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THE APPEARANCE OF JUSTICE

THE APPEARANCE OF JUSTICE REVISITED

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I. INTRODUCTION

In 1919, the *Journal of Criminal Law and Criminology* published an article by George Everson, titled "The Human Element in Justice."[1] In that article, Everson described an empirical research project examining variations in over 150,000 cases by forty-one New York City magistrates in their determinations of guilt and sentencing.[2] Among other conclusions, Everson identified what he called the "remarkable degree" to which the disposal of cases reflected the temperament and personality of judges.[3] Everson described the richness and complexity of the "appearance of justice" for the judges studied:

> The warm human attributes of our ministers of justice, . . . their peculiarities of temperament, their chance of prejudice, their warm openheartedness or their petty tyrannies, their leniencies or their severities are all supposed to be charmed away by the donning of judicial robes and the justice they dispense is supposed to be an abstract thing as immutable as the law of gravitation.[4]

Everson believed his findings "startling" because the "appearance of justice" seemed to revolve more around the personality of the judges examined than any legally principled approach they may employ in implementing the law.[5] Everson concluded that, regardless of

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1 George Everson, *The Human Element in Justice*, 10 J. CRIM. L. & CRIMINOLOGY 90 (1919).

2 *Id.* at 96-98.

3 *Id.* at 98.

4 *Id.* at 90.

5 *Id.* at 99. "Empirical research has shown that significant variation exists in the decisions made by courts functioning within different jurisdictions, despite similarities in court

the actual law, much of its enforcement depended solely upon the judges' particular attitudes toward the allegedly guilty party.[6]

Much has changed, of course, in the appearance and the reality of the administration of justice in the more than seventy-five years since the publication of Everson's article. Yet, much remains the same—indeed, as it has remained since the beginnings of our system of justice. This is particularly true with regard to current conceptions of "the appearance of justice,"[7] as illustrated during the discussions at the Annenberg Washington Program/Woodrow Wilson School Conference.

Judge Cordell's opening remarks at "The Appearance of Justice" Conference[8] express current conceptions and concerns:

> My view from the bench is that the public has a right to know, and must always have access to proceedings in the courtroom. . . . It is the check on judicial malfeasance . . . to make sure that the system behaves as best it can by having public accountability.[9] . . . [But] when we talk about the [current] social norms and the appearance of justice, we have got young [black] men—and Latino males—coming into a system that doesn't appear fair to them. . . . There's got to be different approaches taken.[10]

This Article explores the need for future empirical research on "the appearance of justice." In Part II, this Article gives future research a start by examining what the courts, judges, trial lawyers, and social scientists consider to be "the appearance of justice"; that is, what these diverse groups imply from history, legal precedent, and empirical research about the concept of the appearance of justice, particularly as it applies in criminal jury trials. The appearance of justice is then revisited in light of recent Supreme Court decisions that may impact, in yet unforeseen and far-reaching ways, this core concept in American society and jurisprudence.[11]

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structure, statutes, and other 'legal' factors." James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 LAW & SOC. REV. 343, 344 (1980).

6 Everson, *supra* note 1, at 99.

7 *See The Appearance of Justice: Juries, Judges and the Media* (Nov. 11, 1994) (Transcript Proceedings), co-sponsored by the Annenberg Washington Program and the Woodrow Wilson School of Public and International Affairs, Princeton University, NJ (hereinafter *Conference Proceedings*).

8 The Center of Domestic and Comparative Policy Studies of the Woodrow Wilson School of Public and International Affairs, in conjunction with the Annenberg Washington Program in Communications Policy Studies of Northwestern University, held this conference on November 11, 1995, at Princeton University. The Conference sought to foster an exchange of views on the "appearance of justice" from the perspective of attorneys, judges, jurors, academics, trial consultants, and the media.

9 *Conference Proceedings*, *supra* note 7, at 29-30.

10 *Id.* at 40-41.

11 Professors Redish and Marshall have described the appearance of justice as a core legal concept. → Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and*

In Part III of this Article, the need for future research is reexamined in light of emerging Supreme Court jurisprudence on judicial disqualification and recusal. Particular emphasis is placed on *Liteky v. United States.* Although explanation into the cases illuminates the relationship between conceptions of the appearance of justice and standards for judicial disqualification and recusal, the relationship cannot be fully understood without the help of future studies. Finally, the Article summarizes the questions posed throughout the text and suggests directions for future research.

II. "THE APPEARANCE OF JUSTICE" REVISITED

A. HISTORICAL AND LEGAL ROOTS

Historically, the concept of the appearance of justice has been closely linked with the workings of our judicial system.[12] The possibility of undesirable "appearances" and behavior by trial judges was recognized by the Supreme Court early in our history.[13] Twenty years before Everson's article, the Supreme Court, in *Starr v. United States,* commented that the manner in which a judge instructs and advises the jury can by itself have an undesirable, although sometimes permissible, influence on jury decision-making processes.[14] In *Starr,* the Court cautioned that jurors must remain the triers of fact and that the appearance of the judge's behavior must always remain "guarded" so as to leave the jury free to exercise its own judgment.[15]

During the last quarter century, judicial decisions have reinforced the public's common law right to know,[16] which has, in turn, been tied to the common law notion that "justice must satisfy the appearance of justice."[17] As recently as 1980, the Supreme Court expanded its conception of the appearance of justice to include not only the

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the Values of Procedural Due Process, 95 YALE L.J. 455, 475-81 (1986).

12 For a review of this relationship, see Peter D. Blanck, Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials,* 38 STAN. L. REV. 89, 97-101 (1985) (hereinafter *Judges' Behavior*).

13 *See, e.g.,* Carver v. Jackson, 29 U.S. (4 Pet.) 1, 4 (1830).

14 Starr v. United States, 153 U.S. 614, 626 (1894).

15 *Id.* at 625; *see also* Brown v. Walter, 62 F.2d 798, 799-800 (2d Cir. 1933) (Judge Learned Hand stated: "A judge . . . is more than a moderator . . . . Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.").

16 For an outline of reasons for such actions, see Norman Davis, Comment, *Nonparty Access to Dispositions in Florida,* 39 U. MIAMI L. REV. 157, 168-72 (1984).

17 Levine v. United States, 362 U.S. 610, 616 (1960) (quoting Offut v. United States, 348 U.S. 11, 14 (1954)). *See also* Etzel v. Rosenbloom, 189 P.2d 848, 852 (Cal. Dist. Ct. App. 1948) ("Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially." (quoting Socrates)). Judge Cordell suggested this connection during the Conference. *See Conference Proceedings, supra* note 7, at 29-30.

possibility of judicial influence, but also the general public's right to have meaningful access to the workings of the judicial system. In *Richmond Newspapers v. Virginia*, the Court held that the closing of a criminal trial to the public violated the Constitution.[18] The Court reasoned that:

> [T]he administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." . . . [W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. . . . [T]he appearance of justice can best be provided by allowing the people to observe it.[19]

The Court declared public access to the courtroom essential to the appearance of justice and critical to maintaining public confidence in the judiciary.[20]

Courts have also recognized that in a criminal jury trial due process requires the absence of actual judicial bias toward the defendant.[21] Professors Redish and Marshall have suggested that the appearance or "perception" of fairness in the courtroom is perhaps the most important or "core" value of procedural due process.[22] Redish and Marshall write that "[f]ew perceptions more severely threaten trust in the democratic process than the perception that a litigant never had a chance because of the special favors that the decider owed the other side."[23]

Due process not only requires, therefore, that trial judges be fair and impartial, but it also demands that they "satisfy the appearance of

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18 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980).

19 *Id.* at 571-72 (quoting the 1677 Concessions and Agreements of West New Jersey, *reprinted in* SOURCES OF OUR LIBERTIES 37 (Richard L. Perry ed., 1959)).

20 *See id.* at 595 (Brennan, J., concurring) ("Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice."). The Court relied in part on the writings of Jeremy Bentham, who emphasized the crucial role of disclosure in democratic societies. *Id.* at 569 (quoting 1 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827) "[I]n comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks. . . ."). *Cf.* In re School Asbestos Litig., 977 F.2d 764, 776 (3d Cir. 1992) ("The public's confidence in the judiciary, which may be irreparably harmed if a case is allowed to proceed before a judge who appears tainted," requires that "justice must satisfy the appearance of justice."). *See also Conference Proceedings, supra* note 7, at 36 (Dr. Sandys noting that the appearance of justice can be achieved best by providing access to the system).

21 *See* Blanck, *Judges' Behavior, supra* note 12, at 89-93.

22 Redish & Marshall, *supra* note 11, at 475-81.

23 *Id.* at 483; *see also In re* Murchinson, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.").

justice."[24] Simply put, a trial judge's appearance, conduct, and behavior in a criminal jury trial must never indicate to the jury that the judge believes the accused to be guilty.[25] The appearance of bias alone has served as grounds for reversal or judicial recusal, even when the judge is shown to be completely impartial.[26] Courts have found due process violations sufficient to reverse criminal convictions when a trial judge's behavior created merely the appearance of partiality.[27] Litigants have the right to argue their case fairly before the decision-maker, and thereby, as Justice Frankfurter stated, "generat[e] the feeling, so important to a popular government, that justice has been done."[28]

Judges themselves recognize the central effect of their behavior on the appearance of justice and actual fairness in the trial process.[29] "The responsibility for an atmosphere of impartiality during the course of a trial rests upon the trial judge," noted one judge.[30] And, because of the central impact of the judge's behavior in a jury trial, jurors "can be easily influenced by the slightest suggestion from the court, whether it be a nod of the head, a smile, a frown, or a spoken word."[31]

In a criminal jury trial, judges, like all human beings, develop certain beliefs about the defendant's guilt or innocence.[32] Sometimes these beliefs—often conveyed as "self-fulfilling prophecies"—are communicated by subtle, nonverbal behaviors that impermissibly influence the appearance of fairness and actual justice in the courtroom.[33]

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[24] Offutt v. United States, 348 U.S. 11, 14 (1954); *see also In re* Murchison, 349 U.S. at 136 (quoting *Offutt*) ("Justice must satisfy the appearance of justice."); Walker v. Lockhart, 726 F.2d 1238, 1249 (8th Cir.), *cert. denied*, 104 S. Ct. 2168, *cert. dismissed*, 105 S. Ct. 17 (1984); *id.* at 1251 (Arnold, J., concurring) ("If due process means anything, it means a trial before an unbiased judge or jury."); U.S. CONST. amends. V, VI, XIV; United States v. Robinson, 635 F.2d 981, 986 (2d Cir. 1980), *cert. denied*, 451 U.S. 992 (1981).

[25] For a review, see Blanck, *Judges' Behavior*, *supra* note 12, at 89-92. *See also infra*, notes 137-40 (discussing the *Liljeberg* case).

[26] See *infra* notes 174-88 and accompanying text.

[27] For a review of cases, see Blanck, *Judges' Behavior*, *supra* note 12, at 92-101.

[28] Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

[29] *See* Peter D. Blanck, *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 653, 675-76 (1990) (hereinafter *The Measure of the Judge*).

[30] Bruenig v. American Family Ins., 173 N.W.2d 619, 626 (Wis. 1970) (Hallows, C.J.).

[31] State v. Wheat, 292 P. 793, 797 (Kan. 1930) (Jochems, J., dissenting). For a discussion of proposed remedies for prejudicial judicial conduct, see Rochelle Shoretz, *Letting the Record Show: Modifying Appellate Review Procedures for Claims on Nonverbal Gestures by Trial Court Judges*, 95 COLUM. L. REV. 1273, 1290-1300 (1995).

[32] *See* Blanck, *Judges' Behavior*, *supra* note 12, at 89, 106 (finding that judges may reveal beliefs during a trial by directing the trial based on expectations for trial outcome).

[33] *See id.* at 92-101.

Several Conference participants—trial judges and attorneys—described this phenomenon and the importance of the judge's nonverbal behavior alone to the appearance of justice and fairness in the courtroom:

> Judge Cordell: We judges do all kinds of things when we are presiding over trials that are not really good, and that could lead toward this tendency of depriving individuals of fair trials because of our body language and what we are communicating to jurors.[34]

> Judge Carchman: [New Jersey has] a program of videotaping judges. . . . The judges do find out that we do roll our eyes, and shrug our shoulders, and imperceptibly nod our heads no or yes, and jurors pick that up.[35]

> A New Jersey public defender: In terms of nonverbal communication of judges, I agree that the judges do it . . . . A judge who was the former prosecutor [was] fully aware of every time he rolls his eyes, turns his back, nods his head, and he plays it right to the jury. And that occurs, and it's almost impossible to put on the record, it's impossible to stop a judge during the course of a jury charge and say, "Judge, I would like to note for the record you are nodding your head or shaking your head in disbelief and commenting upon the defense."[36]

These anecdotal stories and other formal acknowledgments in state and federal court cases highlight the central importance of a trial judge's behavior. Courts and commentators caution repeatedly that juries accord great weight and deference to even the most subtle behaviors of the judge.[37] Appellate courts recognize that the impermissible appearance of judicial bias or unfairness at trial often manifests itself through judges' subtle nonverbal behavior.[38] A common example is the judge who demonstrates an appearance of partiality by rolling his eyes in apparent disbelief during the testimony of a witness. Appellate courts regularly are called upon to review the propriety of the appearance of justice on jury decision-making in criminal

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34 *Conference Proceedings*, *supra* note 7, at 48.

35 *Id.* at 56.

36 *Id.* at 72-73.

37 *See* Blanck, *Judges' Behavior*, *supra* note 12, at 90; RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM 129 (1983) (arguing that human beings can never be devoid of prejudices) (citing HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS 9 (David E. Linge trans., 1966)).

38 *See, e.g.*, United States v. Hickman, 592 F.2d 931 (6th Cir. 1979) (pointing to the trial judge's "brilliant redirect examination that would have been entirely proper had it been done by the prosecution"); State v. Barron, 465 S.W.2d 523, 527 (Mo. 1971) (reversing conviction for judge's reaction to defendant's alibi witness by holding and shaking head and swiveling 180 degrees in his chair); People v. Mays, 544 N.E.2d 1264, 1270 (Ill. App. Ct. 1989) (reversing conviction due to judge's slamming pencil down, sighing, and making facial gestures during cross-examination of witness by defense counsel); State v. Jenkins, 445 S.E.2d 622, 624 (N.C. 1994) (finding that jury could reasonably infer rejection of credibility by trial judge's action in turning his back on witness).

trials and to balance whether the alleged error in the proceeding is "harmless"; that is, does not materially affect the trial outcome.[39] Factors balanced in making a decision[40] include the relevance and nature of the alleged behavior, the efficiency of any instruction used to cure the error, and the prejudicial effect of the behavior in light of the entire atmosphere of the trial.[41] The Supreme Court has held that some constitutional rights are "so basic to a fair trial that their infraction can never be treated as harmless."[42] The right to an impartial adjudicator is such a fundamental right.[43]

In *Arizona v. Fulminate*, the Court concluded that a criminal trial tainted by a biased judge represents an example of "structural" error, as opposed to a "trial" error.[44] Trial errors occur "during the presentation of the case to the jury, and . . . may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt."[45] Structural error, on the other hand, affects the "entire conduct of the trial from beginning to end,"[46] and encompasses a judge's behavior throughout the trial.

Implicit in the structural versus trial error distinction is the recognition that a judge's behavior, whether explicit or subtle, can so permeate the atmosphere of a trial as to rise above the level of harmless error. One court concluded that "[w]e have little doubt that facial expressions, gestures, and nonverbal communications which tended to ridicule defendant and counsel could, standing alone, operate so as to destroy the fairness of a trial."[47]

In sum, courts recognize that the appearance of justice, as re-

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39 *See* FED. R. CRIM. P. 52(a) (defining harmless error as "[a]ny error, defect, irregularity or variance which does not affect substantial rights"). That rule also defines "plain error" as one "affecting substantial rights [that] may be noticed although they were not brought to the attention of the court." *Id.*.

40 *See* United States v. Olgin, 745 F.2d 263, 268-69 (3d Cir. 1984) (emphasizing that "[t]he reviewing court should be more concerned with a comment on a matter central to the defense than with comment on a tangential issue"), *cert. denied*, 471 U.S. 1099 (1985); United States v. Anton, 597 F.2d 371, 374-75 (3d Cir. 1979) (noting that judge's comment on defendant's credibility was one factor in appellate court's reversal of conviction).

41 *Olgin*, 745 F.2d at 268-69; Blanck, *Judges' Behavior*, *supra* note 12, at 95-96 (reviewing appellate courts' factor approach in assessing propriety of judge's behavior). But case-by-case, ad hoc determinations of the appearance of justice and trial error remain the norm today. *See* Peter David Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 IND. L.J. 1119, 1123 (1993) [Hereinafter *Calibrating the Scales*].

42 Chapman v. California, 386 U.S. 18, 22 (1967).

43 Gray v. Mississippi, 481 U.S. 648, 668 (1987).

44 111 S. Ct. 1246, 1265 (1991).

45 *Id.*

46 *Id.*

47 Allen v. State, 276 So. 2d 583, 586 (1973).

flected in judges' behavior alone, may have important effects on trial processes and outcomes.[48] Trial and appellate courts acknowledge that juries, witnesses, and other trial participants accord great weight and deference to even the most subtle behaviors of the judge.[49] Yet, limited empirical information is available to address the extent of judges' sensitivity to and knowledge of the effects of their extralegal behavior on fact finding, recusal, trial outcomes, or sentencing patterns.[50] This information gap is troubling, given that many observers believe that the continued success of our judicial system depends fundamentally on the faith and confidence of the public, which depends in turn on the appearance and reality of impartial judges.[51] As discussed next, the few existing empirical studies suggest important opportunities for further understanding the relation among the appearance of justice, courtroom behavior, and trial outcomes.[52]

B. EMPIRICAL STUDY OF THE APPEARANCE OF JUSTICE

Despite historical patterns and legal precedent, participants in our system of justice have rarely relied on empirical methods for evaluating judicial behavior and its impact on trial fairness, judicial recusal or disqualification, or the appearance of justice.[53] Indeed,

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48 *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966) (providing classic study of judges and juries); JOHN P. RYAN ET AL., AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE (1980) (encompassing comprehensive analysis of judges' behavior); Blanck, *The Measure of the Judge*, *supra* note 29, at 654 & n.12 (discussing sources recognizing importance of judge's behavior).

49 As Judge Jochems remarked in 1930, "[t]he trial judge occupies a high position. He presides over the trial. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the court, whether it be a nod of the head, a smile, a frown, or a spoken word." State v. Wheat, 292 P. 793, 797 (Kan. 1930) (Jochems, J., dissenting), quoted in State v. Hamilton, 731 P.2d 863, 868 (Kan. 1987); Marino v. Cocuzza, 81 A.2d 181, 185 (N.J. Super. Ct. App. Div. 1951); *see also* Blanck, *Judge's Behavior*, *supra* note 12, at 155-56 (pattern jury instruction warning that behavior of judge during trial should not influence jury decision-making).

50 *See, e.g.*, Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1203 (1992) (questioning whether judges or jurors "know bias when they see it"); *see also* LaDoris H. Cordell & Florence O. Keller, *Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge*, 68 IND. L.J. 1199 (1993) (arguing that jurors attribute certain opinions, feelings, and biases to judicial personnel through transference).

51 *See, e.g.*, Redish & Marshall, *supra* note 11, at 483-84.

52 *See, e.g.*, Everson, *supra* note 1, at 99 (early study of magistrates behavior); *cf.* CATHERINE FITZMAURICE & KEN PEASE, THE PSYCHOLOGY OF JUDICIAL SENTENCING 7 (1986) (providing a comparative study of sentencing and noting alleged remark by Lord Chief Justice that research on judicial behavior "would not tell judges anything they did not already know . . .").

53 *See* Charles-Edward Anderson, *Trial by Press?: Pretrial Publicity Doesn't Bias Jurors, Panelists Say*, A.B.A. J., Sept. 1990, at 32 (reporting consensus of panelists at The Annenberg Washington Program that jurors subject to extensive publicity can put aside preconcep-

practitioners often confuse conceptions of trial fairness and judicial impartiality.[54] Professor Leubsdorf writes: "Educated by the Legal Realists and their successors, lawyers fear that the values and experiences of judges ultimately shape their decisions. Yet lawyers also believe that it must mean *something* to speak of a judge as impartial, and we also suspect that the role of law depends on the belief that the rule of law is more than a masquerade."[55]

As late as 1985, the factors influencing the appearance of justice had not been tested through systematic empirical study of actual trials. In light of federal and state case law, as well as concerns by judges themselves, the absence of systematic information was and continues to be striking.[56] Since 1985, few empirical studies in law and law-related publications have examined conceptions of the appearance of justice.[57] The majority of relevant studies have focused primarily on litigants' (or mock litigants') perceptions of procedural and distributive fairness and their relation to trial outcomes.[58]

In one study of federal court jurisdiction, the appearance of justice, as reflected by a fear of local court bias, was found to be the primary motivating force behind attorneys' forum choice.[59] In finding that a majority of plaintiff and defense attorneys reported that local (e.g., judicial) bias rather than other tactical considerations de-

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tions if judges provide proper instructions and other curative assistance); John B. McConahay et al., *The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little*, 41 LAW & CONTEMP. PROBS. 205, 213-20 (1977) (recounting juror selection strategies based on empirical model, personality traits, and juror nonverbal behavior).

54 *See* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 245 (1987) (suggesting that in this confusion lies a repressed crisis of confidence in the idea of judicial impartiality).

55 *Id.* at 245 (emphasis in original). Leubsdorf also concludes that the appearance of justice standard "can best be understood as an unsatisfactory attempt to mediate between introspection and objectivity." *Id.* at 277.

56 *See* Charles J. Ogletree, Jr., *Arizona v. Fulminate: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 163 (1991) (noting the lack of systematic study of harmless error rule); Gary B. Melton, *The Law Is a Good Thing (Psychology Is Too)*, 16 LAW & HUM. BEHAV. 381, 387-88 (1992) (suggesting some positive effects of psychological inquiry in the legal system).

57 A search located more than 300 law review articles, notes and comments, published since 1985 in which "the appearance of justice" was discussed, however, none involved empirical study of the concept.

58 For discussion of research impact of variations of procedure on the appearance of justice and perceived fairness, see Laurens Walker, E. Allan Lind, & John Thibault, *The Relation Between Procedural and Distributive Justice*, 65 VA. L. REV. 1401 (1979). *See also* Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 531 (not grounding verdicts on statistical probability evidence in civil cases "may reflect the self-serving interest of lawyers in promoting the mere appearance of justice under the legal system, rather than sound public policy").

59 Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U.L. REV. 369 (1992).

termined forum choice, Professor Miller characterized such perceptions, whether or not congruent with reality, "as a reality in its own right, requiring action to preserve the appearance of justice."[60]

In another study, Professors Lind and Lissak experimentally manipulated the appearance of justice in a mock trial procedure by introducing an obvious trial impropriety.[61] These researchers presented participants (mock jurors) with evidence of a personal relationship between the trial judge and the plaintiff's lawyer.[62] The participants were then informed of the outcome of the case and asked to evaluate the fairness of the trial results. The findings indicated a strong relationship between the appearance of the impropriety and the trial outcome. The presence of the impropriety, combined with an unfavorable outcome, substantially decreased the mock jurors' perceptions of trial fairness.[63]

Since 1985, my colleagues and I have conducted a series of empirical studies on the appearance of justice in jury and bench trials.[64] The appearance of justice and judges' courtroom behavior were examined in lower state courts, where an estimated ninety to ninety-five percent of all cases are handled.[65]

Our studies examined the impact of evidentiary and extralegal factors, both in isolation and in combination, on decision-making by juries and judges. We developed a research model to provide an empirical framework for a more comprehensive view of the appearance of justice.[66] The model set forth a method for researchers, practition-

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60 *Id.* at 426.

61 E. Allan Lind and Robin Lissak, *Apparent Impropriety and Procedural Fairness Judgments*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 19 (1982).

62 *Cf. infra* notes 174-88 and accompanying text (discussing actual cases involving "extrajudicial bias" and the appearance of justice).

63 Lind & Lissak, *supra* note 61, at 21. Also, a favorable outcome for the defendant increased the perceived procedural fairness of the trial significantly more when the impropriety was present. *Id.*.

64 See generally Blanck, *Calibrating the Scales*, *supra* note 41, at 1119; Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM.U. L. REV. 775, 776 (1991) [hereinafter *Empirical Research*]; Blanck, *The Measure of the Judge*, *supra* note 29, at 655-57 (describing research that studied judges' behavior to determine if it "appears" to trial participants to be fair and impartial); Blanck, *Judges' Behavior*, *supra* note 12, at 89-97 (discussing judicial influence and its relationship to procedural due process).

65 John Hagan & Kristin Bumiller, *Making Sense of Sentencing: A Review and Critique of Sentencing Research*, *in* RESEARCH ON SENTENCING: THE SEARCH FOR REFORM II (Alfred Blumstein et al. eds., 1983) [hereinafter RESEARCH ON SENTENCING]. *See also* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN LOWER CRIMINAL COURT xv (1979).

66 Initial studies investigated the various legal and extralegal influences on trial decision-making processes. For instance, in studies conducted in the California courts, we examined the role of judges' verbal and nonverbal behavior in predicting the outcome of criminal jury trials. The relation among legal factors (e.g., criminal history of the defend-

ers, and courts to assess factors that may influence, sometimes impermissibly, decision-making in actual trials. The model tested the conclusion made by others that, in close cases, extralegal behavior alone, such as judges' nonverbal behavior, has a relatively greater impact on trial outcome than does the evidence presented at trial.[67]

Our initial appearance of justice studies explored the effects of judges' behavior on jury verdicts and on other trial process variables.[68] We concluded that a systematic understanding of judges' behavior and its potential influence on trial decision-making, recusal, and sentencing patterns will require further examination.[69]

Several core findings emerged, however, from our empirical studies. For instance, four "global styles" of judicial behavior were delineated: "judicial," "directive," "confident," and "warm."[70] In addition, more "micro" appearance behaviors of judges were identified and examined, including the amount of eye contact with trial participants, and the frequency of smiles, hand movements, or head nods.[71]

The studies also identified various relationships among the defendants' background characteristics (e.g., age, gender, and prior criminal history), the judges' expectations for trial outcome, the appearance of justice as reflected in the judges' global and micro behav-

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ant) and extralegal factors (e.g., preconceived biases and judges' behavior reflecting the appearance of justice) were explored through empirical testing of a model of courtroom dynamics.

67 *See* J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of a Psychologist-Lawyer Collaboration*, 66 N.C. L. REV. 741 (1988) (responding to criticism that availability of prior psychological research on trial processes enhances lawyers' abilities to influence jurors).

68 *See* Blanck, *Judges' Behavior*, *supra* note 12, at 101-37 (proposing preliminary model and describing the characteristics); *see also* Robert Rosenthal, *Pavlov's Mice, Pfungst's Horse and Pygmalion's PONS: Some Models for the Study of Interpersonal Expectancy Effects*, *in* THE CLEVER HANS PHENOMENON 185-89 (Thomas A. Seboek & Robert Rosenthal eds., 1981) (discussing general model for interpersonal effects).

69 Earlier studies of courtroom behavior primarily explored bivariate relationships, such as the relation of race and sentencing. *See* Blanck, *Judges' Behavior*, *supra* note 12, at 104-05.

70 The judges' behavior was rated by independent observers of the videotapes. *See* Blanck, *Judges' Behavior*, *supra* note 12, at 117-18; Blanck, *The Measure of a Judge*, *supra* note 29, at 657-62 (stating that the principal components statistical methodology used to analyze judges' behavior is a useful and practical way to reduce number of variables to describe behavior); *see also* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS 24-28 (1977) (proposing four trial goals that reflect judges' behavior—reducing conflict, avoiding uncertainty, processing cases, doing justice—that relate to the four global styles, respectively: warm, confident, directive, and judicial).

71 *See* Blanck, *Calibrating the Scales*, *supra* note 41, at 1183-91 (describing codes for micro behaviors). A predictive relationship between global styles and micro behaviors highlighted the potential methodological contribution of the model to a study of trial outcomes. *Id.* at 1134-35.

iors, and trial outcome.[72] The empirical model proved most powerful and predictive when examining combinations of these variables.[73]

Three central themes emerged from our initial studies conducted in the California courts.[74] First, and most predictably, judges tended to expect a guilty verdict when the criminal histories of defendants were relatively more serious. Thus, although criminal history should have no legal bearing on a determination of guilt or innocence, it appears to influence judges' expectations for trial outcomes in predictable ways. In fact, defendants with more serious criminal histories were more likely to be found guilty.

Second, judges' knowledge of defendants' criminal histories, information that a jury ordinarily is not allowed to learn unless a defendant testifies, predicted aspects of judges' behavior when instructing their juries. Judges, consciously or unconsciously, may sometimes "leak" or reveal to juries their underlying beliefs about defendants through nonverbal channels. The appearance of judges' behavior alone may convey messages to jurors, sometimes impermissibly, concerning the defendant's guilt or innocence.

Third, although the findings showed that judges' expectations alone did not predict trial outcomes, there was a trend for the appearance of justice to be related to trial outcomes. Judges' global styles appeared to be less judicial and directive when the jury reached a guilty verdict.[75] Perhaps the most compelling conclusion to be drawn from the California study is that the appearance of justice as reflected in judges' behavior alone could predict the verdicts returned by juries, as well as other aspects of juries' decision-making processes.

Subsequent studies in the Iowa state courts examined the concept of the appearance of justice in criminal bench trials, employing a modified version of the research model.[76] The Iowa studies also assessed the strength and quality of the evidence presented in the case. In addition, instead of videotaping trials, the Iowa study tested an online coding scheme for assessing the appearance of justice and court-

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72 *See id.* at 1136-41 (describing simple bivariate relationships generated by the model).

73 Multiple regression analysis were used to explore effects in the model. *See also* JACOB COHEN & PATRICIA COHEN, APPLIED MULTIPLE REGRESSION/CORRELATIONAL ANALYSIS FOR THE BEHAVIORAL SCIENCES 7 (2d ed. 1983).

74 For a summary of the findings, *see* Blanck, *Calibrating the Scales*, *supra* note 41, at 1137-46.

75 Although the findings suggested that the appearance of justice alone may predict trial outcomes, the results varied with regard to the type of communication and information conveyed. *See* Blanck, *Judges' Behavior*, *supra* note 12, at 135.

76 For a review of the Iowa studies, see generally Blanck, *Calibrating the Scales*, *supra* note 41.

room dynamics.[77]

The findings from the Iowa study support many of those in the California study. For instance, the appearance of justice varied depending on the verdict expected by judges (e.g., tending to show fewer smiles when expecting guilty verdicts and the converse for not guilty verdicts). Moreover, when the evidence presented at trial was rated by independent observers as strong towards guilt, judges showed less eye contact and fewer smiles, yet were rated as more judicial, directive, and warm toward trial participants (e.g., arguably attempting to appear fair).

In addition, in cases where a guilty verdict was rendered, judges showed less eye contact and fewer smiles (i.e., appearing negative), yet were rated as globally warmer in relating to trial participants. Consistent with the findings from the California study, judges' expectations for guilty verdicts were found to predict actual trial outcomes of guilt.

The findings from the Iowa study suggest that the strongest predictor of trial outcomes is the strength of the evidence presented. Evidentiary strength is a better predictor than the independent but smaller effect of judges' behavior. The appearance of justice during the trial (e.g., as reflected by the judges' behavior) is a relatively better predictor of sentencing patterns than of trial outcomes.[78] While the strength of the evidence may appear as the central factor in trial outcomes, other factors may independently influence the process in significant ways. For instance, judges' behavior may be particularly influential in cases in which the evidence is close.[79]

Additional study is needed to reveal the complexity of the appearance of justice and trial judges' behavior and to replace unsubstantiated myths about courtroom behavior with empirically validated conclusions.[80] Recent criticism of our system of justice has been

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77 *See id.* at 1192-98 (highlighting the reliability and consistency of on-line rating system, but in the Iowa study, defendants' criminal history variable was not available); *see also* Blanck, *Judges' Behavior*, *supra* note 12, at 113-114 (discussing value of courtroom research). The on-line method in the Iowa studies enabled collection of data similar to that in the California studies.

78 The Iowa findings also suggested that judges appeared able to separate factors affecting their fact finding role (i.e., the determination of guilt) from those affecting their sentencing function. *See* Blanck, *Calibrating the Scales*, *supra* note 41, at 1163.

79 Close cases were defined in the Iowa studies by analyses controlling for strength of the evidence. *See id.* at 1164-67.

80 *See* Vladimir J. Konecni & Ebbe B. Ebbesen, *External Validity of Research in Legal Psychology*, 3 LAW & HUM. BEHAV. 39, 40-42 (1979) (criticizing reliance on simulated legal research for developing practical recommendations); *see also* Peter D. Blanck & Arthur N. Turner, *Gestalt Research: Clinical-Field-Research Approaches to Studying Organizations*, *in* HANDBOOK OF ORGANIZATIONAL BEHAVIOR 109, 111 (Jay W. Lorsch ed., 1987) (stating that field research may be appropriate where goal is to improve practice).

based increasingly on anecdotal or media-driven views of the appearance of unfairness, as manifested, for example, by difficulties in comprehending the law, unfair procedural forces, or other factors portrayed as inherent to our system of justice.[81]

Elsewhere, Professor Saks and I have suggested the need for empirical research examining the appearance of justice and trial fairness in criminal and civil contexts, such as in aggregated trials or mass tort cases.[82] Research is needed, however, to determine how perceptions of procedural and distributive justice affect the appearance of justice and actual trial fairness.[83]

The lack of study is particularly puzzling, given that judicial training programs increasingly emphasize the importance of judges' behavior and decision-making in the courtroom.[84] Most judges, however, receive little feedback about their actual courtroom communication, and what little they do receive is mostly anecdotal.[85] This may be due in part to the absence of standardized feedback mechanisms, to the reluctance of judges to receive such feedback, or to the lack of effective techniques for monitoring the impact of their courtroom behavior.[86]

At the Conference, Judge Cordell echoed these concerns:

> [O]ne thing is to do studies and to get the word out there that we judges need education, we need to better understand what we are doing when we preside over trials. [T]he system is so rigid and resistant to change, and if anybody can change the system and make it better, it's judges. We have the authority. We decide what goes on in our courtroom, and unfortunately, so many judges are motivated to do what they do because of appellate review.[87]

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81 *See* Michael J. Saks, *Do We Know Anything About the Behavior of the Tort Litigation System and Why Not?*, 140 U. PA. L. REV. 1147 (1992) (reviewing empirical evidence on behavior of tort litigation system and demonstrating the inadequacy of evidence for drawing conclusions how the system actually performs); Tanford & Tanford, *supra* note 67, at 742 (arguing that critics of legal system exaggerate the importance of legal and extralegal factors on trial outcomes).

82 Michael Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 832-33 (1992).

83 *Id.* at 832.

84 Blanck, *The Measure of the Judge*, *supra* note 29, at 676 (discussing program that videotapes and analyzes judge's behavior during trial proceedings).

85 Cordell & Keller, *supra* note 50, at 1202-03.

86 *See* Blanck, *Judges' Behavior*, *supra* note 12, at 140-41 (for reasons why judges may receive little feedback).

87 *Conference Proceedings*, *supra* note 7, at 48. *See also* Robert Hanley, *A Courtroom Experiment in High-Tech Video*, N.Y. TIMES, Nov. 26, 1992, at B8 (discussing judge's informal study of videotapes of courtroom proceedings to analyze his own performance and behaviors).

III. EMERGING ISSUES

This section illustrates that while existing research has identified the appearance of justice and judicial conduct as critical to trial fairness, further study is needed to better understand their central role in our system of justice. Recent court decisions involving standards for the recusal and disqualification of state and federal judges and the appearance of justice have left more questions than answers, thus highlighting the need for further empirical research.

A. STATE AND FEDERAL COURT STANDARDS FOR DISQUALIFICATION OF JUDGES

1. State Courts

Disqualification of a state court judge is required when the presiding judge recognizes, or the moving party demonstrates, that the judge either has a direct interest in the case, is closely related to one of the parties, or is prejudiced against or biased toward one of the parties.[88] Many states provide other grounds for disqualifying a judge when prejudice or bias is alleged or could reasonably be inferred. Such provisions seek to preserve the values embodied in the appearance of justice.

State statutes provide two general types of judicial disqualification for cases in which actual bias is not proved. First, some states provide litigants an absolute right to disqualification through a peremptory challenge to an allegedly biased judge.[89] Second, some states grant parties a conditional right to disqualification when a judge's impartiality in a proceeding might reasonably be questioned.[90] The provisions are not mutually exclusive and often coexist in a jurisdiction.[91]

Nineteen states provide litigants with a statutory right to make a peremptory challenge to remove a judge believed to be prejudiced or biased.[92] Two forms of "peremptory challenge" provisions exist. The

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88 *See, e.g.*, 725 ILCS 5/114-5(d) (1993); KY. REV. STAT. ANN. § 26A.015 (Baldwin, 1994).

89 *See infra* notes 92-101 and accompanying text.

90 *See infra* notes 102-14 and accompanying text.

91 *See, e.g.*, 725 ILCS 5/114-5(a), *id.* at 114-5(d); CAL. CIV. PRO. CODE §§ 170.1, 170.6 (West Supp. 1992).

92 *See* ALASKA STAT. § 22.20.022 (1988); ARIZ. REV. STAT. ANN. § 12-409 (1992); CAL. CIV. PROC. CODE § 170.6 (West Supp. 1992); HAW. REV. STAT. § 601-7(b) (1988); IDAHO R. CIV. PRO. 40(d)(1) (1987); 725 ILCS 5/1145(a) (1993); IND. CODE ANN. § 35-36-5-1 (Burns 1985); KAN. STAT. ANN. § 20.311(d) (1988); MINN. STAT. ANN. § 542.16 (West 1988); MO. R. CIV. PRO. 51.05 (West 1976 & Supp. 1992); MONT. CODE ANN. § 3-1-804 (1991); N.D. CENT. CODE § 29-15-21 (1991); N.M. STAT. ANN. § 38-3-9 (Michie 1992); NEV. SUP. CT. R. 48.1; OR. REV. STAT. §§ 14-250-70 (1991); S.D. CODIFIED LAWS ANN. § 15-12-22 (1984); WASH. REV. CODE ANN. §§4.12.040-50 (West 1988 & Supp. 1992); WIS. STAT. ANN. § 801.58 (West Supp. 1991); and WYO. R. CIV. PRO. 40.1(b)(1) (1992). Analysis of the peremptory challenge

first form, used in Wisconsin, closely mirrors the peremptory challenges of jurors: a party may remove a presiding judge without expressing a reason for the request. In jurisdictions with this standard, the judge may be removed when a party files the required written documents within the time limits of the statute.[93]

California uses the second form of peremptory challenge.[94] Under the California rule, a movant retains an automatic right to disqualify a judge, provided the movant makes the motion with a good faith belief in the judge's prejudice[95] and within the prescribed time limits.[96] In California, the act of verification in making the motion under oath establishes good faith.[97] A motion for disqualification under this statute does not require allegations of specific facts supporting assertions of prejudice or bias.[98]

To protect against potential misuse, statutes providing litigants with peremptory challenges have imposed strict limitations on their use. Not only are peremptory motions for disqualification subject to

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provisions shows that the provisions are limited in their scope by the type of proceeding, the standards necessary for granting the motion, the timing requirements, and the number of challenges available. *See* Randy Merritt, Avoiding the "I Didn't Have a Chance" Syndrome: A Proposed Judicial Disqualification Statute for Iowa (1995) (unpublished manuscript on file with author).

93 *See* WIS. STAT. ANN. § 801.58 (West Supp. 1991) (requiring filing of written request for substitution with no reason necessary). Among the states adopting this standard are: MINN. STAT. ANN. §542.16 (West 1988) (requiring filing of notice to remove with court administrator and service of notice on opposing party); MONT. CODE ANN. § 3-1-804 (1991) (requiring motion filed with clerk without allegation of cause); N.D. CENT. CODE § 29-15-21 (1991) (requiring written demand for change of judge, including statement of good faith).

94 *See* CAL. CIV. PRO. CODE § 170.6 (West Supp. 1992). Other states adopting this standard include: ALASKA STAT. § 22.20.022 (1988) (requiring filing of affidavit alleging belief in inability to receive a fair and impartial trial along with statement assuring good faith and "not for purposes of delay"); S.D. CODIFIED LAWS ANN. § 15-12-21-27 (same) (1984); OR. REV. STAT. § 14-250-70 (1991) (requiring filing of affidavit alleging belief in inability to receive a fair and impartial trial).

95 *See* Journey v. Superior Court, San Diego County, 120 Cal. Rptr. 897 (Cal. Ct. App. 1975) (stating that good faith belief in prejudice is sufficient and that proof of facts of actual bias is not required).

96 *See* Mackey v. Superior Court, 270 Cal. Rptr. 905 (Cal. Ct. App. 1990) (stating that, based on the provisions of 170.6, peremptory challenge must be made at least five days before date set for beginning of trial if presiding judge is identified ten days before date set for trial or hearing).

97 *See* Solberg v. Superior Court of City and County of San Francisco, 561 P.2d 1148 (Cal. 1977). Oregon's statute requires a challenged judge either to withdraw immediately or to request a "good faith" hearing before another judge. *See* State *ex rel* Strain v. Foster, 537 P.2d 547 (Or. 1975). The challenged judge bears the burden of proving that the movant made the motion in bad faith or for purpose of delaying the proceedings. *See* State *ex rel* Kafoury v. Jones, 843 P.2d 932 (Or. 1992).

98 *See* Journey v. Superior Court of San Diego, 120 Cal. Rptr. 897 (1975).

timeliness requirements,[99] but the number of permitted challenges is restricted.[100] Furthermore, peremptory challenge provisions may not be used to disqualify a judge solely based on group affiliation (e.g., race or gender grounds).[101]

In addition to the absolute right of disqualification granted in peremptory challenges, litigants in a majority of jurisdictions have a conditional right to require allegedly biased judges to disqualify or recuse themselves. Most states require such disqualification if a person "of ordinary prudence" in the judge's position and knowing all of the facts known to the judge could find a reasonable basis for questioning the judge's impartiality.[102] This standard requires disqualification even in cases in which the allegation of bias is not supported by substantial fact.[103]

To mandate disqualification under the "appearance of impartiality" test, however, requires that the alleged bias, hostility, or prejudice be "personal."[104] In most states, this means that the alleged impartiality must stem from an "extrajudicial source" outside of the judge's experience obtained during the course of the particular legal proceeding.[105] In such states, "extrajudicial source" bias must be alleged

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99 *See* N.D. CENT. CODE § 29-15-21 (1991) (requiring filing of challenge within ten days of notice of assignment or notice of trial date scheduled); OR. REV. STAT. § 14-250-70 (1991) (requiring filing within ten days after assignment of case to judge); ALASKA STAT. § 22.20.022 (1988) (requiring filing within five days after issue is assigned to a judge).

100 *See* CAL. CIV. PROC. CODE § 170.6 (West Supp. 1992) (limiting challenge to one judge); OR. REV. STAT. § 14-260(5) (1991) (allowing only two applications for removal for any proceeding).

101 *See* People v. Superior Court, 10 Cal. Rptr. 2d 873 (Cal. Ct. App. 1992) (requiring party challenging on group bias grounds to establish *prima facie* case of invidious discrimination and, if case is established, placing burden on challenging party to show that challenge was not predicated solely on group bias).

102 *See, e.g.*, Alley v. State, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994); Riddle v. State, No. CR93-1117, 1994 WL 717032 (Ala. Crim. App. 1994); Wilson v. Wilson, No. CD-94-1174, 1994 WL 705352 (Minn. Ct. App. 1994); Fogarty v. Commonwealth, 546 N.E.2d 354 (Mass. 1989). *But see supra* notes 85-86 (stating that most judges lack information and training to make such decisions).

103 *See, e.g.*, Ross v. Luton, 456 So.2d 249 (Ala. 1984).

104 *Ex parte* Duncan, 638 So.2d 1332, 1334 (Ala. 1994).

105 *See,e.g.*, State v. Farni, 325 N.W.2d 107, 110 (Iowa 1982) (requiring for recusal of judge that alleged bias stem from an extrajudicial source); Los v. Los, 595 A.2d 381, 384 (Del. 1991) (same); United Nuclear Corp. v. General Atomic Co., 629 P.2d 231, 323 (N.M. 1980) (same); People v. Butler, 484 N.E.2d 921, 933 (Ill. Ct. App. 1985) (same); Smith v. Smith, 564 P.2d 1266, 1270 (Ariz. Ct. App. 1977) (same); Riddle v. State, No. Cr 93-1117, 1994 WL 717032 at *4 (Ala. Crim. App. 1994) (same); Alley v. State, 882 S.W.2d. 810, 821 (Tenn. Crim. App. 1994) (same); Shahmoradi v. Bing, No. 01-93-00439-CV, 1994 WL 362788 at *3 (Tex. Ct. App. 1994) (same); McBride v. State, 446 S.E.2d. 193, 195 (Ga. Ct. App. 1994) (same); In re Bell, 373 A.2d 232, 233 (D.C. Ct. App. 1977) (same); State v. Williams, 601 So.2d 1374, 1374 (La. 1992) (same); Desfosses v. Desfosses, 813 P.2d 366, 368 (Idaho Ct. App. 1991) (same); People v. Lowenstein, 325 N.W.2d 462, 465 (Mich. Ct. App. 1982) (same).

for judicial disqualification to be required.[106]

However, not all states require an "extrajudicial source" of the alleged bias. According to the Colorado Supreme Court, for instance, disqualification is required if a person could reasonably infer that a judge has a personal bias or prejudice against one of the litigants or his attorney.[107] The Colorado court narrowed the test by specifying two additional questions.[108] First, the court must determine whether the motion and supporting affidavits allege facts sufficient to reasonably infer that the judge is either prejudiced or biased against a litigating party, in fact or appearance. The second inquiry consists of determining whether, and to what extent, the judge manifests an attitude of hostility or ill will toward an attorney, such that the judge's impartiality reasonably may be questioned.[109] Unlike the extrajudicial source requirement test, the alleged bias test against either a party or counsel need not arise outside of the legal proceeding.[110] In Colorado, for example, disqualification will not be required unless "the parties or the public are left with a substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation."[111]

Other state courts, such as those in Florida, have required judicial disqualification when the alleged or actual bias by the trial judge is "pervasive."[112] As discussed above, systematically determining the

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106 *See infra* notes 174-88 and accompanying text (discussing cases involving extrajudicial source bias).

107 *See* S.S. v. Wakefield, 764 P.2d 70, 72 (Colo. 1988) (requiring motion to disqualify and supporting affidavits to allege facts sufficient to make a reasonable inference that the judge held a personal bias against either moving party or her attorney).

108 Each question may be tested through empirical assessment. *See infra* notes 235-50 and accompanying text (discussing questions for future empirical study).

109 *Wakefield*, 764 P.2d at 73. The difficulties associated with the systematic assessment of such alleged bias were described in Part I above.

110 *See* Klinck v. District Court, 876 P.2d 1270, 1277 (Colo. 1994) (en banc) (disqualifying a judge from presiding over pending criminal case based on bias inferred from comments made by the judge at the conclusion of a bond hearing). In *Klinck*, bias was inferred reasonably when the judge allegedly said to the defendant's co-counsel that "if you do not keep [Klinck's other co-counsel] on a short leash, you will have problems in this case." *Id.* at 1273, 1277. The court concluded that this judicial statement indicated an "absence of the impartiality necessary to assure that Klinck [would] receive a fair trial." *Id.* at 1277.

111 Goebel v. Benton, 830 P.2d 995, 999 (Colo. 1992) (en banc). This "substantial doubt" standard is similar to that used in Pennsylvania. *See, e.g.*, In re McFall, 617 A.2d 707, 713 (Pa. 1992) (requiring recusal when substantial doubt exists as to the ability of the judge to impartially preside over the proceeding).

112 An example of pervasive bias arises when a judge "actively refutes," verbally or nonverbally, factual allegations brought by a party seeking to disqualify the judge. In jurisdictions permitting the judge to rule on the legal sufficiency of the motion, an attempt by the judge to pass on the factual matters alleged may create a pervasive bias sufficient to require disqualification. *See* Rogers v. State, 630 So. 2d 513, 516 (Fla. 1993) (requiring evidentiary hearing before different judge when original judge participated in a "mini-hearing" to determine veracity of defendant's allegations concerning the judge, as the be-

extent to which behavior is pervasive is an empirical question.[113] Under the Florida approach, disqualification is possible whether the "pervasive bias" derives from an "extra" or "intrajudicial" source.[114]

2. *Federal Courts*

Sections 144 and 455 of the Judicial Code address the disqualification of federal judges.[115] Section 144 provides the framework for motions to disqualify a judge on grounds of personal bias or prejudice to the litigants.[116] Section 455 provides the criteria for mandatory self-disqualification of judges.[117]

Section 144 requires the assignment of an alternate judge to hear the legal proceeding if a sufficiently supported claim of judicial prejudice or bias is timely filed.[118] The 1921 Supreme Court decision in *Berger v. United States*[119] sets forth an early test for disqualification of a federal judge under section 21 of the United States Judicial Code, the controlling section prior to section 144.[120] In *Berger*, the German defendant filed an affidavit claiming that a fair trial was not possible before a judge who allegedly made public anti-German remarks outside of a criminal espionage trial.[121] The Court held that the

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havior generated an appearance of bias that "was so pervasive it tainted the remainder of the proceeding.").

113 *See supra* notes 70-87 and accompanying text.

114 *See Rogers*, 630 So. 2d at 515-16 (failing to take into account the possible source of bias).

115 28 U.S.C. §§ 144, 455 (1994).

116 Section 144 states:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

117 Section 455 states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

118 28 U.S.C. § 144.

119 255 U.S. 22 (1921).

120 *See id.* at 35. The *Berger* interpretation of § 21 has been held authoritative by federal courts interpreting § 144. *See, e.g.*, United States v. Hoffa, 382 F.2d 856, 859 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968) (citing *Berger* as authority for interpreting § 144).

121 The alleged statement was quoted in *Berger*. "One must have a very judicial mind, indeed, not to be prejudiced against the German[-]Americans in this country. Their

judge should have been disqualified from the proceedings.[122]

Under the *Berger* test, a judge may be disqualified if: (1) a party files an affidavit[123] claiming personal bias or prejudice demonstrating an "objectionable inclination or disposition of the judge";[124] and (2) the claim of bias is based on facts antedating the trial.[125] The second part of the *Berger* test is analogous to the state court extrajudicial source doctrine described earlier.[126]

Section 455 of the Judicial Code defines the standards for self-disqualification or recusal. The 1970 version of section 455 of the Code required a judge to disqualify himself if the questionable circumstances "render[ed] it improper, *in his opinion*, for him to sit."[127] Since 1970, this section of the Code has undergone modification. To increase public confidence in the judiciary through adherence to a more "objective" standard for determining impartiality,[128] Congress in 1974 amended section 455 to conform with the American Bar Association's (ABA) Code of Judicial Conduct. In Canon 3C, the ABA Code

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hearts are reeking with disloyalty." 255 U.S. at 28.

122 *Id.* at 36. The challenged judge, Kenesaw Mountain Landis, achieved lasting notoriety as the first commissioner of major league baseball in the aftermath of the infamous Black Sox scandal of 1919. *See* JOHN HEYLAR, LORDS OF THE REALM: THE REAL HISTORY OF BASEBALL 7-8 (1994) (relating the background behind the choice of Judge Landis to be baseball's first commissioner).

123 *Berger*, 255 U.S. at 33. The affadavit must be accompanied by a certification of counsel. *Id.*.

124 *Berger*, 255 U.S. at 35. The challenged judge cannot pass on the truth of the matters alleged. The judge may only rule on their legal sufficiency. *Id.* at 36.

125 *Berger*, 255 U.S. at 34. In United States v. Grinnel Corp., 384 U.S. 563 (1966), the Court recites the extrajudicial source doctrine and applies it to § 144. *Id.* at 583. The reason behind this requirement is explicitly stated in United States v. Hoffa, 382 F.2d 856, 859 (6th Cir. 1967), *cert. denied*, 390 U.S. 924 (1968). Bias and prejudice occurring during a trial can be addressed, and if necessary corrected, through the appeal process. *Id.*

126 *See supra* note 105 and accompanying text. Two additional facets of the test for disqualification under § 144 were not addressed in *Berger*. First, the statute requires the timely filing of the affidavit to be a minimum of ten days before the trial begins, absent a showing of good cause for the failure to file. *See* 28 U.S.C. § 144 (1994). This requirement is cited in *Hoffa*, 382 F.2d at 859 and Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co., 380 F.2d 570, 576 & n.13 (D.C. Cir.), *cert. denied*, 389 U.S. 327, 328 (1967). Second, courts have required that the affidavit make specific allegations of facts that raise the belief in the judge's bias or prejudice; allegations based on inference or generalities are insufficient. *Brotherhood of Locomotive Firemen*, 380 F.2d at 576; *see Hoffa*, 382 F.2d at 860.

127 28 U.S.C. § 455 (1970), *amended by* 28 U.S.C. § 455 (1994) (emphasis added).

128 The legislative history in the House Report noted that amended subsection (a) contains a general provision "that a judge shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned. This sets up an objective standard, rather than the subjective standard . . . of the phrase 'in his opinion.'" This standard "is designed to promote public confidence in the impartiality of the [judiciary]; if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside." H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-55.

set forth an objective standard for determining judicial disqualification.[129] Canon 3C requires that a judge disqualify himself when the judge's impartiality "might be reasonably questioned."[130] A judge should be disqualified if a "reasonable man knowing all the circumstances" would still hold doubts about the judge's impartiality.[131] Again, this test is in need of empirical study.

Thus amended, the 1975 Judicial Code requires not only that a biased judge not participate, but also that no person could reasonably believe such bias to be present. The 1975 Code intended to foster the appearance of impartiality throughout the judiciary[132] and recognized the necessity of the appearance of justice for the maintaining of public confidence in the judiciary.[133] Court authority rests upon confidence in the judiciary, which in turn depends upon belief in reasoned judicial decisions, uninfluenced by personal interests, biases, or considerations of the judge.[134] The Code replaced as a guiding principle in disqualification decisions the "duty to sit" concept predominating in the federal courts with the "appearance of justice" notion,[135] providing for judicial disqualification where the judge's impartiality "might reasonably be questioned."[136]

As recently as 1988, the Supreme Court affirmed the amended 1975 Code in *Liljeberg v. Health Services Acquisition Corp.*,[137] where it valued the appearance of justice so highly that a trial judge was required to disqualify himself retroactively, even though he was unaware

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129 CODE OF JUDICIAL CONDUCT Canon 3C (Am. Bar Ass'n 1972), *reprinted in* H.R. REP. No. 1453, 93d Cong., 2d Sess. 4-5 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6353-54.

130 *Id. See generally supra* part I.

131 H.R. REP. No. 1453 at 60.

132 *See* Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 745-46 (1973) ("standard of a reasonable man knowing all the facts does not reduce [the] emphasis on appearance; . . . and hidden facts tending to rebut an inference of partiality are presumably in the judge's power to reveal once public suspicion of his partiality in a given instance has been aroused.").

133 *See supra* notes 16-20 and accompanying text. As mentioned in part I, *supra*, this public perception concern lies at the heart of what is unique to the nature of the judicial process in a democratic society. Courts in such a society, as Justice Frankfurter observed, possess "neither the purse nor the sword." Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

134 *See* Note, *supra* note 132, at 747 (listing specific difficulties in implementing a stricter appearance test, including increased disqualifications which might "undermine public confidence in the judiciary," and greater inconvenience in providing competent judges to hear particular cases).

135 *See* United States v. International Business Machines Corp. (In re International Business Machines Corp.), 618 F.2d 923, 929 (2d Cir. 1980) (ruling that courts in determining disqualification under § 455 must look to see whether a reasonable person would believe that the judge's impartiality could be questioned).

136 28 U.S.C. § 455(a) (1994).

137 486 U.S. 847 (1988).

of a potential conflict of interest when the case was decided.[138] In *Liljeberg*, the Court held that public confidence in the integrity of the judiciary does not require a judge's *scienter* for disqualification.[139] A judge's lack of knowledge fails to "eliminate the risk that 'his impartiality might be reasonably questioned' by other persons," thereby hindering public confidence in the judiciary.[140]

After the Court's adoption of the *Liljeberg* "objective test" for disqualification, lower federal courts began to merge the requirements of section 455 with the "extrajudicial source doctrine."[141] The United States Court of Appeals for the District of Columbia Circuit applied the extrajudicial source limitation to section 455(a) in *United States v. Barry*.[142] In *Barry*, the District of Columbia Mayor sought both disqualification of the presiding judge and re-sentencing for his conviction of cocaine possession.[143] Four days before sentencing, speaking at an independent function, the judge remarked on the truthfulness of prospective jurors at the mayor's trial.[144] On this basis, Barry claimed that the judge should have disqualified himself before sentencing.[145] The court of appeals concluded that a reasonable person would not question the judge's impartiality based on his out-of-court remarks alone.[146] *Barry* illustrates that appellate courts will apply to section 455 motions the objective reasonable person standard for bias derived from an extrajudicial source.

The federal courts of appeals have been split, however, between[147] and among[148] themselves regarding whether section 455(a)

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138 *Id.* at 859, 868-70.

139 *Id.* at 859.

140 *Id.*; *cf.* Gardner v. Florida, 430 U.S. 349, 358 (1977) (plurality) (stating that a death penalty decision must "be, and appear to be, based on reason rather than caprice or emotion"). *See also* Blanck, *Calibrating the Scales*, *supra* note 41, at 1176-77.

141 For a review of the case law on this issue, see generally Christopher R. Carton, Comment, *Disqualifying Federal Judges for Bias: A Consideration of the Extrajudicial Bias Limitation for Disqualification Under 28 U.S.C. § 455(a)*, 24 SETON HALL L. REV. 2057 (1994). This doctrine is not limited to federal courts, but is included in many state jurisdiction tests. *See supra* note 105 and accompanying text.

142 961 F.2d 260 (D.C. Cir. 1992).

143 *Id.* at 263.

144 *Id.* at 262.

145 *Id.*

146 *Id.* at 264-65.

147 *Compare Barry*, 961 F.2d at 263-265 (concluding that judge's remarks at a law school were derived from a judicial source, and so there was no disqualification under § 455(a)) *with* United States v. Chantal, 902 F.2d 1018, 1024 (1st Cir. 1990) (determining comments made at trial were not pertinent to § 455(a), and the judge should apply a reasonable person test when disqualifying himself).

148 *Compare* Johnson v. Trueblood, 629 F.2d 287, 290-91 (3d Cir. 1980), *cert. denied*, 450 U.S. 999 (1981) (affirming extrajudicial limitation), *with* Haines v. Liggett Group, Inc., 975 F.2d 81, 98 (3d Cir. 1992) (finding that the appearance of impartiality could be main-

is subject to the limitation of the extrajudicial source doctrine.[149] This debate mirrors that among the state courts described earlier.[150] The split reflects contrasting interpretations of section 455(a) and centers on whether the extrajudicial limitation in section 144 should be incorporated with the disqualification standard under section 455(a) and (b). The issue is whether the disqualification sections of the Judicial Code, sections 144 and 455, should follow the same uniform standard of considering bias only if it derives from an extrajudicial source.

Even in circuits limiting disqualification to bias derived from extrajudicial sources, an exception exists. Although as a general rule courtroom statements are not sufficient to justify disqualification absent extrajudicial bias, disqualification has been required when the moving party can demonstrate "pervasive" bias.[151] As discussed earlier, pervasive bias need not be limited to personal animosity or be grossly improper or prejudicial.[152] As long as the judge's remarks within the judicial proceeding demonstrate that the trial judge had pre-determined the outcome of the case, disqualification is warranted.[153] Put in terms of the prior empirical research, the judge's expectations for trial outcome must unfairly influence the outcome of

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tained only if case was reassigned to another district court judge).

149 *See* United States v. Grinnel Corp., 384 U.S. 563, 583 (1966) (explaining that to be disqualifying, judge's bias or prejudice must come from an extrajudicial source).

150 *See supra* notes 104-114 and accompanying text.

151 *See, e.g.*, United States v. Chandler, 996 F.2d 1073, 1104 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 2724 (1994); United States v. Page, 828 F.2d 1476, 1481 (10th Cir.), *cert. denied*, 484 U.S. 989 (1987); United States v. Rosenberg, 806 F.2d 1169, 1174 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); Davis v. Commissioner, 734 F.2d 1302, 1303 (8th Cir. 1984). This "pervasive bias" exception is similar to the same grounds for disqualification in state courts. *See supra* note 112 and accompanying text.

152 *See* King v. United States District Court, 16 F.3d 992, 995 (9th Cir. 1994) (Reinhardt, J., concurring); *contra Davis*, 734 F.2d at 1303.

153 *King*, 16 F.3d at 994-95. The King decision involved Rodney King's civil suit against the City of Los Angeles for injuries resulting from his altercation with the city's police officers. King sought the disqualification of the judge at the civil proceeding who had also presided over the federal trial of the officers convicted of violating King's civil rights. King sought recusal under § 455(a) and provided evidence of "pervasive bias" in numerous rulings and statements. King argued that the evidence showed that the judge had firm convictions regarding the factual issues underlying the civil claim. Examples of such statements and rulings include his finding that the officers' offense was "de minimis," his statement that King had "no serious injuries," his findings that one of the officers could reasonably have believed that King was armed and dangerous, and that the incident would never have developed to its final conclusion if not for King's initial misconduct. *See King*, 16 F.3d at 995. The Ninth Circuit ruled against granting mandamus to remove the judge. The concurring opinion stated that a review of the matter on direct appeal was necessary: "While due to the unresolved nature of the law King's petition for mandamus relief may fall short of the rigorous legal standard applicable in extraordinary writ proceedings, it raises a serous legal question as to Judge Davies' continued participation in the civil trial." *Id.* at 996.

the case before disqualification is required.[154]

B. THE APPEARANCE OF JUSTICE IN LIGHT OF *LITEKY V. UNITED STATES*

1. *Standards for Judicial Disqualification Under* Liteky

The split among the circuits regarding the applicability of the extrajudicial source doctrine to section 455 of the Judicial Code set the stage for the Supreme Court to settle the interpretive question. In *Liteky v. United States*,[155] Justice Scalia, writing for the majority, extended the application of the "extrajudicial source" doctrine, previously applied to motions brought under sections 144 and 455(b)(1), to those brought under section 455(a).[156]

The Court reasoned that under the extrajudicial source doctrine, judicial rulings by themselves will "almost never" constitute a valid basis for disqualification on grounds of impartiality, bias, or prejudice.[157] Judicial rulings, stripped of surrounding comments or accompanying opinions, cannot show reliance on an extrajudicial source. In short, rulings provide grounds for appeal, not for judicial disqualification. However, in rare cases of "pervasive bias," where a judge's rulings display a degree of favoritism or antagonism that makes fair judgment impossible, disqualification is merited.[158]

The Court explained that a judge's expressions of opinion formed on the basis of facts introduced or events occurring in the course of current or prior judicial proceedings similarly are not grounds for disqualification, unless they reflect a "deep-seated favoritism or antagonism that would make fair judgment impossible."[159] Thus, judicial behavior during the course of a trial that is critical or disapproving of or even hostile to counsel, the parties, or their cases

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154 *See supra* notes 21-31 and accompanying text.

155 114 S. Ct. 1147 (1994).

156 The Court justified its extending the doctrine on the basis that, first, the term "partiality" in § 455(a) should have the equivalent "pejorative connotation" as the terms "bias" and "prejudice" in §§ 144 and 455(b), including the equivalent consequence of importation of the extrajudicial source doctrine. *Id.* at 1155-56. Second, the Court found that it would be "poor statutory construction" to apply the extrajudicial source doctrine to §§ 144 and 455(b) but not to § 455(a), because it would be unreasonable without any qualifying language in the subsection to interpret § 455(a) as implicitly eliminating a limitation explicitly contained in §455(b). *Id.*

157 *Id.* at 1157 (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). For examples of this rule, see Rafferty v. Nynex Corp., 60 F.3d 844, 848 (D.C. Cir. 1995) (denying recusal motion based on judge's delay in ruling on motions and his unfavorable rulings, including dismissal of five of plaintiff's six claims); Lechuga v. United States, No. 93-1411, 1995 U.S. App. LEXIS 4167, *3-4, (7th Cir. Feb. 28, 1995) (affirming trial judge's refusal to grant defendant's motion for recusal based on the judge's familiarity with the case and adverse decision on motion to suppress evidence used in his cocaine conviction).

158 114 S. Ct. at 1157. This is a question capable of future empirical study.

159 *Id.* (citing United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)).

ordinarily will not require disqualification.[160] A judge may be "exceedingly ill disposed towards a defendant, who has been shown to be a thoroughly irresponsible person," but the judge's demeanor alone would not be disqualifying unless the opinions derive from an extrajudicial source or were so severe as to preclude the judge from conducting a fair and impartial trial.[161]

The Court emphasized that the central issue in examining grounds for disqualification is not the source of a judge's bias or prejudice. In other words, the majority in *Liteky* did not purport to adopt a strict extrajudicial source requirement for disqualification motions under section 455(a).[162] Nor did the Court adopt a per se rule requiring disqualification when evidence exists demonstrating that the judge's partiality stems from an extrajudicial source.[163] Rather, the Court explained that the key to understanding and applying the extrajudicial source doctrine and its exception lies in the pejorative connotations of the word "partiality" in section 455.[164] Because "partiality" connotes an inappropriate opinion, an opinion that is wrongful or undeserved is disqualifying regardless of its source.[165]

In practice, however, the extrajudicial or intrajudicial source of bias largely controls the disposition of disqualification motions. As discussed earlier, if the source of bias is extrajudicial, the movant must show that a reasonable person, aware of all the circumstances, might doubt the judge's impartiality.[166] Movants asserting intrajudical bias

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160 114 S. Ct. at 1157.

161 Justice Scalia only discusses this "pervasive bias exception" to the extrajudicial source requirement as it applies to §§ 144 and 455(b)(1). However, this "exception" exists whenever the extrajudicial source requirement is invoked. Therefore, although not explicitly stated, the pervasive bias exception applies to motions brought under § 455(a) as well as those under §§ 144 or 455(b). Bias may be classified as pervasive if it displays a "clear inability to render fair judgment," even if it does not derive from an extrajudicial source. One example of such intrajudicial behavior that has been found not to reflect this "high degree of favoritism" is the involvement of the trial judge in interrupting and interrogating witnesses for the prosecution and the defendant and in questioning the relevance of specific evidence prior to its admission on the record. *See* United States v. Castner, No. 93-5641, 1995 U.S. App. LEXIS 7626, *10-11, (4th Cir., April 5, 1995) (applying *Liteky* standard to judge's involvement in the presentation of testimony and evidence when court was fulfilling its obligation to correct inadequate examinations and clarify factual issues).

162 *Liteky*, 114 S. Ct. at 1157.

163 *See* United States v. Bogard, No. 94-50099, 1995 U.S. App. LEXIS 6082f, *3-4 (9th Cir., March 22, 1995) (stating that the Supreme Court in *Liteky* reasoned that " . . . neither the presence of an extrajudicial source establishes bias nor the absence of an extrajudicial source necessarily precludes bias.").

164 *Liteky*, 114 S. Ct. at 1155-57. *See also* United States v. Bertoli, 40 F.3d 1384, 1412 (3d Cir. 1994) (explaining that "the words 'extrajudicial bias' really are intended to convey the notion of a 'wrongful or inappropriate' bias, regardless of whether the improper bias arises from evidence adduced at trial or from some extraneous source").

165 *Liteky*, 114 S. Ct. at 1155-57.

166 *See, e.g.*, United States v. Jordan, 49 F.3d 152, 156-57 (5th Cir. 1995); United States v.

claims must show that a reasonable observer would find that the judge displayed a degree of antagonism or favoritism which would make fair judgment impossible.[167] Thus the source of a judge's impartiality has a decisive bearing on whether disqualification is deemed necessary.[168]

The *Liteky* opinion gives rise to several questions capable of empirical study. One obvious question is exactly what extrajudicial sources of bias would cause a "reasonable person" to doubt a judge's impartiality. Another is precisely what intrajudicial conduct is so extreme as to cause a reasonable person to conclude that fair judgment is impossible.[169] In this regard, *Liteky* asserts that manifestations of animosity must be "much more than subtle,"[170] and that judicial sternness and short temper in reaction to frustrations with courtroom administration cannot be deemed disqualifying.[171] Although empirical research may not produce clear, bright-line answers to these questions, in part because the reasonable person test is flexible and fact-controlled, empirical study of these questions may further discussion of these issues and help to clarify future standards for assessing "post-*Liteky*" section 455 claims, a topic to which I now turn.

2. *Post-*Liteky *Treatment of Section 455 Claims*

Circuit court opinions since *Liteky* that address section 455 claims illuminate recent conceptions of the appearance of justice.[172] As illustrated by the cases that follow, treatment of intrajudicial and extraju-

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Greenspan, 26 F.3d 1001, 1005-06 (10th Cir. 1994); El Fenix de Puerto Rico v. Johanny, 36 F.3d 136, 140 (1st Cir. 1994). *See also supra* notes 128-31 and accompanying text.

167 United States v. Williams, No. 95-0179, 1995 WL 434581 *2 (Bankr. E.D. Pa. July 24, 1995); Blanche Rd. v. Bensalem Township, 57 F.3d 253, 266 (3d Cir. 1995).

168 *Liteky*, 114 S. Ct. at 1155.

169 This issue is the central question in United States v. Antar, Nos. 94-5228, 94-5230, 1995 U.S. App. LEXIS 8083 (3d Cir. Apr. 12, 1995), which is discussed *infra* notes 191-204.

170 *Liteky*, 114 S. Ct. at 1158 n.3.

171 *Id.* at 1157.

172 Judicial disqualification issues also arise when claimants assert due process claims. Section 455 analysis does not apply to due process claims because federal judges do not have the authority to impose federal judicial disqualification standards on state court judges accused of unconstitutional judicial bias. *See* Fero v. Kerby, 39 F.3d 1462, 1479-80 (10th Cir. 1994); Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1378 (7th Cir. 1994). In addition, a finding of judicial bias sufficient to establish a due process violation rarely results from a mere appearance of impropriety. Thus, any claim that fails under § 455 should fail also under due process. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820-21 (1986) ("Only in the most extreme cases would disqualification [on the basis of appearance of bias] be constitutionally required"); Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d at 1378 ("[B]ad appearances alone should not require disqualification to prevent an unfair trial"); Diaz v. Botet, 182 B.R. 654, 661 (Bankr. D.P.R. 1995) ("[N]ot every case of judicial disqualification rises to the level of a Constitutional challenge"). *But see* supra notes 24-27 and accompanying text for a discussion of judicial opinions finding due process violations solely on the basis of appearance of bias).

dicial bias claims under the *Liteky* reasonable person standard varies greatly. This variation, combined with the fact-intensive nature of these decisions, suggests the need for additional empirical study to help identify the emerging judicial framework for assessing the appearance of justice.[173]

a. Extrajudicial Bias

The presence of an extrajudicial source of alleged bias increases the risk of an appearance of impropriety. Therefore, parties seeking to recuse a judge for extrajudicial bias must show only that a reasonable person, aware of the relevant circumstances, might harbor doubts about the judge's impartiality. Consistent with *Liteky*, this test, as applied by the federal courts, has proven less difficult to satisfy than recusal motions based on intrajudicial bias.

In *United States v. Greenspan*,[174] for example, the Tenth Circuit held that a judge who had received death threats from a criminal defendant should have recused himself under section 455 from sentencing that defendant. In *Greenspan*, the FBI informed the presiding judge, prior to sentencing, that the defendant was a participant in a multi-state conspiracy to kill the judge and his family. Instead of recusing himself, the judge expedited sentencing, and explained the need to "get [the defendant] into the federal penitentiary system immediately, where he can be monitored more closely."[175] In addition, the judge refused to grant the defendant a continuance, even though the defendant's new attorney was appointed just two days before the revised sentencing date.[176]

The court of appeals concluded that the judge's rulings alone would not have been a sufficient basis for recusal. However, in light of the judge's extrajudicial knowledge of the death threat, a reasonable person might question whether the judge could be impartial in sentencing the defendant.[177] The court emphasized, in part to ward off future judge-shopping, that had the record indicated the threat was merely a ploy to obtain a new judge, recusal would have been

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173 *See infra* notes 235-50 (proposing future empirical studies relating to § 455 and the reasonable person standard).

174 26 F.3d 1001 (10th Cir. 1994).

175 *Id.* at 1005.

176 *Id.*

177 *Id.* at 1006. *Cf.* CR 95-110-A, 1995 WL 606949 (10th Cir., filed Sept. 27, 1995). (Oklahoma City bombing defendant Terry Nichols' pending petition for writ of mandamus recusing the assigned district judge and all other judges in the Western District of Oklahoma). Counsel for Nichols rely heavily on *Greenspan* in their petition for recusal. For a discussion of appearance of justice issues raised by the Oklahoma City bombing case, see *infra* note 248.

improper.[178]

Similarly, in *United States v. Jordan*,[179] the Fifth Circuit granted the defendant's section 455 motion for recusal on the basis of extrajudicial bias. The defendant, convicted of wire fraud and money laundering, had an extremely hostile relationship with the trial judge's close personal friend of twenty-two years, Michael Wood. The animosity between Wood and the defendant stemmed from Wood's previous appointment as a receiver for the defendant's trucking company. The hostility escalated during the course of the relationship and culminated in the defendant having Wood arrested for assault. Wood was represented in that matter by the trial judge's husband, who was also Wood's former law partner. The court of appeals held that whether or not the trial judge was aware of the extent of the discord between the defendant and Wood, a reasonable person could question the judge's impartiality.[180]

In contrast to cases like *Greenspan* and *Jordan*, some claims of extrajudicial bias do not meet the relatively low threshold established by the *Liteky* test. In *United States v. Williams*,[181] for example, a defendant convicted of several counts of making false statements in connection with purchasing firearms alleged that the trial judge was biased against him because the judge's son had previously been murdered by gunshot during a completely unrelated felony. In denying the section 455 recusal motion, the trial judge explained that no reasonable third party observer could conclude from the judge's personal experience with violent crime that he would be biased against this particular defendant. Since all judges bring personal histories and experiences to the bench,[182] the court concluded that remote or speculative connections between those experiences and litigants or criminal defendants

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178 *Greenspan*, 26 F.3d at 1006.

179 49 F.3d 152 (5th Cir. 1995).

180 *Id.* at 156. The court acknowledged that judges are less likely than the reasonable third party observer to harbor doubts about their own impartiality and that of fellow judges, but noted judges must examine the situation from the perspective of a reasonable third party who is not a judge. *Id.* at 156-57. Study of this issue is required.

Early in its opinion, the court emphasized the fact-bound nature of § 455 claims: "[E]ach § 455(a) case is extremely fact intensive and fact bound, and must be judged on its unique facts and circumstances, more than by comparison to situations considered in prior jurisprudence." *Id.* at 157. Later, the court criticized the dissent's attempt to place Fifth Circuit judicial disqualification cases in a continuum: "[W]e see nothing more than a parsing of our prior cases into two pots, one containing those cases in which an appearance of impartiality was found and the other containing those cases in which such appearance was not found. That is certainly no 'continuum'; just an inventory exercise." *Id.* at 158 n.9.

181 No. 95-0179, 1995 WL 434581 (E.D. Pa. July 24, 1995).

182 *See supra* notes 32-36 and accompanying text.

by themselves should not be adequate grounds for recusal.[183]

The First Circuit similarly denied a recusal motion in *El Fenix de Puerto Rico v. Johanny*,[184] which arose out of a dispute between a yacht owner and his insurer over the cause of a shipwreck that occurred in the aftermath of Hurricane Hugo. Much of the information presented at trial was highly technical expert evidence regarding whether the insured had scuttled his yacht. The court rejected the expert testimony offered by the insurer and found the sinking was an accident.

The trial judge in *Johanny* had invited a friend, Bob Fisher, to view the trial. Fisher was a "local yachtsman well versed in maritime matters"[185] and a "boat aficionado."[186] Early in the trial, Fisher told one of the insurer's witnesses that the judge requested he attend the trial and listen to the evidence.[187] On the basis of Fisher's presence and the judge's subsequent rejection of the insurer's expert evidence, the insurer moved to have the presiding judge recused. The judge explained he had invited Fisher and his wife to view the trial only because they might find it interesting; nonetheless, the judge disqualified himself. When the insured moved for reconsideration, the judge vacated the recusal order and reinstated his earlier decision in favor of the insured.

On appeal, the First Circuit rejected the insurer's claim that disqualification was warranted under section 455. In reaching that conclusion, the court of appeals emphasized that the lack of facts supporting a finding of partiality and the absence of a factual basis for recusal undermined the recusal motion. According to the court, the only plausible reason for recusal was the "possible appearance of impartiality."[188]

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183 *Williams*, 1995 WL 434581 at *1. The court considered the defendant's accusation of intrajudicial bias separately. For an analysis of the court's consideration, see *infra* notes 212-14 and accompanying text.

184 36 F.3d 136 (1994).

185 *Id.* at 138.

186 *Id.* at 139.

187 *Id.* at 138-39.

188 *Id.* at 140. In addition, the court referred to the insurer's allegation as an "unfounded innuendo." *Id.* The *Johanny* court required that movants demonstrate more than a "possible appearance of partiality." *Id.* The type and level of proof that would have satisfied the court is unclear. The court concluded the judge's request that an expert friend attend the trial and his subsequent decision to reject the insurer's technical expert evidence did not merit recusal. Accordingly, to satisfy the court that recusal was warranted, movants would have had to produce proof that the judge asked his friend for an opinion or proof that the judge considered that opinion in rendering his opinion. Thus, the First Circuit seemed to require some proof of actual bias, contrary to the *Liteky* test's focus on the appearance of impropriety.

Diaz v. Botet, 182 B.R. 654 (D.P.R. 1995), another case arising within the First Circuit's

b. Intrajudicial Bias

To require recusal on the basis of intrajudicial bias, a movant must show that a reasonable person could find the trial judge displayed behavior to such a high degree of antagonism or favoritism as to preclude a fair trial.[189] The circuit courts have applied this exception narrowly to the extrajudicial source doctrine.[190] *United States v. Antar*[191] is a rare example of a post-*Liteky* decision that required recusal on the basis of intrajudicial bias alone.

In *Antar*, the Securities and Exchange Commission brought a civil action against Antar, the president and chairman of the board of Crazy Eddie, Inc., a consumer electronics store chain.[192] Six months later, the United States District Court for New Jersey entered a default judgment against Antar and ordered him to disgorge more than $52 million dollars, the amount the court determined Antar had illegally profited from the sale of stock in Crazy Eddie, Inc.[193]

In June 1992, a federal grand jury indicted Antar and three others on various racketeering and fraud charges. Antar was later convicted on all counts in the indictment. The trial judge sentenced Antar to 151 months in prison and ordered him to make restitution in the amount of $121 million.[194] Antar appealed the conviction and the sentence, arguing that the trial judge was biased against him and should have recused himself *sua sponte* from the criminal trial. Antar based this allegation on a statement the judge made to the United States Attorney during the sentencing hearing: "My object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant

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jurisdiction, may clarify *Johanny*'s requirement of a sufficient factual basis for recusal. In *Diaz*, a bankruptcy defendant sought recusal of the judge on both intrajudicial and extrajudicial grounds. The court explained that because § 455 claims turn on whether a reasonable third party aware of all the facts would question the judge's impartiality, "it is crucial that the facts which might cause a reasonable observer to question impartiality are identified." *Id.* at 659. Although the *Johanny* court did not frame the issue this way, the court may have insisted the movant present stronger proof of inappropriate behavior to establish "facts which might cause a reasonable observer to question impartiality" rather than to establish actual bias.

189 *See supra* notes 74-83 and accompanying text (describing empirical studies of judges' behavior and the appearance of justice).

190 *See Liteky*, 114 S. Ct. at 1157 (explaining that intrajudicial bias will rarely be disqualifying); United States v. Antar, 53 F.3d 568, 574 (3d Cir. 1995).

191 *Id.*

192 *Id.* at 570.

193 *Id.* at 571-72. Before the default was entered, Antar had fled the country. He was arrested two years later, after the criminal indictments, but before the criminal trial. *Id.* at 572.

194 *Id.*

and others."[195]

The Third Circuit concluded that a reasonable person could find the trial judge's behavior and comments at Antar's sentencing hearing displayed favoritism or antagonism sufficiently strong to make a fair trial impossible. A reasonable person could conclude from the trial judge's statements that his goal from the outset of the criminal trial was to restore large amounts of money to parties the defendant had allegedly harmed. Indeed, a criminal conviction of the defendant would have substantially advanced this goal.[196] Thus, the Third Circuit held that a reasonable person, knowing all the circumstances, could conclude that this goal sufficiently influenced the judge's rulings so as to make a fair trial impossible. The appellate court therefore reversed the convictions and remanded the action for a new trial with a different presiding judge.[197]

The Third Circuit acknowledged *Liteky*'s holding, that biased remarks arising during judicial proceedings must be "particularly strong in order to merit recusal,"[198] and noted that other courts have narrowly construed *Liteky*'s exception to the extrajudicial source doctrine.[199] The court expressed concern that, although *Liteky* did not require recusal of a judge who had formed an opinion of a person based on knowledge gained in earlier proceedings, "when a judge has formed opinions during a civil case, he or she certainly must be careful not to have those beliefs influence his or her goal in the criminal case."[200]

In contrast to *Antar*, other courts have declined to require recusal in situations that arguably demonstrate a high degree of intrajudicial prejudice, thereby highlighting the varied results produced by the reasonable person test. In *United States v. Young*,[201] for example, the Tenth Circuit did not require recusal of a judge who made statements that arguably exhibited extreme prejudice against a criminal defendant.[202] The defendant in *Young* had been indicted on three counts of money laundering and one count of conspiracy to possess with intent to distribute cocaine. During the trial, the court rejected the defend-

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195 *Id.* at 573-74.

196 *Id.* at 577.

197 *Id.* at 579.

198 *Id.* at 574.

199 *Id.*

200 *Id.* at 578.

201 45 F.3d 1405 (10th Cir. 1995).

202 *But see Antar*, 53 F.3d at 575 (distinguishing that case from *Young* on grounds that the judge in *Young* merely predicted what the jury would find, whereas the judge in *Antar* admitted to having an active purpose in the criminal trial other than seeking truth and justice).

ant's guilty plea for failure to admit all the elements of the crime. The jury convicted the defendant of two counts of money laundering and sentenced her to seventy months in prison. The defendant appealed the conviction on several grounds, including the trial judge's refusal to disqualify himself. The defendant grounded her section 455 motion on a remark the judge made to her attorney at a pretrial scheduling conference:

> [T]he obvious thing that's going to happen to [the defendant] is that *she's going to get convicted*, and then they're going to sprinkle her and bless her with immunity, and then she's going to get to testify. And then she's going to pull the same act on me again, and then she's going to the county jail for at least 30 days for contempt. And we'll do that as often as necessary until she starts talking. . . . All I'm telling you is that's the preview of coming attractions.[203]

In affirming the trial judge's decision, the court of appeals held that the judge's comment was, at worst, a mere prediction and may even have been intended to give the defendant strategic advice on amending her guilty plea to meet the pleading requirements. According to the Tenth Circuit, nothing in the judge's comment showed an unwillingness or inability to handle the case impartially. As a result, the defendant's recusal motion was held to have been properly denied.[204]

The Eighth Circuit likewise rejected a defendant's claim of intrajudicial bias and corresponding recusal motion in *In re Larson*.[205] In *Larson* the defendant sought removal of a district court judge from a criminal proceeding arising from the defendant's discovery of a fossilized Tyrannosaurus Rex that the government alleged was illegally collected. After two years of pretrial proceedings, the media announced that the government and the defendants had concluded a plea bargain. The trial judge, who had handled the case from its inception and who was currently presiding over a related civil action, heard news of the alleged plea bargain and announced in a letter to the parties that he would oppose any plea bargain, especially the one reported in the newspaper.[206] The defendants filed a motion for recusal on grounds that the trial judge was biased due to his long term involvement with the case.[207]

The trial judge denied the motion, and thereafter the defendant petitioned for a writ of mandamus. The appellate court found recusal unnecessary, since a reasonable person, knowing that the trial judge

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203 *Young*, 45 F.3d at 1414 (emphasis added).
204 *Id.* at 1416.
205 43 F.3d 410 (8th Cir. 1994).
206 *Id.*
207 *Id.*

had been involved for a long time in the criminal prosecution and had presided over a civil action involving many of the same parties and issues, "would not view these isolated remarks as an occasion for concern."[208] In effect, the defendant did not demonstrate that a reasonable person could find such animus or favoritism as to make fair judgment impossible.[209]

Two other post-*Liteky* trial court cases provide illustrations of judges denying motions to recuse grounded on alleged intrajudicial bias. In *Diaz v. Botet*,[210] the defendant in a bankruptcy action moved for recusal when the trial judge described him as a "bon vivant" during the trial. The judge denied the section 455 motion, reasoning that calling the defendant a "bon vivant" did not exhibit animosity or favoritism that would make a fair trial impossible. Not only did the evidence of the defendant's extravagant lifestyle presented at trial corroborate this description of the defendant, but also this description was arguably complimentary.[211]

In *United States v. Williams*,[212] the defendant also sought recusal of the trial judge for alleged intrajudicial bias. The defendant asserted that comments the judge made during a plea hearing in response to defendant's extrajudicial bias concerns indicated intrajudicial bias.[213] The trial judge denied the motion to recuse, concluding that any reasonable person who read the transcript would recognize that his statement did not demonstrate deep-seated favoritism or antagonism. Rather, the judge stated that his comments intended to ensure that the defendant was aware of his right to request recusal.[214]

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208 *Id.* at 414.

209 *Id.* at 416.

210 182 B.R. 654 (Bankr. D.P.R. 1995).

211 *Id.* at 660.

212 No. 95-0179, 1995 WL 434581 (E.D.Pa. July 24, 1995).

213 Those comments included: "I hope, too, my personal life does not visit me in my sentencing, but if that's a concern of your client, then maybe you ought to let him have an opportunity and you can talk with him and in fact, I will take a break now and if he says 'I want you, Mr. DeStefano, to file a motion for recusal', we'll continue this matter and we'll see how I rule on it." *Id.* at *2.

214 *Id.* Numerous other cases involve intrajudicial bias claims that failed to meet the *Liteky* test. *See, e.g.*, United States v. Gordon, 61 F.3d 263, 267 (4th Cir. 1995) (denying request to disqualify judge who sought outside information in deciding whether to accept defendant's plea bargain); Grodon v. Random House, Inc., 61 F.3d 1045, 1053 (2d Cir. 1995) (finding judge's statement, made during Lanham Act trial, that no theory of the Kennedy assassination is universally accepted was insufficient to require recusal); Rafferty v. Nynex Corp., 60 F.3d 844, 847-48 (D.C. Cir. 1995) (holding unfavorable rulings did not demonstrate judicial bias); Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 266 (3d Cir. 1994) (concluding judge's comments during trial expressing impatience and frustration with the plaintiff and its attorneys were not disqualifying under § 455); United States v. Bertoli, 40 F.3d 1384, 1412-13 (3d Cir. 1994) (refusing to disqualify judge who made unfavorable rulings and reprimanded the defendant and his attorneys on several

c. Extrajudicial and Intrajudicial Bias

In several cases courts have required recusal on the basis of both intrajudicial and extrajudicial bias. For example, the D.C. Circuit ordered the recusal of a presiding district judge for exhibiting intrajudicial and extrajudicial bias in *United States v. Microsoft Corp.*[215] In *Microsoft*, the Department of Justice brought an antitrust action alleging that Microsoft had been using 'per processor' licenses and restrictive nondisclosure agreements to deter competition.[216] The Department of Justice subsequently entered into a consent decree with Microsoft that prohibited Microsoft from engaging in these two anticompetitive practices and filed the decree with the court.

Throughout the proceedings, the trial judge introduced into the trial issues outside the scope of either the complaint or the consent decree. On several occasions the judge questioned the attorneys about allegations made in the book *Hard Drive*,[217] focusing on the book's allegation that Microsoft employed "vaporware."[218] The judge also accepted ex parte submissions from the defendant's accusers, allowing one accuser to remain anonymous. Moreover, the judge made several comments during trial indicating dislike for and distrust of Microsoft and Microsoft's attorneys.[219]

The court of appeals directed that a new trial judge be assigned to the case on remand, determining that the judge's repeated references to vaporware "contaminated" his review of the case. These references, the appellate court reasoned, made it clear that the judge's acceptance of the accusations in the book *Hard Drive* resulted in his expansive inquiries.[220] Taken together, the improper references, the judge's favorable treatment of Microsoft's accusers, and his disparaging remarks concerning the defendant and its attorneys led the appellate court to rule that a reasonable observer could question the

occasions); United States v. Chischilly, 30 F.3d 1144, 1149-50 (9th Cir. 1994) (rejecting bias claim founded on judge's finding, twelve years prior to the present criminal trial, that the same defendant was incompetent to stand trial on other criminal charges).

215 56 F.3d 1448 (D.C. Cir. 1995) (per curiam). Although the recusal motion in *Microsoft* was brought under 28 U.S.C. § 2106, the court analogized that statute to § 455, and applied § 455 precedent in deciding the motion. *Id.* at 1463, nn.1-2.

216 *Id.* at 1452-53.

217 *Id.*

218 *Id.* at 1463. The judge stated, for example, "[y]ou see, what you have to explain to me is why not if these other practices—say while we're cleaning up this mess, why don't we also take care of—you must agree that vaporware is a problem . . . ." "Vaporware" describes Microsoft's alleged practice of publicly announcing new computer devices while in the production stages solely to deter consumers from purchasing competitor's products that are currently (or will be imminently) on the market. *Id.* at 1453.

219 *Id.* at 1464.

220 *Id.* at 1463.

judge's impartiality.[221]

The Fourth Circuit, in *Hathcock v. Navistar International Transportation Corp.*, similarly upheld a claim of disqualifying bias based on intrajudicial and extrajudicial sources.[222] Concerning the former, the judge issued a default order against the defendant that allegedly had been drafted by the plaintiff's counsel. Although the judge submitted an affidavit in response to the recusal motion in which the judge admitted that plaintiff's counsel had drafted the factual portion of the default order, the judge insisted he had arrived at independent legal conclusions.

Concerning the extrajudicial source of bias, the defendant alleged that while a trial on damages in the instant action was underway, the judge made several public derogatory remarks about tort defendants and their attorneys. In particular the defendant alleged that the judge said: "[E]very defense lawyer objects to the net worth coming in [on the issue of punitive damages]. . . . Then after the verdict you can get up there and call them the son-of-a-bitches that they really are."[223]

The court of appeals held that a reasonable person could conclude from these facts that the judge could not decide the case impartially. The appellate court reasoned that, by itself, the judge's request that plaintiff's counsel draft the default order may not have justified recusal. However, viewed in conjunction with the judge's personal involvement in opposing the recusal motion and the apparent prejudice against tort defendants exhibited during his speech, recusal under section 455 was warranted.[224]

A final example of recusal based on intrajudicial and extrajudicial bias occurred in *In re International Business Machines Corp (IBM)*.[225] In *IBM*, the Second Circuit ordered the district judge to recuse himself from presiding over a civil antitrust action brought by the United States against IBM in 1952.[226] The 1952 action ended in a consent decree which the parties amended in 1956. Nothing further occurred regarding that action until 1994, when IBM filed two motions: the first requesting termination of the consent decree as amended; the second requesting recusal of the presiding judge. The judge denied the

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221 *Id.* at 1465.

222 53 F.3d 36 (4th Cir. 1995).

223 *Id.* at 39. In that same speech he commented: "What makes [these pro-plaintiff decisions] so great is that the lawyers that represent these habitual defendants, they met these three decisions with about the same degree of joy and enthusiasm as the fatted calf did when it found out the prodigal son was coming home. That indicates that that's some pretty good decisions." *Id.*

224 *Id.* at 41.

225 45 F.3d 641 (2d Cir. 1995).

226 *Id.* at 644.

recusal motion, and IBM filed for a writ of mandamus.[227]

A related action involving the same parties and the same judge played a central role in the recusal motion and the Second Circuit's ultimate decision. The United States had brought a second antitrust civil action against IBM in 1969. Seven years later, while this trial on liability was in progress, the United States agreed to a dismissal, with the parties stipulating that the government had determined the case was without merit.[228] Several actions by the presiding judge in the aftermath of the stipulated dismissal formed the basis for IBM's motion for recusal in 1994: the judge criticized the government's decision to dismiss the case; refused motions to dispose of copious pages of documents accumulated during the litigation; indicated that he might reject the dismissal pursuant to the provisions of the Antitrust Procedures and Penalties Act;[229] and gave numerous interviews in the press concerning developments in the case.[230]

The Second Circuit granted IBM's recusal motion, concluding that a reasonable observer, fully informed of the circumstances surrounding the judge's refusal to dismiss the 1969 case when both parties had agreed to dismiss, could question the judge's continuing ability to impartially handle the 1952 case.[231] The court of appeals held that *Liteky* did not preclude judicial rulings from serving as a basis for recusal.[232] It concluded that a reasonable person could question the judge's impartiality regarding whether to dismiss the 1956 consent decree and granted mandamus relief.[233] In so doing, the court acknowledged that the *Liteky* decision did not establish a "bright line" test for extrajudicial source criteria in judicial disqualification analysis.[234] The future study of judicial disqualification and its rela-

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227 *Id.* at 642.

228 *Id.* at 643.

229 15 U.S.C. 16(b)-(h) (1988).

230 *In re International Business Machines*, 45 F.3d at 642.

231 *Id.* at 643.

232 *Id.* at 644.

233 *Id.* at 643.

234 Based on a review of state and federal cases as of November 1995, the issue of nonverbal expressions of bias has not yet arisen under a *Liteky* analysis. Analysis of a bias claim based on nonverbal behavior, however, should proceed as one for claims founded on relationships or verbal expressions. First, the court should determine whether the source of the alleged bias underlying the behavior is extrajudicial or intrajudicial. If the source is extrajudicial, the court should assess whether a reasonable person would doubt the impartiality of the judge displaying that behavior. If intrajudicial, the court should evaluate whether a reasonable person viewing the behavior would conclude it exhibited such a high degree of bias as to preclude fair judgment. *Cf.* U.S. v. Edmund, 52 F.3d 1080, 1101-03 (D.C. Cir. 1995) (quoting *Liteky*, 114 S. Ct. at 1157, discussion of defendant's due process claim that judge's comments, facial expressions, gestures and tone of voice demonstrated bias).

tion to the appearance of justice is the final issue to which I now turn.

C. FUTURE STUDY OF JUDICIAL BEHAVIOR AND THE APPEARANCE OF JUSTICE

Two general areas relating to the appearance of justice call out for future empirical study. First, as mentioned above, empirical investigation of the actual workings of various judicial tests and standards (e.g., disqualification standards) is needed. Second, examination of the relation of nonjudicial factors, such as evidentiary factors and media coverage in high profile trials, to the appearance of justice must be examined.

With regard to the first line of study, the *Liteky* Court's adoption of the extrajudicial source doctrine raises at least two immediate questions capable of empirical study relating to recent judicial treatment of bias claims. First, what specific degree of measurable bias satisfies the legal sufficiency test for a reasonable person having doubts about a presiding judge's impartiality? Second, what measureable judicial behavior could lead a reasonable person (or a sitting judge) to conclude that a fair trial is "impossible?" Systematic study of these and related issues may further the understanding of the reasonableness of a proposed disqualification determination based on particular behaviors.[235]

Regarding the second line of study, future research on judicial disqualification in the federal courts under the *Liteky* test is also warranted.[236] Research may concentrate on delineating the boundaries of the "impossible to have a fair trial test" by analyzing how federal courts in practice mark the limits of acceptable intrajudicial behaviors when prejudicial remarks are reflected in the record.[237] Once deline-

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235 In the Iowa studies, independent observers of trials reported that they "knew bias" when they saw it. *See* Blanck, *The Measure of the Judge*, *supra* note 29, at 679-80. Courts and commentators have recognized the usefulness of empirical studies in evaluating how the "reasonable person" would react to certain situations. *Cf.* U.S. v. Little, 18 F.3d 1499, 1508 (10th Cir. 1994) (Logan, J., dissenting) (illegal seizure claim); Stuart L. Bass, *The "Reasonable Woman" Standard: The Ninth Circuit Decrees Sexes Perceive Differently*, 43 LAB. L.J. 449 n.13 (1992) (sexual harassment claim). *See also* Toni P. Lester, *The Yankee Woman in King Arthur's Court—What the United States and United Kingdom Can Learn From Each Other About Sexual Harrassment*, 17 B.C. INT'L & COMP. L. REV. 233, 254 (1994) (arguing judges should look to statistical research and expert testimony in applying the reasonable person test to sexual harassment claims).

236 The contours of such a test are outlined through an illustration provided by the Court in *Liteky*. In indicating the limits of non-prejudicial intrajudicial behavior, the Court referred to a statement by a judge in a World War I espionage case involving German-American defendants, 114 S. Ct. at 1157 (quoting Berger v. United States, 255 U.S. 22 (1921)), *see supra* notes 119-26 and accompanying text.

237 *See, e.g.*, United States v. Holland, 655 F.2d 44 (5th Cir. 1981) (judge's on-record remarks reflected personal prejudice against defendant for successfully appealing his con-

ated, the elements of such a test may emerge and be identified as variables incorporated in existing or new research designs on the appearance of justice.[238]

Empirical studies could also furnish insight into appearance of justice concerns regarding situations that frequently present the occasion for seeking judicial disqualification, for example, in sentencing proceedings, and in new trials after remand from an appellate court. Although a presiding judge is often in the best position to determine an appropriate sentence for a convicted criminal defendant, the appearance of justice requires that discretionary sentencing be exercised by a judge without a "hint of animosity" toward the defendant.[239] Similarly, empirical studies of the relationship between allegedly biased judicial behavior, as well as the verdicts and sentencing patterns in new trials after remand, may provide valuable guidance for deciding whether certain circumstances foster a reasonable belief in the judge's inability to act in an impartial manner.

In addition, research may focus on determining what the general public perceives as factors in the tainting of the appearance of justice. Real world and mock studies that present various scenarios involving extrajudicial bias sources and intrajudical behavior indicating bias could be distributed to a cross-section of society. Analysis of the responses could help guide courts considering bias claims by highlighting factors widely perceived as indicating bias. As mentioned in section II, the Iowa Study indicated that nonverbal judicial behavior alone sometimes can predict trial outcomes and sentencing patterns. Study is needed of the type and form of particular nonverbal expressions of bias which the public perceives as making a fair trial impossible.

Additional study of the strength and quality of the evidence presented at trial and its relation to the appearance of justice and judicial behavior is needed as well. As the California and Iowa empirical studies suggest, the moderating behaviors of judges, combined with evidentiary strength, may be especially predictive of trial outcomes.[240] Further research is required to understand the combined and independent effects of judicial and extrajudicial sources necessary to adhere to the reach of *Liteky*.

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viction on basis of judge's actions during prior trial; remarks were sufficient to require judge's disqualification for partiality under § 455(a)).

238 *See supra* notes 64-83 and accompanying text (research framework in California and Iowa studies).

239 *See* Commonwealth v. Darush, 459 A.2d 727 (Pa. 1983) (requiring sentencing by a judge whose "impartiality cannot reasonably be questioned"). *Cf. supra* note 174-78 and accompanying text (discussing *Greenspan* and recusal in sentencing hearing).

240 *See* Blanck, *Judges' Behavior*, *supra* note 12, at 119-36.

Other related questions require systematic study. To what extent does the strength of the evidence alone predict verdicts in higher versus lower complexity trials, or in higher versus lower media profile cases? The degree to which evidence is the primary "engine of justice" regardless of the appearance of justice remains an open question for future study.[241]

In addition, researchers may attempt to identify other sources that influence judicial decision-making in high profile cases. One such pervasive topic in the general public's eye today is the role of the appearance of justice in highly publicized criminal cases.[242] Expansive and unprecedented media coverage in recent high profile criminal cases—cases involving the Menendez brothers, William Kennedy Smith, Rodney King, O.J. Simpson, Mike Tyson, and others—have focused public attention on satisfying the appearance of and actual justice.[243] Professor Paul Robinson commented at the Conference that in high profile cases the disparity between the appearance of justice and actual justice is often exaggerated.[244] High profile cases tend to be those cases in which the system "does not tend to work well . . . [where the public] focus[es] on the unusual, [the] bizarre cases, the cases gone wrong, the distortion effect that comes with the media coverage."[245] The appearance of justice is distorted and presented in ways different from "the 99 burglary cases that come to trial and the person gets what they deserve."[246]

Attorney Leslie Abramson also commented at the Conference that in the O.J. Simpson case, presiding "Judge Ito's obvious concern [was] not just with the appearance of justice, but with [actual] justice."[247] Study is needed, therefore, of media portrayals of the appearance of justice, as well as actual justice, in high profile versus low profile cases.[248] In addition, the impact of the media on judge and

241 *See, e.g.*, Michael J. Saks, *The Limits of Scientific Jury Selection: Ethical and Empirical*, 12 JURIMETRICS J. 3, 22 (1976).

242 *See, e.g.*, the research on extralegal influences on jury decision making, in David T. Wasserman & J. Neil Robinson, *Extra-legal Influences, Group Processes, and Jury Decision-making: A Psychological Perspective*, 12 N.C. CENTRAL L.J. 96 (1980).

243 *See* Marla Sandys & Steve M. Chermak, A Journey into the Unknown: The Effects of Pretrial Publicity on Capital Cases (1995) (unpublished manuscript on file with author).

244 *Conference Proceedings, supra* note 7, at 28.

245 *Id.* at 28.

246 *Id.* at 28.

247 *Id.* at 88.

248 The appearance of justice has become increasingly important in light of the extensive media coverage given trials of major public interest. Because of the high visibility of such cases, they have the potential to shape judicial and popular notions of the appearance of justice.

The Oklahoma City bombing case, U.S. v. McVeigh, provides an example of a well-publicized trial that raises appearance of justice issues. In that case, defendants Terry

jury decision-making, the use of jury sequestration, and the appearance of justice is capable of future study.

Another equally important area requiring study is the impact of our increasingly multi-cultural society on conceptions of the appearance of justice and fairness in the courtroom. At the Conference, Dr. Florence Keller commented that we can no longer conduct trials in traditional ways and believe that a defendant can get "a fair hearing from people whose cultures are so different, whose symbols are so opposite."[249] To believe that our system of justice can provide a defendant "a fair hearing without knowing more about the cultures, more about our juries, and more about how to relate to these juries, is to do a disservice to our system of justice and to the defendant."[250] Empirical study of diverging views of the appearance of justice from a multicultural and multi-ethnic view point is needed.

IV. CONCLUSION

George Everson's 1919 article in this Journal continued a tradition of analysis and discussion, perhaps more important than ever before, of the concept of the appearance of justice. At the Appearance of Justice Conference, Professor Paul Robinson spoke of this dialogue:

> We need to have a criminal justice system which speaks with moral authority, which means it has to have the appearance of fairness . . . . That's one part of making law more powerful—by increasing its appearance of doing justice.[251]

The ultimate authority of the judiciary is derived from the faith that society places in the fairness and impartiality of judges presiding in our courts. In a day of ever increasing public awareness and media coverage of courtroom trials, the "appearance of justice," to para-

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Nichols and Timothy McVeigh sought recusal of district Judge Alley under §§ 144, 455(a) and 455(b), because the impact of the April 1995 bombing of the federal building in Oklahoma City reached and severely damaged the nearby federal courthouse. In addition, several courthouse employees, including some judges, sustained injuries or lost relatives as a result of the explosion. Finally, the defendants alleged the general atmosphere at the courthouse was one of anger and hurt, as evidenced by the circulation at the courthouse of pamphlets, t-shirts and videos relating to the bombing disaster.

Although the government recommended voluntary recusal of all Western District of Oklahoma judges, Judge Alley denied defendants' recusal motion, noting that he was not personally acquainted with any of the bombing victims and that the damage to the courthouse had not impeded normal courtroom functioning. U.S. v. McVeigh, No. CR 95-110-A, 1995 WL 558992 (W.D. Okla. Sept. 14, 1995). Defendant Nichols petitioned the Tenth Circuit for a writ of mandamus recusing Judge Alley and all other judges in the Western District of Oklahoma. CR 95-110-A, 1995 WL 606949 (10th Cir., filed Sept. 27, 1995).

249 *Conference Proceedings, supra* note 7, at 35.

250 *Id.* at 35.

251 *Id.* at 29.

phrase Justice Frankfurter, is more important than ever before to generate public feelings that justice has been done.