to Judge Hunter’s situation in New Orleans: one kind of voice (primary of
the poor, black, and dispossessed) arguing that Judge Hunter’s judicial legitimacy rests on his
taking bold steps to protect those incarcerated without adequate legal representation;\textsuperscript{132} another
kind of voice (primary of the middle and upper classes, those either least affected by Katrina or
at least better able to recover from it) criticizing Judge Hunter for putting the dubious legal rights
of incarcerated criminal defendants above the public safety.\textsuperscript{133}

No clean or complete answer exists for what are ultimately problems of
interpretation that both judges and the public they serve must face. But there are better
and worse ways of approaching both the parts and the sum of so vital an issue as judicial
legitimacy. The philosopher Honi Fern Haber, in arguing for a pragmatic reframing of
our approach to vague and indeterminate ideals, offers as helpful an intellectual approach
as I have seen:

There is no view from nowhere. We can never leave all our prejudices behind
and operate from a wholly disinterested standpoint, but our prejudices become
dangerous only when they are dogmatic, kept hidden from view and not open to
discussion . . . \textsuperscript{134}

\section*{VI. Conclusion}

My general goal in having explored the hermeneutically unstable state of affairs within
three core components of the indispensable concept of judicial legitimacy is to encourage
renewed examination of these basic elements of our judicial system so that we might come to
clearer terms with the interpretive diffuseness of our national concept of judicial legitimacy, so

\textsuperscript{132} Duplessis, “Corrupt Judge Hunter in New Orleans Corrupt Court System,” \textit{supra} note 12.
\textsuperscript{133} Simmons, “New Orleans Judge Fights Poor Defense,” \textit{supra} note 10.
\textsuperscript{134} Honi Fern Haber, \textit{Beyond Postmodern Politics: Lyotard, Rorty, Foucault} 1 (1994). For an excellent discussion
that we might remember the special place of the judiciary in our democracy, and so that we might become more vigilant toward threats to the independence of our courts.

My particular argument, I believe, points helpfully – concretely – in that direction. As we have seen, although certainly there are universal rights and wrongs for judges (the easy cases), unique difficulties arise when judges behave in ways that the general public will find debatable, which the public, in reality a diversity of publics, surely will. It is in those situations that specific community values, narratives, and standards, which reflect specific cultural values and their attendant interpretive proclivities within each coherent community of minds, may be the best tools available for cultivating useful understandings of the otherwise vague and indeterminate components of judicial legitimacy and for arriving at a meaningful sense of judicial legitimacy itself.