

6-2020

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### Recommended Citation

McKoski, Raymond J. (2020) "Rewriting Judicial Recusal Rules with Big Data," *Utah Law Review*. Vol. 2020 : No. 2 , Article 2.

Available at: <https://dc.law.utah.edu/ulr/vol2020/iss2/2>

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## REWRITING JUDICIAL RECUSAL RULES WITH BIG DATA

Raymond J. McKoski\*

### *Abstract*

*Big data affects the personal and professional life of every judge. A judge's travel time to work, creditworthiness, and chances of an IRS audit all depend on predictive algorithms interpreting big data. A client's choice of counsel, the precise wording of a litigant's motion, and the composition of the jury may be dictated by analytics. Touted as a means of bringing objectivity to judicial decision-making, judges have employed big data to determine sentences and to set the amount of restitution in class action cases. Unfortunately, the legal profession and big data proponents have ignored one perplexing problem begging for a big data solution—the arbitrary and inconsistent manner in which courts determine judicial recusal issues.*

*Every jurisdiction disqualifies a judge when the fully-informed, reasonable, lay observer concludes that the judge's "impartiality might reasonably be questioned." Created by the American Bar Association in 1972 to bring uniformity and consistency to the disqualification process, this "objective" test has been a dismal failure. The ABA's goal, however, can be realized by infusing data analytics into the disqualification decision-making process.*

*Part I of this Article identifies the serious shortcomings of an appearance-based disqualification standard. Part II explains how analysis of big data can correct the theoretical and practical problems plaguing the "might reasonably be questioned" standard. Part III applies the big data derived model to one type of disqualification motion—motions seeking a judge's removal from a case because of contributions made to the judge's election campaign by litigants, lawyers, or others connected with the litigation.*

### INTRODUCTION

Big data influences the personal and professional life of every judge.<sup>1</sup> As like any other person, a judge may benefit from medical technology's use of big data to

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<sup>1</sup> See Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders' Use of Big Data*, 93 CHI.-KENT L. REV. 3, 10 (2018) ("Big Data is not a futuristic phenomenon. It is already in widespread use, pervading all aspects of our daily lives." (internal quotation marks omitted)).

create a patient-specific vaccine for the judge or a member of the judge's family.<sup>2</sup> The judge's creditworthiness,<sup>3</sup> travel time to work,<sup>4</sup> and the likelihood of an Internal Revenue Service audit<sup>5</sup> depend on predictive algorithms interpreting big data. Big data enhances a judge's enjoyment of sporting events because analytics is "revolutionizing" all major sports "from player recruitment to fan engagement."<sup>6</sup> If a judge cannot find one of the 15,000 broadcast radio stations in the United States to her liking,<sup>7</sup> data analysis allows the judge "to have [her] own, personal radio stations."<sup>8</sup>

In the exercise of adjudicative responsibilities, a judge knows that law enforcement departments rely on technology to predict where crimes will occur and to identify likely victims and perpetrators.<sup>9</sup> Soon, big data may establish reasonable suspicion to support the temporary detention of a suspect under the U.S. Supreme Court's 1968 ruling in *Terry v. Ohio*.<sup>10</sup>

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<sup>2</sup> See Chloé Margulis, *The Application of Big Data Analytics to Patent Litigation*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 305, 317–18 (2017).

<sup>3</sup> See Komal S. Patel, Note, *Testing the Limits of the First Amendment: How Online Civil Rights Testing Is Protected Speech Activity*, 118 COLUM. L. REV. 1473, 1481 (2018).

<sup>4</sup> See Andrew Kasabian, Note, *Litigating in the 21st Century: Amending Challenges for Cause in Light of Big Data*, 43 PEPP. L. REV. 173, 191 (2015) ("A final industry where Big Data has made an impact is traffic management and control.").

<sup>5</sup> See Kimberly A. Houser & Debra Sanders, *The Use of Big Data Analytics by the IRS: What Tax Practitioners Need to Know*, 128 J. TAX'N 6, 6 (2018).

<sup>6</sup> Ryan Ayers, *How Big Data Is Revolutionizing Sports*, DATAECONOMY (Jan. 24, 2018), <https://dataconomy.com/2018/01/big-data-revolutionizing-favorite-sports-teams> [<https://perma.cc/P7B8-MY6Q>]; see also Brian Burke, *4th Down Study*, ADVANCED FOOTBALL ANALYTICS, (Nov. 12, 2004), <http://www.advancedfootballanalytics.com/index.php/home/research/game-strategy/120-4th-down-study> [<https://perma.cc/LH9H-67ZZ>] (using big data to analyze decisions made on fourth downs); Bernard Marr, *The Big Risks of Big Data in Sports*, FORBES (Apr. 28, 2017), <https://www.forbes.com/sites/bernardmarr/2017/04/28/the-big-risks-of-big-data-in-sports/#6926d6757c6f> [<https://perma.cc/7UGQ-Q8LF>] (discussing pitfalls of big data's use in sports).

<sup>7</sup> See FCC, BROADCAST STATION TOTALS AS OF SEPTEMBER 30, 2018 (FCC News, Oct. 3, 2018), <https://docs.fcc.gov/public/attachments/DOC-354386A1.pdf> [<https://perma.cc/E4AS-L5JQ>].

<sup>8</sup> *How Does Big Data Impact Your Life?*, BOTANANALYTICS BLOG (Aug. 4, 2017), <https://botanalytics.co/blog/2017/08/04/big-data-impact-life/> [<https://perma.cc/QXC8-ZPNT>].

<sup>9</sup> See Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1113 (2017) ("Data from past crimes, including crime types and locations, are fed into a computer algorithm to identify targeted city blocks with a daily (and sometimes hourly) forecast of crime. . . . In large cities such as Los Angeles, Chicago, and New Orleans, complex social network analysis has isolated likely perpetrators and victims of gun violence.").

<sup>10</sup> 392 U.S. 1, 21, 30 (1968) (holding that the Fourth Amendment permits brief investigative detentions by law enforcement officers who possess "specific and articulable facts" short of probable cause, that create a likelihood "that criminal activity may be afoot");

But law enforcement's use of big data and algorithms to bring alleged offenders into court is only one way in which predictive analytics will affect the administration of justice. Prosecutors already present adjudicators with the results of algorithmically generated recidivism predictions as an aid in bail, parole, and sentencing decisions.<sup>11</sup> Litigants may choose their lawyers through dataset analysis that compares overall lawyer success rates, lawyer success rates before individual judges, and even lawyer success rates before individual judges in specific types of litigation.<sup>12</sup> Big data can dictate case processing and outcomes by providing clients with the “universe of options others have taken in similar situations and to forecast the probability that a particular course of action would be favorable to the client.”<sup>13</sup> The vast amount of personalized electronic information makes jury selection ripe for predictive software.<sup>14</sup> And courts have employed algorithms to set restitution amounts in class action cases.<sup>15</sup>

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*see also* United States v. Sokolow, 490 U.S. 1, 7–9 (1989) (comparing *Terry*'s “reasonable suspicion” standard with the probable cause standard); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 327, 386 (2015) (describing how “big data tools exist to generate the necessary reasonable suspicion” required by *Terry v. Ohio*).

<sup>11</sup> See MEGAN T. STEVENSON & JENNIFER L. DOLEAC, THE ROADBLOCK TO REFORM 1, 3 (Am. Const. Soc'y, Nov. 2018), <https://www.acslaw.org/wp-content/uploads/2018/11/RoadblockToReformReport.pdf> [<https://perma.cc/E5JG-WU6U>] (stating that algorithmic risk assessment tools are used at sentencing in “at least twenty-eight full states; at least seven additional states have at least one county that uses risk assessment tools at sentencing”); *see also* Ferguson, *supra* note 9, at 1120–21 (discussing the use of actuarial predictions in bail, sentencing, and parole decisions); Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System*, 15 OHIO ST. J. CRIM. L. 573, 573 (2018) (discussing debate over the use of big data in pre-arrest monitoring, bail, and sentencing); Jason Tashea, *Risk-assessment algorithms challenged in bail, sentencing and parole decisions*, A.B.A. J. (Mar. 1, 2017), [http://www.abajournal.com/magazine/article/algorithm\\_bail\\_sentencing\\_parole/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/magazine/article/algorithm_bail_sentencing_parole/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email) [<https://perma.cc/NPM7-H47T>] (describing the debate over “the use of algorithms in bail, sentencing and parole decisions”).

<sup>12</sup> *See* Kasabian, *supra* note 4, at 206 (stating that data analytics can “help clients identify the attorneys that win before certain judges on certain types of cases.”); Margulis, *supra* note 2, at 318 (“Big data is currently implemented to compare competing law firms” and to “predict[] and compare[] lawyer success rates.”).

<sup>13</sup> Caryn Devins et al., *The Law and Big Data*, 27 CORNELL J. L. & PUB. POL'Y, 357, 367 (2017).

<sup>14</sup> Andrew Guthrie Ferguson, *The Big Data Jury*, 91 NOTRE DAME L. REV. 935, 937 (2016) (“The rise of ‘big data’ has the potential to upend the current informational limitations of jury selection.”); *see also* VOLTAIRE, TOUR, <https://voltaireapp.com/tour> [<https://perma.cc/S5V7-V8LD>] (last visited Sept. 17, 2019) (offering to combine “powerful artificial intelligence,” patent pending algorithms, and access to more than a billion data points to identify “hidden risks and potential biases” of jurors).

<sup>15</sup> *See, e.g.*, Pulaski & Middleman, LLC v. Google, Inc., 802 F.3d 979, 989 (9th Cir. 2015) (noting that algorithms may also be used to calculate restitution).

The explosion of scholarly work and proliferation of private and publicly sponsored research into the use of big data in the administration of justice has ignored one problem that begs for a big data solution—the “crumbling” framework of judicial disqualification.<sup>16</sup> Of course, some disqualification decisions are easy. For example, the American Bar Association’s Model Code of Judicial Conduct requires a judge’s disqualification in any matter in which the judge’s relative within the third degree of relationship appears as a lawyer, witness, or litigant.<sup>17</sup> Judges effortlessly comply with such specific disqualification standards because they know their relatives. But in addition to a list of specific disqualifying factors, every jurisdiction requires disqualification “in any proceeding in which the judge’s impartiality might reasonably be questioned.”<sup>18</sup> This catch-all standard is one of the most frequently invoked provisions of judicial codes and the primary disqualification standard.<sup>19</sup> Because the “might reasonably be questioned” standard is “troublesomely vague,”<sup>20</sup> “frighteningly empty of content,”<sup>21</sup> and “unworkable,”<sup>22</sup> the standard has failed to accomplish its drafters’ objectives. It has not brought

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<sup>16</sup> Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again*, 30 REV. LITIG. 671, 675 (2011) (“I argue that the dominant regime that has structured judicial disqualification in the state and federal courts for nearly forty years . . . is crumbling, and the struggle for a successor regime has begun.”).

<sup>17</sup> MODEL CODE OF JUD. CONDUCT r. 2.11(A)(2) (AM. BAR ASS’N 2010); *see also id.* at Terminology (defining “Third degree of relationship” to include “the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.”).

<sup>18</sup> *Id.* at r. 2.11(A); *see also* Raymond J. McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned: Moving Beyond a Failed Standard*, 56 ARIZ. L. REV. 411, 416 n.29 (2014) (explaining that every jurisdiction has adopted this standard).

<sup>19</sup> *See* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55, 55 (2000) (describing the “might reasonably be questioned” test as “[o]ne of the most frequently invoked standards in the [judicial] Codes”); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 155 n.356 (2014) (describing the “might reasonably be questioned” test as “[t]he primary disqualification standard for judges”).

<sup>20</sup> John P. Frank, *Disqualification of Judges: In Support of the Bayh Bill*, 35 LAW & CONTEMP. PROBS. 43, 59-60 (1970); *see also* Leslie W. Abramson, *What Every Judge Should Know About the Appearance of Impartiality*, 79 ALB. L. REV. 1579, 1583 (2016) (“[T]he ABA’s 1972 general principle for judicial disqualification endures despite its intrinsic vagueness.”).

<sup>21</sup> *Judicial Disqualification: Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 93d Cong. 39 (1971, 1973) [hereinafter *Hearings*] (statement of John P. Frank).

<sup>22</sup> *Haynes v. State*, 937 S.W.2d 199, 204 (Mo. 1996) (en banc); *see also* *Burgess v. State*, 342 S.W.3d 325, 328 n.5 (Mo. 2011) (en banc) (“The Court in *Haynes* found the ‘might reasonably be questioned’ standard unworkable. . . .” (internal quotation marks omitted)).

consistency and uniformity to recusal decisions,<sup>23</sup> made recusal decisions objective rather than subjective, or increased public confidence in the judiciary.<sup>24</sup>

Many shortcomings infect the catch-all category of recusal. First, the drafters of the “might reasonably be questioned” language provided judges with little help in interpreting or applying the elusive test.<sup>25</sup> Second, rather than filling that void, courts have specifically advised judges not to rely on case precedent when deciding whether to remove themselves from cases.<sup>26</sup> Third, judicial ethics advisory committees—created to assist judges in complying with ethical mandates—have largely abdicated on the issue.<sup>27</sup> Fourth, the test pretends to be an “objective test” because the ordinary, reasonable, lay observer, and not the judge, is assigned to decide whether a set of circumstances creates an appearance of partiality.<sup>28</sup> It is no coincidence, however, that the lay arbiter of judicial disqualification is imbued with precisely the same knowledge as the challenged judge. That knowledge includes facts unknown to the general public, all facets of substantive and procedural law, the judge’s past judicial performance, the practicalities and realities of practicing law, and a complete mastery of the code of judicial conduct.<sup>29</sup> The level of imputed knowledge attributed to the reasonable person raises the suspicion that the fictitious arbiter is, in reality, the challenged judge. This suspicion is confirmed by the fact that challenged judges usually decide their own disqualification motions, thus simultaneously serving as the interpreter and object of the “might reasonably be questioned” standard. The result is an objective test in theory and a subjective test in practice.<sup>30</sup>

These and other failings have led researchers to conclude that “judicial disqualification frequently is subjective, random, and arbitrary” and that the appearance of partiality test in particular “pose[s] a special dilemma.”<sup>31</sup> Professor Charles Geyh put it this way: “The net effect is that except in extreme or well-settled cases, consensus on when it is fair or reasonable to doubt the impartiality of a judge is elusive—we do not know it when we see it.”<sup>32</sup>

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<sup>23</sup> This Article uses the terms “recusal” and “disqualification” interchangeably. *Cf. In re Sch. Asbestos Litig.*, 977 F.2d 764, 769 n.1 (3d Cir. 1992) (observing that courts commonly use the terms “recusal” and “disqualification” interchangeably).

<sup>24</sup> See *infra* notes 31–32 and accompanying text.

<sup>25</sup> See McKoski, *supra* note 18, at 434–38.

<sup>26</sup> See *infra* Section I.B.1.

<sup>27</sup> *Id.*

<sup>28</sup> See *infra* Section I.B.2.

<sup>29</sup> See *infra* Section I.B.2.a.

<sup>30</sup> RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 5.1 (2d ed. 2007).

<sup>31</sup> JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4–5 (Am. Judicature Soc’y, 1995).

<sup>32</sup> Geyh, *supra* note 16, at 676.

Further signaling the profession's disappointment with the "might reasonably be questioned" standard, the literature is replete with suggested reforms to improve the objectivity and consistency of disqualification decisions.<sup>33</sup> The recommended modifications include directing that independent judges hear recusal motions, requiring judges to provide written disqualification decisions, the preemptory disqualification of trial judges, and the use of lay panels to decide recusal issues.<sup>34</sup> Even if states were anxious to adopt such reforms, the reforms do not address the fundamental theoretical flaw in the appearance-based disqualification regime. The "reasonable observer" as presently constructed is simply "hopelessly outmoded."<sup>35</sup>

This Article proposes that permitting big data<sup>36</sup> to control, or at least inform, disqualification decisions will significantly reduce the theoretical and practical deficiencies of appearance-based recusal. By removing the judge from the equation and enhancing the objective information possessed by the fictitious reasonable person, the ultimate goal of uniform, consistent, and predictable disqualification decisions can be achieved. Part I examines the undeniable defects of appearance-based disqualification. Part I also briefly reviews recurring recommendations for reforming the judicial disqualification process. Part II describes how the use of big data would transform the "might reasonably be questioned" test into what its architects intended. Part III illustrates how big data can cure shortcomings in appearance-based disqualification by applying the big data model to one type of disqualification motion—motions seeking a judge's removal from a case based on contributions made to the judge's election campaign by litigants, lawyers, or others connected with the litigation. The devastating impact that campaign contributions can have on the perceived fairness of the judiciary and the sheer volume of untapped,

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<sup>33</sup> See *infra* Section I.C.

<sup>34</sup> See Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification—And a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation, and Perceptual Realities*, 30 REV. LITIG. 733, 788–805 (2011) (collecting suggested reforms).

<sup>35</sup> *Id.* at 809.

<sup>36</sup> Some commentators might describe the proposal outlined in this Article as employing "analytics" rather than "big data" because the relevant data sets may not satisfy the "volume, velocity, and variety" requirement usually associated with big data. See Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 774 (2017). And in some applications of the proposal, the "three Vs" might not meet the evolving and "squishy" definitions of big data. See Paul Ohm, *The Underwhelming Benefits of Big Data*, 161 U. PA. L. REV. 339, 340 (2013). But today, the term "'big data' has become nearly synonymous with 'data analysis,'" *id.*, and is used here to describe "a way of thinking about knowledge through data and a framework for supporting decision making. . . ." Sofia Grafanaki, *Autonomy Challenges in the Age of Big Data*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 803, 805 (2017) (quoting Solon Barocas & Helen Nissenbaum, *Big Data's End Run Around Anonymity and Consent*, in PRIVACY, BIG DATA, AND THE PUBLIC GOOD: FRAMEWORKS FOR ENGAGEMENT 44, 46 (Julia Lane et al. eds., 2014)); see also Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 539 (2014) ("The term, 'big data,' refers to a new method of empirical inquiry.").

public information relevant to whether a judge's impartiality might reasonably be questioned because of financial assistance provided to a judge's election effort, make this issue the perfect test for big data's ability to correct the defects in appearance-based disqualification.

#### I. APPEARANCE-BASED JUDICIAL DISQUALIFICATION: ORIGINS AND FAILED REFORM EFFORTS

In 1972, the American Bar Association (ABA) adopted a new judicial disqualification regime mandating disqualification whenever the lay observer might reasonably question a judge's impartiality.<sup>37</sup> Suffering from serious deficiencies in a theoretical framework and practical application, this ambiguous disqualification test never had a chance to succeed. Patch-work attempts to revise the standard have failed to address the inherent flaws in appearance-based recusal.

##### A. *The ABA's Transition to Appearance-Based Disqualification*

Until the last quarter of the twentieth century, the legal profession embraced the long-standing value of actual judicial impartiality as the cornerstone of the American legal system.<sup>38</sup> The common law presumed that every judge possessed this "indispensable feature of democracy."<sup>39</sup> This presumption was irrebuttable, save for matters in which a judge had a direct financial interest.<sup>40</sup> The common law considered "the lure of lucre" such a "particularly strong motivation,"<sup>41</sup> that any pecuniary interest in a proceeding, no matter how small, automatically disqualified

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<sup>37</sup> CODE OF JUD. CONDUCT Canon 3(C)(1) (AM. BAR ASS'N 1972), *reprinted in* LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 116 (1992).

<sup>38</sup> *See* McKoski, *supra* note 18, at 418. ("But the 'big bang' in the expanding universe of judicial disqualification came in 1972, when the ABA decided that promoting public confidence in judicial impartiality, rather than protecting a litigant's right to a fair judge, supplied the primary rationale for disqualifying judges.")

<sup>39</sup> Elizabeth B. Wydra, *The Fourteenth Amendment's Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context*, 60 SYRACUSE L. REV. 239, 241 (2010) ("[A] fair and impartial judiciary has been an indispensable feature of democracy.").

<sup>40</sup> *See* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 250 (2012) ("[A]t common law, the presumption of impartiality was irrebuttable: judges could not be disqualified for bias."); *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877–79 (2009) (holding that financial interest is sufficient to require recusal).

<sup>41</sup> Bruce A. Green, *May Judges Attend Privately Funded Educational Programs? Should Judicial Education be Privatized?: Questions of Judicial Ethics and Policy*, 29 FORDHAM URB. L.J. 941, 947 (2002) ("As the common law recognized, and as experience teaches, the lure of lucre is a particularly strong motivation, and therefore judges ought to be prohibited from presiding over cases in whose outcomes they have a direct financial interest.").

the judge.<sup>42</sup> The common law recognized no other interest as sufficient to overcome a judge's oath to administer justice impartially.<sup>43</sup> In the United States, disqualifying factors slowly expanded to include interests other than financial. In 1821, Congress amended the federal recusal statute to remove a judge from a case in which the judge's relative was a party.<sup>44</sup> In 1911, Congress further amended the statute to require recusal when a judge possessed a "personal bias or prejudice" in a matter.<sup>45</sup> During this expansion of the grounds for judicial disqualification, one fact remained constant—the determinative issue was a judge's actual impartiality.<sup>46</sup> Frequently, courts and commentators also advised against creating an appearance of bias, partiality, or evil, but these admonishments were hortatory and directed to all participants in the justice system including lawyers, judges, jurors, witnesses, and even law professors.<sup>47</sup>

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<sup>42</sup> *Pearce v. Atwood*, 13 Mass. 324, 340 (1 Tyng) (1816), stated the rule:

It is very certain, that, by the principles of natural justice, of the common law, and of our constitution, no man can lawfully sit as judge in a cause in which he may have a pecuniary interest. Nor does it make any difference, that the interest appears to be trifling: for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line. *Any* interest, therefore, *however small*, has been held sufficient to render a judge incompetent.

(emphasis in original).

<sup>43</sup> See *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1936) ("As Blackstone put it, 'the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*361)).

<sup>44</sup> Act of Mar. 3, 1821, ch. 51, 3 Stat. 643; see also *Oakley v. Aspinwall*, 3 N.Y. 547, 551 (1850) ("Hence the statute declares, that no judge of any court can sit as such in any cause to which he is a party or in which he is interested, or in which he would be disqualified from being a juror by reason of consanguinity or affinity to either of the parties." (internal quotations omitted)).

<sup>45</sup> Act of Mar. 3, 1911, ch. 231, § 21, 36 Stat. 1090.

<sup>46</sup> See Kevin D. Swan, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 815–16 (1987) (stating that "actual impartiality" governed a federal judge's recusal until 1972 when Congress adopted the ABA's new appearance-based, "might reasonably be questioned" test).

<sup>47</sup> *E.g.*, *Ayrhart v. Wilhelmy*, 112 N.W. 782, 783 (Iowa 1907) ("[Jurors] should be careful not only to avoid actual impropriety, but to keep themselves clear of the very appearance of evil. . . ."); *In re Duncan*, 42 S.E. 433, 441 (S.C. 1902) ("And we hope that Mr. Duncan's unenviable experience in this proceeding will prove a warning, especially to the young members of the bar, so to acquit themselves as attorneys at law as to avoid even the appearance of evil."); Paul W. Brosman, *The Association Law School and Bar Examination Preparation*, 7 AM. L. SCH. REV. 412, 414–15 (1930–1934) (suggesting that law professors avoid the appearance of evil); R. Ogden Doremus, *Duties of Experts and Others in Poison Cases*, 1 CRIM. L. MAG. 293, 320 (1880) (instructing expert witnesses how

Canon 4 of the first model judicial code adopted by the ABA in 1924 instructed judges to aspire to keep their in-court conduct “free from impropriety and the appearance of impropriety” and their personal lives, “beyond reproach.”<sup>48</sup> Canon 4, however, did not govern disqualification. That task was assigned to Canons 13 and 29.<sup>49</sup> Canon 13 disqualified a judge when a near relative appeared as a litigant.<sup>50</sup> Canon 29 required recusal when a judge’s direct “personal interests,” usually interpreted to mean financial interests, were involved.<sup>51</sup> Consistent with the law at the time, no Canon dictated or even suggested recusal for the sake of appearances. That would change with the ABA’s 1972 Code of Judicial Conduct.<sup>52</sup>

The 1972 ABA Code continued to list several circumstances that required the automatic disqualification of a judge. Those disqualifying factors included financial interests, relationships with lawyers and litigants, prior service as a lawyer in a case, actual bias or prejudice, and personal knowledge of controverted adjudicative facts.<sup>53</sup> But the 1972 ABA Code added a standalone ground for recusal that relied on perceptions rather than reality. Canon 3(C)(1) mandated disqualification whenever a judge’s impartiality “might reasonably be questioned.”<sup>54</sup> Several important considerations convalesced to convince the drafters of the 1972 Code to adopt an appearance-based disqualification regime.

First, while the traditional fact-based disqualifying factors like financial and family interests were sufficient to protect the litigants’ constitutional due process right to an impartial arbiter,<sup>55</sup> these disqualifiers did not do enough to enhance public confidence in the judiciary.<sup>56</sup> To fill that void, the ABA enacted a broad, appearance-based recusal test that focused on how things looked to the public rather than on the parties’ substantive right to a fair and impartial trial and judge. A trial might be fair

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to avoid the appearance of evil); *Office Duties*, 4 AM. L. REG. 193, 200 (1856) (“A lawyer’s honor, like a woman’s, must be above all suspicion. He, as well as she, must avoid the very appearance of evil.”).

<sup>48</sup> CANONS OF JUD. ETHICS Canon 4 (AM. BAR ASS’N 1924).

<sup>49</sup> *Id.* at Canons 13, 29.

<sup>50</sup> *Id.* at Canon 13.

<sup>51</sup> *Id.* at Canon 29.

<sup>52</sup> CODE OF JUD. CONDUCT (AM. BAR ASS’N 1972).

<sup>53</sup> *Id.* at Canon 3(C)(1)(a)–(d).

<sup>54</sup> *Id.* at Canon 3(C)(1).

<sup>55</sup> The Fifth and Fourteenth Amendments to the U.S. Constitution require “due process of law” before the government may deprive a person of life, liberty, or property. U.S. CONST. amend V, amend. XIV. The U.S. Supreme Court has interpreted this clause as requiring an impartial decisionmaker. *See, e.g.,* *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

<sup>56</sup> *See* Raymond J. McKoski, *Giving Up Appearances: Judicial Disqualification and the Apprehension of Bias*, 4 BRIT. J. AM. LEGAL STUD. 35, 63 (2015) [hereinafter McKoski, *Giving Up Appearances*] (“[R]ules mandating a judge’s removal for an appearance of bias do not protect the parties but instead serve to promote public confidence in judicial impartiality. When a judge possessing an actual bias hears a case, the litigants sustain the injury. But when a judge suffers from only an appearance of bias the injury is not to the parties but to the judicial system.”).

in actuality, thereby protecting the parties, but *look* unfair, thereby damaging public trust in the courts. Second, proving actual judicial bias was nearly impossible.<sup>57</sup> Third, the devastating effect of the Watergate scandal<sup>58</sup> on public confidence in governmental institutions triggered attempts to shore-up faith in the judiciary.<sup>59</sup> How better to enhance public trust in the judiciary than to disqualify judges when the public has “any scintilla of doubt” about a judge’s impartiality.<sup>60</sup> Fourth, the legal profession was dissatisfied with the subjective test that judges applied in determining whether disqualification was necessary.<sup>61</sup> For example, prior to its amendment in 1974, the federal disqualification statute required recusal when a judge was “so related to or connected with any party or his attorney as to render it improper, *in his opinion*, for him to sit on the trial, appeal, or other proceeding therein.”<sup>62</sup> The subjective standard left disqualification matters “basically committed to the judge’s conscience.”<sup>63</sup>

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<sup>57</sup> *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (noting the difficulty in proving actual bias); *Smith v. State*, 357 S.W.3d 322, 345 (Tenn. 2011) (observing that as a practical matter subjective bias or lack of impartiality may be impossible to prove).

<sup>58</sup> The “Watergate” scandal refers to the events triggered by the arrest of five persons attempting to “bug” the Democrat National Committee headquarters in the Watergate Hotel in Washington, D.C., for the purpose of giving the Republicans inside information in planning election strategy in the 1972 presidential campaign. The break-in to the Watergate, the connection between the burglary and President Richard Nixon’s reelection campaign, a Supreme Court decision ordering the release of recordings made by President Nixon in the Oval Office, and resolutions of impeachment voted by the House Judiciary Committee, led to President Nixon’s resignation in August 1974. See HERBERT S. PARMET, *RICHARD NIXON AND HIS AMERICA* 637–38 (1990).

<sup>59</sup> See James J. Alfini et al., *Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889, 908 (2007) (concluding that most states adopted the 1972 ABA Code of Judicial Conduct “in the wake of the Watergate scandal, a time when the press and the public were demanding greater accountability from public officials.”).

<sup>60</sup> *Hearings*, *supra* note 21, at 14 (statement of Sen. Birch Bayh) (explaining why the federal judicial disqualification statute should be amended to require recusal when the circumstances create an appearance of partiality).

<sup>61</sup> See *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 872 (1988) (Rehnquist, C.J., dissenting) (observing that when Congress amended the federal disqualification statute in 1974, it “was concerned with the ‘appearance’ of impropriety, and to that end changed the previous subjective standard for disqualification to an objective one; no longer was disqualification to be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think.”).

<sup>62</sup> 28 U.S.C. § 455 (1948) (emphasis added).

<sup>63</sup> *United States v. Haldeman*, 559 F.2d 31, 139 (D.C. Cir. 1976); *MacNeil Bros. Co. v. Cohen*, 264 F.2d 186, 189 (1st Cir. 1959) (“[W]hether a member of a court of appeals should disqualify himself . . . is a matter confided to the conscience of the particular judge.”); see also *Weiss v. Hunna*, 312 F.2d 711, 714 (2d Cir. 1963) (“[D]isqualification for being ‘so related or connected’ is generally ‘a matter confided to the conscience of the particular judge.’”) (quoting *MacNeil Bros.* at 189); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d

Convinced that an objective test would make disqualification decisions less capricious and arbitrary and so increase public confidence in the judiciary, the ABA added the appearance-based test to the 1972 Code.<sup>64</sup> The new test, apparently derived from *Commonwealth Coatings Corporation v. Continental Casualty*,<sup>65</sup> stated, “[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.”<sup>66</sup> The 1990 and 2007 ABA Model Codes<sup>67</sup> included the “might reasonably be questioned” test and it has been adopted by every state and federal jurisdiction.<sup>68</sup>

But, as the next section details, the objective disqualification standard adopted by the 1972 ABA Code suffers from theoretical and practical problems at least as significant as the subjective test it replaced. Big data can help eliminate these shortcomings, as discussed in Part II.

### *B. Surveying the Inadequacies of Appearance-Based Disqualification*

Vagueness impedes any attempt to apply an appearance-based recusal test. Courts and administrative bodies readily admit their inability to cabin the “might reasonably be questioned” standard or guide judges in interpreting and applying the test.<sup>69</sup> Compounding the vagueness problem, an “objective” inquiry requires the reasonable layperson to assess whether the circumstances warrant a belief that a judge’s impartiality might reasonably be questioned. That ordinary observer, the average person on the street, is presumed to know all the facts and law in the case, including everything the judge knows, and in some cases, facts unknown to the judge.<sup>70</sup> And while the reasonable, detached observer must be someone outside the judiciary, it is the challenged judge who takes off his robe to examine the issue and then puts the robe back on to announce the lay observer’s decision.<sup>71</sup>

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903, 907 (7th Cir. 1959) (observing that recusal is an issue “to be determined by the judge within his own conscience”).

<sup>64</sup> CODE OF JUD. CONDUCT Canon 3(E)(1) (AM. BAR ASS’N 1972).

<sup>65</sup> 393 U.S. 145, 150 (1968) (“[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.”).

<sup>66</sup> CODE OF JUD. CONDUCT Canon 3(E)(1) (AM. BAR ASS’N 1972); *see also* E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUD. CONDUCT 61 (1973).

<sup>67</sup> MODEL CODE OF JUD. CONDUCT Canon 3(E)(1) (AM. BAR ASS’N 1990); MODEL CODE OF JUD. CONDUCT R. 2.11(A) (AM. BAR ASS’N 2007).

<sup>68</sup> *See* McKoski, *supra* note 18, at 416 n.29.

<sup>69</sup> *See infra* notes 74–79 and accompanying text.

<sup>70</sup> *See infra* Section I.B.2.a.

<sup>71</sup> *See infra* Section I.B.2.b.

### *1. A Hopelessly Vague Standard*

Courts, commentators, and judicial advisory bodies agree that the catch-all disqualification standard is “troublesomely vague” and “elusive” in application.<sup>72</sup> Nevertheless, the 1972 Code did not attempt to define the standard or set parameters to foster its consistent application.<sup>73</sup> This omission is curious because the drafters of the 1972 Code were critical of the indefinite disqualification provisions of the 1924 Canons. The drafting committee for the 1972 Code found the old Canon 13’s command to disqualify in cases involving near relatives and Canon 29’s requirement to disqualify from cases involving a judge’s personal interests “far from satisfactory . . . for their lack of guidance in a specific situation.”<sup>74</sup> The drafters’ failure to define or refine the new standard in the 1972 Code appears to have resulted from their belief that most recusal questions would fall within the four specific conflict-based disqualifying circumstances included in Canon 3C(1).<sup>75</sup> In fact, Professor Thode worried that lawyers and judges would “overlook” the general catch-all standard.<sup>76</sup> The lack of importance attached to the new test was also reflected in Thode’s failure to mention the “might reasonably be questioned” language in his list of “highlights of the new [1972] ABA Code.”<sup>77</sup> The ABA drafting committee did, however, make two things very clear. First, the 1972 Code adopted an appearance-based disqualification regime by requiring recusal whenever the circumstances created an “appearance of bias,” “appearance of impropriety,” or the “appearance of a lack of impartiality.”<sup>78</sup> Second, the new test was “objective” because the fully-informed, reasonable person, not the judge, would determine if the challenged judge’s impartiality might reasonably be questioned.<sup>79</sup>

Reviewing courts concede that their decisions do not help judges struggling over whether disqualification is necessary for a particular matter. In stark

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<sup>72</sup> Frank, *supra* note 20, at 59–60 (“troublesomely vague”); *Foster v. United States*, 618 A.2d 191, 195 (D.C. 1992) (Reilly, J., dissenting) (describing the standard as “somewhat elusive”).

<sup>73</sup> See MILORD, *supra* note 37, at 116–17; *see also* SCA Services, Inc. v. Morgan, 557 F.2d 110, 116 (7th Cir. 1977) (observing that “no factual or concrete examples of the appearance of impartiality were provided in the Congressional debates” concerning the adoption of this standard).

<sup>74</sup> THODE, *supra* note 66, at 60, 63 (“[O]ld canon 29 prescribes a disqualification for ‘personal interest,’ but gives no help to a judge in defining which interests are disqualifying.”).

<sup>75</sup> *Id.* at 60.

<sup>76</sup> *Id.*

<sup>77</sup> E. Wayne Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 797–803 (1972). Similarly, Judge Robert A. Ainsworth, Jr., in his 1971 article summarizing the ongoing work of the ABA committee, failed to mention the appearance-based standard while discussing conflict-based disqualification rules. Robert A. Ainsworth, *Judicial Ethics—A Crisis Abates*, 45 TULANE L. REV. 245, 257–58 (1971).

<sup>78</sup> THODE, *supra* note 66, at 60–61.

<sup>79</sup> *Id.* at 60.

admissions, courts advise judges of the futility of consulting disqualification jurisprudence when deciding whether to remain on a case. The Ninth Circuit Court of Appeals, for instance, advises judges that because recusal decisions turn on factual subtleties, “the analysis of a particular [disqualification issue] must be guided, not by comparison to similar situations addressed by prior jurisprudence, but rather by an independent examination of the unique facts and circumstances of the particular claim at issue.”<sup>80</sup> And while disappointing, the failure of courts to provide guidance on disqualification issues is understandable because no circumstance is immune from a claim of apparent partiality. For example, Comment 4 to Rule 2.11 of the 2007 ABA Model Code of Judicial Conduct states that a judge is not disqualified because a lawyer appearing before the judge is a member of a firm that employs a relative of the judge.<sup>81</sup> But Comment 4 hastens to add that recusal is necessary if the appearance of the member of the relative’s firm might cause the judge’s impartiality to be reasonably questioned.<sup>82</sup> Just as unhelpful, under Rule 2.11, a judge who previously served as a lawyer for a governmental agency is disqualified from cases involving the agency only if the judge “personally and substantially” participated in the case — unless, of course, a lesser degree of involvement creates an appearance of impropriety.<sup>83</sup>

Judicial ethics advisory committees have also failed to help judges interpret and apply the “might reasonably be questioned” disqualification test. For example, the New York Advisory Committee on Judicial Ethics provided no guidance when it tried to establish a rule governing a judge’s disqualification due to a personal or social relationship with an attorney appearing before the judge. The New York Advisory Committee declared the black letter rule that mere acquaintanceships between lawyers and judges do not require recusal, unless, of course, an acquaintanceship creates an appearance of impropriety.<sup>84</sup> In other words, an acquaintanceship does not require disqualification unless the facts could reasonably cause the reasonable person to question the judge’s impartiality. This circular reasoning does not help judges. The ethics advisory committee for federal judges fared no better than the New York Committee when it advised a judge considering

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<sup>80</sup> *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (quoting *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999)); *see also* *United States v. Swallers*, 897 F.3d 875, 877 (7th Cir. 2018); *In re Moody*, 755 F.3d 891, 895 (11th Cir. 2014); *Nicholas v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995); *State v. Shelton*, 901 N.W.2d 741, 745–46 (S.D. 2017); *Griffen v. Dan Kemp*, No. 4:17CV00639 JM, 2018 WL 387810, at \*1 (E.D. Ark. Jan. 11, 2018).

<sup>81</sup> MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 4 (AM. BAR ASS’N 2007).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* r. 2.11A(6)(b).

<sup>84</sup> N.Y. Advisory Comm. on Jud. Ethics, Op. 11-125 (2011).

whether to recuse from a case in which the godfather of the judge's child appeared, that "ultimately, the question of disqualification is one that only the judge may answer."<sup>85</sup>

## 2. *The Ordinary Reasonable Person*

Vagueness is not the only problematic aspect of the phrase, "might reasonably be questioned." To be considered an "objective" test, a layperson, not a judge, must determine whether a judge should be removed from a case. In the United States, this ubiquitous, hypothetical observer is the "average person on the street."<sup>86</sup> Relying on the disinterested lay observer brings the public into the courtroom<sup>87</sup> to apply accepted societal norms in many areas of public and private jurisprudence.<sup>88</sup> Unquestionably, the reasonable person has faithfully fulfilled their duty—at least where a societal consensus exists—about the applicable standard. Thus, for instance, the reasonable person easily concludes that the driver of an automobile violates society's accepted standard by proceeding through a red light. Similarly, a court examining a contract may safely conclude, "a reasonable person would agree that a potential income loss of \$584,000 a year is an important economic interest,"<sup>89</sup> and

<sup>85</sup> U.S. Comm. on Codes of Conduct, Formal Op. 11 (2009); *see also* Fla. Jud. Ethics Advisory Comm., Op. 98-29 (1998) (advising a judge that the disqualification decision "would be up to the individual judge to decide whether recusal would be necessary").

<sup>86</sup> *United States v. Robinson*, 809 F.3d 991, 998 (8th Cir. 2016); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980) ("[A] judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street."); *Woods v. United States*, No. 1:17CV00047 SNLJ, 2018 WL 4333565, at \*7 (E.D. Mo. Sept. 11, 2018) (citing *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) ("The operative issue is whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.")); *see also* Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perceptive*, 14 LEWIS & CLARK L. REV. 1233, 1236 (2010) ("[L]ooking at the reasonable person across his many appearances makes at least one thing clear—he is most often the common or ordinary man.").

<sup>87</sup> McKoski, *Giving Up Appearances*, *supra* note 56, at 53 ("The whole idea of employing the reasonable person standard in judicial ethics is to "bring the public into the room." (quoting Lori Ann Foertsch, *Scalia's Duck Hunt Leads to Ruffled Feathers: How the U.S. Supreme Court and Other Federal Judiciary Should Change Their Recusal Approach*, 43 HOUS. L. REV. 457, 466 (2006))).

<sup>88</sup> RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (AM. LAW INST. 1965) (stating that the reasonable man determines negligence by employing "a standard of conduct demanded by the community"); Ashley M. Votruba, *Will the Real Reasonable Person Please Stand Up? Using Psychology to Better Understand How Juries Interpret and Apply the Reasonable Person Standard*, 45 ARIZ. ST. L.J. 703, 707 (2013) ("[T]he Reasonable Person Standard has had an invasive presence throughout much of American jurisprudence including administrative law, constitutional law, contract law, criminal law, and . . . tort law.").

<sup>89</sup> *Kofi Kessey, MD/PHD, Inc. v. Los Robles Reg'l Med. Ctr.*, No. B279550, 2018 WL 459357, at \*3 (Cal. Ct. App. Jan. 18, 2018).

that a “reasonable person whose water supply has been contaminated by toxic wastes is likely to suffer serious emotional distress arising out of fear for his or her own health.”<sup>90</sup> In each situation, neither personal philosophy nor partisan interests affect the theoretical reasonable person’s deliberative process. The assessment of negligence or contract interpretation is the same regardless of whether the ordinary observer is a Republican, Democrat, Conservative, Liberal, Climate Change believer or Climate Change denier. The same cannot be said for many questions concerning whether a judge’s impartiality might reasonably be questioned. Would the reasonable person question Justice Clarence Thomas’s impartiality in the Patient Protection and Affordable Care Act (Affordable Care Act) case because Justice Thomas’s wife lobbied against the Act? The answer is unequivocally “yes,” if the reasonable person is a Democrat.<sup>91</sup> The answer is “absolutely not” if the observer is a Republican. How does the reasonable observer view Justice Elena Kagan’s involvement with the Affordable Care Act while serving as the President’s Solicitor General? Republicans saw an appearance of impropriety; Democrats did not.<sup>92</sup>

Unlike assessing fault in negligence cases or interpreting the terms of a contract, “the question of whether a judge’s impartiality might reasonably be questioned lies in the eye of the beholder and is often influenced by partisan, biased, and selfish interests.”<sup>93</sup>

(a) *The Reasonable Person Is Fully Informed*

Contrary to the theory underlying appearance-based disqualification, the reasonable person standard, as constructed by the courts, does not bring the public into the courtroom. This is because the comprehensive factual and legal knowledge attributed to the arbiter of recusal issues far exceeds that of the average person and,

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<sup>90</sup> *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 834 (Cal. 1993) (George, J., concurring and dissenting).

<sup>91</sup> “Seventy-four House Democrats sent a letter to Justice Thomas suggesting that he disqualify himself from the health care litigation because his wife’s role in lobbying against the legislation created ‘the appearance of a conflict of interest.’” Raymond J. McKoski, *The Overarching Legal Fiction: Justice Must Satisfy the Appearance of Justice*, 4 SAVANNAH L. REV. 51, 61–62 (2017) (citing Felicia Sonmez, *House Democrats Say Justice Thomas Should Recuse Himself in Health-Care Case*, WASH. POST (Feb. 9, 2011), <http://voices.washingtonpost.com/44/2011/02/house-democrats-say-justice-th.html> [<https://perma.cc/GV9V-G2NL>]).

<sup>92</sup> Conservatives filed an amicus brief seeking Justice Kagan’s recusal from the Affordable Care Act case because her involvement with the health care legislation while President Obama’s Solicitor General allegedly created a reasonable question as to her impartiality. Brief of Amicus Curiae Freedom Watch in Support of Neither Party and on Issue of Recusal or Disqualification of Justice Elena Kagan at 6–7, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (Nos. 11-393, 11-400), 2012 WL 72452.

<sup>93</sup> McKoski, *supra* note 18, at 452.

for that matter, far surpasses that of any mortal.<sup>94</sup> Courts assume that the reasonable person possesses an in-depth understanding of the law, the legal system, and the administration of justice. For example, courts engraft onto the ordinary observer a mastery of substantive and procedural law, including the proper method of calculating a “lodestar,”<sup>95</sup> as well as mastery of the code of judicial conduct.<sup>96</sup> The “facts of life” surrounding the judiciary<sup>97</sup> and the practice of law<sup>98</sup> together with the court procedures implemented by the challenged judge<sup>99</sup> are implanted in the disinterested observer’s brain. The reasonable person is also assumed to be well versed in the court record and draws appropriate inferences from statements in the transcripts.<sup>100</sup> Of course, the reasonable person understands and appreciates the role politics plays in elected and appointed judiciaries.<sup>101</sup>

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<sup>94</sup> See, e.g., Abimbola A. Olowofoyeku, *Bias and the Informed Observer: A Call for a Return to Gough*, 68 CAMBRIDGE L.J. 388, 395 (2009) (comparing the reasonable person of judicial ethics with the Archangel Michael).

<sup>95</sup> Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co., No. 11-10230, 2018 WL 3216012, at \*8 (D. Mass. June 28, 2018) (finding that the reasonable person would know that “[a] lodestar is properly calculated by multiplying the number of hours reasonable expended [by a lawyer] on the litigation by a reasonable hourly rate.”).

<sup>96</sup> See, e.g., WIS. SUP. CT. R. 60.04(4) (2019) (defining the arbiters of disqualification as “well-informed persons knowledgeable about judicial ethics standards and the justice system”).

<sup>97</sup> *Spriggs v. Gonzales*, No. 07-16-00418-CV, 2018 WL 4403352, at \*2 (Tex. Ct. App. Sept. 14, 2018) (“But, that ‘reasonable person’ must be aware of the ‘facts of life’ which surround the judiciary.”) (quoting *Aguilar v. Anderson*, 855 S.W.2d 799, 805 (Tex. Ct. App. 1993) (Osborn, C.J., concurring)).

<sup>98</sup> See, e.g., *Ex Parte Ellis*, 275 S.W.3d 109, 116–17 (Tex. Ct. App. 2008) (assuming that community members are familiar with the everyday realities of a law practice).

<sup>99</sup> See, e.g., *United States v. Kohring*, No. 3:07–CR–00055–JWS, 2008 WL 1746700, at \*8 (D. Alaska Apr. 14, 2008) (assuming that the ordinary observer knows the duties of the chief judge of a federal district court), *vacated on other grounds*, 637 F.3d 895 (9th Cir. 2011).

<sup>100</sup> *United States v. Holland*, 519 F.3d 909, 914 (9th Cir. 2008) (stating that the reasonable person reviews the record and the law); *Ponder v. State*, 382 S.E.2d 204, 205 (Ga. Ct. App. 1989) (stating that the reasonable person would infer that the defendant received certain admonishments at a pre-trial conference); see also *Harden v. City of Gadsden*, 821 F. Supp. 1446, 1451 n.14 (N.D. Ala. 1993) (“In determining the relevant facts, a reasonable person would review the entire 672 pages of the trial transcript instead of relying on the seventeen pages appended to the City’s recusal motion.”).

<sup>101</sup> See *A.E. Higginbotham v. Okla. Trans. Comm’n*, 328 F.3d 638, 645 (10th Cir. 2003) (“It is, of course, ‘an inescapable part of our system of government that judges are drawn primarily from lawyers who have participated in public and political affairs.’”); *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990) (“Merit selection of federal judges means selection by merit from among a group that rises to attention on other grounds—grounds not exclusively political, but often so.”); *In re Disqualification of Ghiz*, 55 N.E.3d 1113, 1115 (Ohio 2015) (“Many judges were involved in politics before taking the bench.”).

Few limits attach to the encyclopedic and sometimes psychic knowledge attributed to the average member of the public. For example, courts have attributed the following knowledge to the reasonable person in the context of judicial impartiality and recusal:

- that the challenged judge was “*evidently* the first judge to have appointed a Master to investigate the reliability of representations made by lawyers in seeking an award of attorneys’ fees in a class action”;<sup>102</sup>
- that a lawyer provided his expert witness with incomplete and inaccurate data;<sup>103</sup>
- that the challenged judge found remarks directed toward him to be laughable;<sup>104</sup>
- that the trial judge “was publicly ordained as a Sixth Avenue deacon”;<sup>105</sup>
- that the challenged judge had presided over many death penalty cases without a challenge to the judge’s impartiality;<sup>106</sup>
- an appellate judge’s voting record in personal injury cases;<sup>107</sup>
- the challenged judge’s entire judicial record.<sup>108</sup>

Burdening the average onlooker with complete knowledge and understanding of every facet of the law and every ruling of a judge may be a legal fiction necessary to excavate a disqualification decision from the nadirs of an appearance-based recusal scheme. But imputing this fantasized level of information to the reasonable person cannot advance the ABA’s desire to buttress public faith in the judiciary by bringing the public into the recusal process.<sup>109</sup> There is only one way to maintain any modicum of legitimacy in the concept of the fully informed lay observer in recusal jurisprudence—enhance the reasonable person’s knowledge with artificial intelligence.<sup>110</sup>

*(b) The Reasonable Person Is an “Outsider”*

In addition to requiring that the reasonable person be fully informed, appearance-based disqualification requires that the reasonable person not be a

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<sup>102</sup> Ark. Teacher Ret. Sys. v. State St. Bank & Trust Co., No. 11-10230, 2018 WL 3216012, at \*27 (D. Mass. June 28, 2018) (emphasis added).

<sup>103</sup> Paul v. D & B Tile of Hialeah, Inc., No. 09-60259-CIV, 2009 WL 2430901, at \*5 (S.D. Fla. Aug. 7, 2009).

<sup>104</sup> United States v. Salemme, 164 F. Supp. 2d 86, 99 (D. Mass. 1998).

<sup>105</sup> Drake v. Birmingham Bd. of Educ., 476 F. Supp. 2d 1341, 1347 (N.D. Ala. 2007).

<sup>106</sup> Miles v. Ryan, 697 F.3d 1090, 1090–91 (9th Cir. 2012).

<sup>107</sup> Doe v. Stegall, 900 So. 2d 357, 362 (Miss. 2004).

<sup>108</sup> Perry v. Schwarzenegger, 630 F.3d 909, 916 (9th Cir. 2011).

<sup>109</sup> See Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 201 (2011) (“[T]he ‘public’ is highly unlikely to have the requisite ‘knowledge of all the relevant circumstances disclosed by a reasonable inquiry. . . .’”).

<sup>110</sup> See *infra* Part II.

member of the legal profession.<sup>111</sup> That means the reasonable person deciding recusal issues cannot be a judge or even a lawyer.<sup>112</sup> The lay observer requirement is essential if appearance-based disqualification is to maintain its theoretical claim as an objective test. In practice, however, it is generally the challenged judge who determines whether judicial impartiality might reasonably be questioned.<sup>113</sup> Chief Justice John Roberts outlined recusal procedure in federal courts:

All of the federal courts follow essentially the same process in resolving recusal questions. In the lower courts, individual judges decide for themselves whether recusal is warranted, sometimes in response to a formal written motion from a party, and sometimes at the judge's own initiative.<sup>114</sup>

Similarly, state court judges usually decide their own recusal issues.<sup>115</sup> This widespread practice rests on historical precedent, judicial code provisions assigning the task to the challenged judge, and the somewhat self-serving assumption that the judge knows best.<sup>116</sup>

Some states require a judge other than the challenged judge to resolve disqualification motions.<sup>117</sup> But whether the challenged judge or another judge hears the motion, the ultimate determination is not made by someone "outside the legal system" as contemplated by an objective standard. To avoid this flaw in appearance-based disqualification, courts invoke the fiction that judges disregard their own

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<sup>111</sup> See *United States v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (describing the reasonable person as outside the judicial system); Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 197 (2007) (stating that courts "stress" that the reasonable person is a person outside the judicial system).

<sup>112</sup> *Copeland v. Copeland*, 904 So. 2d 1066, 1071 (Miss. 2004) ("Impartiality is viewed under the 'totality of the circumstances' analysis using an objective reasonable 'person, not a lawyer or judge, standard.'" (citing *Dodson v. Singing River Hosp. Sys.*, 839 So. 2d 530, 534 (Miss. 2003)); see also Christina Reichert, Comment, *Should I Stay or Should I Go Now: Foreign Law Implications for the Supreme Court's Recusal Problem*, 16 U. PA. J. CONST. L. 1195, 1218 (2014) (observing that in Australia, the reasonable person in disqualification matters is not a lawyer).

<sup>113</sup> Debra Lyn Basset, *Three Reasons Why the Challenged Judge Should Not Rule on a Judicial Recusal Motion*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 659, 679 (2015) ("Nevertheless, in the vast majority of circumstances, the challenged judge decides the disqualification motion.").

<sup>114</sup> CHIEF JUSTICE JOHN ROBERTS, 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7–8 (2011).

<sup>115</sup> JAMES SAMPLE ET AL., BRENNAN CTR. FOR JUST., FAIR COURTS: SETTING RECUSAL STANDARDS 19 (2008).

<sup>116</sup> See *McKoski*, *supra* note 18, at 448–50 (explaining the justifications offered for permitting challenged judges to decide their own recusal issues).

<sup>117</sup> See, e.g., TEX. R. CIV. P. 18a(f)–(g) (2019).

views of the circumstances and divine how the reasonable layperson would assess the situation.<sup>118</sup> Thus, the judge, as the ultimate insider, takes all the factual and legal information known to the judge, retreats to chambers, applies the facts and the law to judicial code provisions, and emerges with the average layperson's assessment of whether the judge's impartiality might reasonably be questioned. And the judge accomplishes this feat without helpful disqualification jurisprudence, focus groups, polling, empirical or even anecdotal evidence of how non-lawyers view the potential conflict.

The process by which a judge is both the interpreter and object of the "might reasonably be questioned" standard is reminiscent of regulatory capture. Regulatory capture occurs when a regulatory agency becomes "too cozy" with the industry that it regulates.<sup>119</sup> When that happens, the agency loses its objectivity in determining the measures necessary to protect the public from misdeeds of the regulated industry. The underlying causes of regulatory capture vary but usually involve: (1) a close personal relationship between the regulators and members of the industry; (2) "shared professional norms, and education, common culture or class position"; and (3) regulators who are former employees of the industry or hope to be employed in the industry when they leave the agency.<sup>120</sup> It is bad enough when the regulators are so closely aligned with the regulated so as to cloud objective decision-making. Any suggestion that members of an industry wear two hats, one as promoters of the industry and another as protector of the public against overreaching by the industry would be dismissed as absurd. But judges are in this precise situation when evaluating recusal issues. The judiciary is the industry regulated by the prohibition against judges presiding in matters in which their impartiality might reasonably be questioned. At the same time, members of the judiciary are the regulators deciding when the test has been met. The impossibility of the conflicting positions is no secret.<sup>121</sup>

### C. Surveying Traditional Recusal Reform Proposals

Commentators suggest a series of patchwork reforms to cure the ills of appearance-based disqualification including: (1) requiring that independent judges hear recusal motions; (2) mandating written disqualification decisions; (3) the

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<sup>118</sup> Marko v. Marko, 816 N.W.2d 820, 827 (S.D. 2012) ("A judge's own subjective view is not relevant to the 'appearance of partiality' inquiry. 'Judges must imagine how a reasonable, well-informed observer of the judicial system would react.'" (quoting *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990))).

<sup>119</sup> J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1545 (2018).

<sup>120</sup> *Id.*; Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENV'T'L. L.J. 81, 111 (2002).

<sup>121</sup> See *State v. Allen*, 778 N.W.2d 863, 882 (Wis. 2010) ("Commentators have variously described a lack of independent review of a judge's decision on a recusal challenge as 'one of the most heavily criticized features of U.S. disqualification law,' a 'Catch-22' and akin to having a student 'grade his own paper.'" (citations omitted)).

preemptory disqualification of trial judges; and (4) granting lay panels the authority to decide recusal issues.<sup>122</sup> As demonstrated below, most proposals fail to address the inherent failings of the current disqualification regime and proposals that do directly attack the faults of appearance-based disqualification have not received a warm reception by the courts.

### 1. *Independent Judges*

Requiring a judge other than the challenged judge to rule on a motion for disqualification is a frequently suggested recusal reform.<sup>123</sup> Proponents argue that an independent judge will assess the circumstances neutrally, avoiding the challenged judge's natural inclination to deny harboring a bias and to deny engaging in conduct that creates an appearance of bias. As a result, the theory goes, independent judges are likely to grant disqualification motions more often.<sup>124</sup> This proposal ignores the tendency of judges to show deference to their colleagues and the reluctance of a judge to impugn another judge's impartiality by removing a fellow judge from a case.<sup>125</sup> Indeed, the authors of one study concluded "that judges are more inclined to disqualify themselves than they are to recommend that a colleague do so."<sup>126</sup> But a more fundamental deficiency in the independent-judge proposal is that switching one judge for another does nothing to bring the public into the courtroom. The view of the reasonable layperson, which under appearance-based disqualification must govern the recusal decision, is still filtered through the ultimate "insider"— a judge.

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<sup>122</sup> See *infra* Section I.C.1.–4.

<sup>123</sup> See William E. Raftery, "The Legislature Must Save the Court From Itself?": *Recusal, Separation of Powers, and the Post-Caperton World*, 58 DRAKE L. REV. 765, 772 (2010) (stating that as of the year 2000, fifteen states required an independent judge to decide recusal motions and that number has remained static).

<sup>124</sup> See Stempel, *supra* note 34, at 796–97 (concluding that "there is simply too much inertia in favor of non-disqualification, which results in insufficiently frequent recusal when challenged judges assess questions of their own impartiality or public perception of it").

<sup>125</sup> See Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135, 1192 (2015); cf. Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2161 (2018) ("[S]trong forces make it difficult to admit the bias that exists in one's own community."); Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 585–86 (2005) ("A more significant problem with this proposal is that judges might not be any more willing to disqualify their colleagues than they are to recuse themselves. Judges might find it difficult to grant a motion to disqualify, fearing it would offend a fellow judge.").

<sup>126</sup> JEFFERY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 67 (Am. Judicature Soc'y 1995) ("The data from this survey show that judges are more inclined to disqualify themselves than they are to recommend that a colleague do so.").

## 2. *Mandating that Judges Provide Reasons Supporting Recusal Decisions*

Some commentators promote a requirement that judges provide written or recorded reasons for granting or denying disqualification motions as a way to develop a body of case law upon which judges may rely in assessing whether their impartiality might reasonably be questioned.<sup>127</sup> Even staunch supporters of the proposal, however, admit that the failure of judges to record their rationales, “is not the gravest problem with modern disqualification.”<sup>128</sup> That is because an increase in written recusal decisions is of little value when reviewing courts caution that disqualification motions should be decided on their unique facts rather than “by comparison to similar situations addressed by prior jurisprudence.”<sup>129</sup> Moreover, most written recusal decisions offer little substantive analysis. Judges often follow a simple decisional format by: (1) detailing the facts surrounding the disqualification issue; (2) reciting general propositions of disqualification law;<sup>130</sup> and (3) concluding that “clearly,” “plainly,” or “undoubtedly” the reasonable observer would not question the judge’s impartiality under the circumstances presented.<sup>131</sup> Finally, as with the majority of other proposals to reform the disqualification process, a judicial officer, not an outsider, determines whether a judge remains on a case.

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<sup>127</sup> Stempel, *supra* note 34, at 799 (“Written explanations of recusal decisions would also in turn develop a more comprehensive body of precedent to guide the legal community and the bench.”); *see also* Melinda A. Marbes, *Reshaping Recusal Procedures: Eliminating Decisionmaker Bias and Promoting Public Confidence*, 49 VAL. U. L. REV. 807, 857 (2015) (arguing that written decisions “will not only legitimize the specific disqualification decision, but will help create an entire body of law on disqualification that will guide future disputes and legitimize the judiciary as a whole.”).

<sup>128</sup> Stempel, *supra* note 34, at 799.

<sup>129</sup> *United States v. Bremers*, 195 F.3d 221, 226 (5th Cir. 1999); *see also supra* note 80 and accompanying text.

<sup>130</sup> *See, e.g., Pellegrini v. Merchant*, No. 1:16-cv-01292 LJO-BAM, 2017 WL 735740, at \*2–\*3 (E.D. Cal. Feb. 24, 2017).

<sup>131</sup> *See, e.g., United States v. Mix*, No. 12–171, 2014 WL 580758, at \*16 (E.D. La. Feb. 13, 2014) (“Clearly the foregoing facts do not present an instance where reasonable person, knowing all of the facts, would harbor doubts concerning the judge’s impartiality as is required under § 455(a).”); *Berthelot v. Boh Bros. Const. Co.*, 431 F. Supp. 2d 639, 647 (E.D. La. 2006) (“Clearly, a reasonable person, knowing all the circumstances, would recognize that the undersigned would be impartial.”); *Exxon Corp. v. Heinze*, 792 F. Supp. 72, 74–75 (D. Alaska 1992) (“Clearly, a reasonable person would not doubt a judge’s impartiality on that basis. While the average citizen might believe federal judges are for sale, it is unlikely that she would believe they come so cheap.”); *see also Perlmutter v. Verone*, No. GJH–14–2566, 2015 WL 4757183, at \*5 n.8 (D. Md. Aug. 11, 2015) (quoting a state court judge’s finding that the “vague allegations . . . plainly would not provide a reasonable person with grounds to question Judge Salant’s impartiality.”); *Leja v. Schmidt Mfg., Inc.*, Civ. No. 01–5042(DRD), 2010 WL 2571850, \*3 (D. N.J. June 22, 2010) (quoting a state judge’s finding that a “reasonable person would undoubtedly draw the conclusion” that the judge was not disqualified).

### 3. *Peremptory Challenges*

Similar to a party's right to peremptorily excuse a prospective juror, eighteen states permit a litigant to disqualify one trial judge automatically.<sup>132</sup> Some states require a simple request to remove a judge, while other jurisdictions require a perfunctory affidavit claiming that the judge is biased against a party.<sup>133</sup> Although not without its critics,<sup>134</sup> the automatic substitution of judges has worked reasonably well<sup>135</sup> for more than one hundred and seventy years.<sup>136</sup> Preemptory challenges work precisely because they reject the major tenant of appearance-based disqualification—that a disinterested, objective, fully informed person determine that a judge's impartiality might reasonably be questioned.

Preemptory disqualification is not governed by an objective standard.<sup>137</sup> The view of the ordinary, reasonable person plays no role in deciding whether a judge remains on a case. To the contrary, peremptorily removing a judge employs a quintessentially subjective test. A litigant's subjective opinion of a judge's impartiality controls. Nor does such automatic disqualification require a fully informed decision-maker. A litigant exercising a preemptory challenge can be uninformed, misinformed, or delusional for that matter. Likewise, preemptory disqualification does not demand a disinterested decision-maker. Unlike the reasonable person, a litigant is the most interested and least objective person in the courtroom. Further, preemptory disqualification statutes provide what is impossible under appearance-based rules—predictable and uniform results. If a litigant makes a request or files a motion, the judge is disqualified.

Two dynamics prevent preemptory disqualification from effectively reforming recusal procedures. First, the number of states with preemptory disqualification statutes has not increased in the last forty years,<sup>138</sup> and the federal courts are unalterably opposed to the procedure.<sup>139</sup> Second, instead of replacing the “might

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<sup>132</sup> See McKoski, *supra* note 18, at 468 (citing ABA STANDING COMMITTEE ON JUDICIAL INDEPENDENCE: REPORT TO THE HOUSE OF DELEGATES 6 n.17 (2011) (listing states permitting the automatic disqualification of trial judges)). The preemptory disqualification of reviewing court judges presents unique problems. *See id.* at 472 n.382.

<sup>133</sup> *Id.* at 468–69.

<sup>134</sup> *Id.* at 470–72.

<sup>135</sup> Jeffrey W. Stempel, *Judicial Preemptory Challenges as Access Enhancers*, 86 *FORDHAM L. REV.* 2263, 2265 (2018) [hereinafter Stempel, *Judicial Preemptory Challenges*] (stating that preemptory disqualification “appears to work well”).

<sup>136</sup> *See, e.g.,* *McGoon v. Little*, 7 Ill. (2 Gilm.) 42 (1845) (citing the statute requiring an automatic change of judge upon the filing of an affidavit by a party alleging judicial prejudice).

<sup>137</sup> *See* John R. Bartels, *Preemptory Challenges to Federal Judges: A Judge's View*, 68 *A.B.A. J.* 449, 451 (1982) (criticizing the subjective nature of preemptory judicial recusal).

<sup>138</sup> Stempel, *Judicial Preemptory Challenges*, *supra* note 135, at 2272.

<sup>139</sup> Bartels, *supra* note 137, at 450–51; *see also* David Ingram, *Federal Judges Push Back Against Recusal Proposals, Congress Considers Revising Rules on Judge Disqualifications*, *NAT'L L.J.*, Dec. 14, 2009 (“The Judicial Conference has opposed

reasonably be questioned test” with the right to an automatic substitution of one trial judge, jurisdictions adopting peremptory disqualification have retained the appearance-based test. That means judges still must apply the test when a litigant claims that a successor judge’s impartiality might reasonably be questioned.<sup>140</sup>

#### 4. *Judicial Recusal Panels*

Professor Dmitri Bam proposes a change to recusal procedures that, consistent with the theoretical foundation of appearance-based disqualification, places the recusal decision in the hands of those outside the judiciary.<sup>141</sup> Bam suggests that panels of laypersons could offer guidance to judges facing recusal issues or, better yet, review a judge’s decision or make the decision for the judge.<sup>142</sup> However, no state has been bold enough to embark on a procedure that would sanction joint fact-finding by judges and laypersons or authorize a lay panel to overrule a judge’s decision.

## II. THE ADVANTAGES OF BIG DATA

This Article proposes that big data can transform appearance-based disqualification into what its creators envisioned—an objective test producing uniform disqualification decisions.<sup>143</sup> Injecting big data into the recusal process will ensure the involvement of a fully informed, reasonable, decision-maker who sits outside the judicial system. It will eliminate or significantly reduce implicit judicial biases in the decision-making process, reduce judicial stress, and save precious

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[automatic disqualification] proposals for at least three decades. . . .”); Russell R. Wheeler, *A Primer on Regulating Federal Judicial Ethics*, 56 ARIZ. L. REV. 479, 490 (2014) (stating that in 2009, the United States Judicial Conference resisted an automatic disqualification proposal for federal judges “on the practical grounds that finding replacement judges in small districts would be difficult and on the policy grounds that giving parties the right of automatic disqualification was akin to permitting judge-shopping.”).

<sup>140</sup> Challenges to successor judges based on an appearance of bias would likely be few in number. See McKoski, *supra* note 18, at 472 (“Allowing each party one peremptory challenge should satisfy most litigants that an impartial trial judge will decide their case.”).

<sup>141</sup> Bam, *supra* note 125, at 1191–92.

<sup>142</sup> *Id.* Professor Bam also suggests that lawyers could join laypersons on the recusal panels. *Id.* at 1191. Other authors have made similar suggestions. Cf. Roy A. Schotland, *A Plea for Reality*, 74 MO. L. REV. 507, 521 (2009) (suggesting that before ruling on a recusal motion, reviewing court justices consult “with a panel of three court-appointed ‘wise souls’ (probably retired judges, lawyers, and legal academics. . . .)”). However, one might observe that Professor Bam’s suggestion to include lawyers on recusal panels would detract from the intended “outsider” makeup of the panels.

<sup>143</sup> See *Hearings*, *supra* note 21, at 13 (statement of Sen. Birch Bayh) (justifying the adoption of an objective test to govern federal disqualification by the need to bring “clarity and certainty” to judicial disqualification); Geyh, *supra* note 16, at 691 (identifying one goal of appearance-based disqualification as making judicial disqualification “less capricious”).

judicial resources. Importantly, even if big data analytics proves to be unhelpful in this regard, the experiment will not injure any litigant or diminish public confidence in the judiciary.

*A. Big Data Fully-Informs the Reasonable Person*

Big data legitimatizes an essential—yet currently fictional—characteristic of the lay decision-maker in judicial disqualification matters—that the reasonable person is fully informed. This unbounded knowledge and wisdom attributed to the lay observer is currently an unmitigated fiction.<sup>144</sup> Much of the information attributed to the ordinary observer in the context of judicial recusals is actually unknown to the person on the street and, in some cases, is even beyond the judge’s knowledge or recollection. For example, in *Perry v. Schwarzenegger*, Judge Reinhardt of the U.S. Court of Appeals for the Ninth Circuit denied a disqualification motion, finding that “[a] reasonable person familiar with [his] judicial record throughout [his] career, and the other facts relevant to this recusal inquiry” would not question Judge Reinhardt’s impartiality.<sup>145</sup> It seems safe to say that the ordinary observer would not have command of the rulings made by Judge Reinhardt during his thirty-year career as a federal judge.<sup>146</sup> It is also reasonable to assume that Judge Reinhardt would not recall every case in which he participated. The reasonable observer, however, enhanced with big data’s access to the pleadings, motions, orders, transcripts, and other court documents in each of the thousands of matters handled by Judge Reinhardt would be completely familiar with the judge’s judicial record. Moreover, big data would include each of Judge Reinhardt’s speeches and law review articles relevant to the recusal inquiry.<sup>147</sup>

*B. Big Data Is Not an Insider*

As discussed above, one reason the “might reasonably be questioned” test fails to live up to its objective label is that an “insider”—a judge—rather than someone outside the legal system, decides recusal questions.<sup>148</sup> Indeed, the ultimate insider, the challenged judge, usually determines whether the circumstances call into question the judge’s impartiality. Permitting big data to control the ethical propriety of a judge remaining on a case removes this “insider” impediment by applying a

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<sup>144</sup> See *supra* Section I.B.2.a.

<sup>145</sup> 630 F.3d 909, 916 (9th Cir. 2011).

<sup>146</sup> *Id.* (stating that Judge Reinhardt had been a member of the federal judiciary for thirty years).

<sup>147</sup> In discussing the reasonable person’s view of the facts supporting the recusal motion in *Perry*, Judge Reinhardt cites one of his law review articles, Stephen Reinhardt, *The Conflict Between Text and Precedent in Constitutional Adjudication*, 73 CORNELL L. REV. 434 (1988), adapted from a speech at the Federalist Society’s Sixth Annual Symposium on Law and Public Policy. *Perry*, 630 F.3d at 916.

<sup>148</sup> See *supra* Section I.B.2.b.

truly objective test. With big data analytics, the judge is no longer the sole interpreter and object of the appearance-based disqualification standard.

### C. *Big Data Mitigates the Cognitive Biases of Judges*

Predictive algorithms have the potential to eliminate or reduce cognitive and other biases that distort judicial decisions, including rulings in disqualification matters.<sup>149</sup> Implicit biases reflecting negative stereotyping based on race, gender identity, age, immigration status, and other characteristics may work to the detriment of even “privileged minorities.”<sup>150</sup> Compounding the problem, the subconscious misuse of decision-making heuristics may influence the objectivity of a judge’s decision.<sup>151</sup> To reduce automatic biases at work in bail and sentencing decisions, some courts have instructed judges to use algorithms known as risk assessment tools.<sup>152</sup> Big data analytics can be employed in the same manner to reduce subconscious biases in disqualification decisions. Although some bias may be inherent in algorithmic processing because humans create the algorithms,<sup>153</sup> at least the biases will not be those of the challenged judge.<sup>154</sup>

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<sup>149</sup> See STANFORD U., ARTIFICIAL INTELLIGENCE AND LIFE IN 2030 8 (2016), [https://ai100.stanford.edu/sites/default/files/ai100report10032016fnl\\_singles.pdf](https://ai100.stanford.edu/sites/default/files/ai100report10032016fnl_singles.pdf) [<https://perma.cc/88Y2-RXXL>] (“AI prediction tools have the potential to provide new kinds of transparency about data and inferences, and may be applied to detect, remove, or reduce human bias, rather than reinforcing it.”); Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 113 (2017) (finding that “automatic biases and cognitions indeed influence a much broader range of judicial decisions than has ever been considered.”).

<sup>150</sup> Levinson et al., *supra* note 149, at 68.

<sup>151</sup> See Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis”*, 99 KY. L.J. 269, 306–07 (2011).

<sup>152</sup> Marla N. Greenstein, *Judicial Ethics of Bail Decision Making*, 57 JUDGES’ J. 40, 40 (2018). For a description of risk assessments tools used in the pre-trial release decisions involving criminal defendants, see Brook Hopkins & Colin Doyle, *The Pathways of Pretrial Reform*, 57 JUDGES’ J. 31, 33 (2018).

<sup>153</sup> See Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 859 n.85 (2018) (“There is a growing literature on the biases inherent in artificial intelligence, machine learning, and algorithmic processing.”).

<sup>154</sup> The danger of embedding implicit biases into algorithms used to decide disqualification issues lies in the fact that “AI systems are commonly ‘taught’ by reading, viewing, and listening to copies of works created by humans[.]” Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence’s Implicit Bias Problem*, 93 WASH. L. REV. 579, 582 (2018), and judges and lawyers will have authored many of the documents used to inform recusal algorithms.

*D. Big Data Brings Collateral Benefits to the Judiciary*

Reliance on big data will produce the collateral benefit of reducing judicial stress.<sup>155</sup> It will also free-up judicial time for other tasks. Because challenges to judicial impartiality go to the essence of a judge's worth, judges often feel compelled to refute the charge in excruciating detailed, time-consuming, lengthy orders.<sup>156</sup>

*E. Big Data Can Do No Harm*

Courts can incorporate big data into the disqualification process in a way to protect litigants' rights and public confidence in the judiciary, even if big data analytics fails to produce results more uniform and consistent than the current disqualification regime. First, state and federal judicial conduct codes direct judges to initially determine whether recusal is required.<sup>157</sup> This self-assessment is obligatory regardless of whether a litigant files a motion for the judge's disqualification.<sup>158</sup> If the judge recuses herself at this initial stage, the matter is assigned to another judge.<sup>159</sup> No other inquiry, with or without the help of big data, is necessary. Second, if after the initial assessment, the judge concludes that recusal is not required but that facts exist that "the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification," judicial codes require the judge to disclose that information.<sup>160</sup> If, after the disclosure, a litigant files a motion for disqualification, the judge may grant the motion, and the case will be reassigned to another judge.<sup>161</sup> If the judge does not summarily grant the disqualification motion, then under the procedure suggested here, the judge would refer the matter for a big data analysis. Third, under the current procedure, a litigant

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<sup>155</sup> Cf. Dmitry Bam, *Recusal Failure*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 653 (2015) ("Even an unbiased judge may worry that a recusal sends a message that he is biased."); R. Matthew Pearson, Note, *Duck Duck Recuse: Foreign Common Law Guidance & Improving Recusal of Supreme Court Justices*, 62 WASH. & LEE L. REV. 1799, 1833 (2005) ("[A]sking a challenged Justice to rule on a motion to recuse puts that Justice in a precarious position.").

<sup>156</sup> See, e.g., *Ark. Teacher Retirement System v. State Street Bank & Trust Co.*, No. 11-10230, 2018 WL 3216012, at \*1 (D. Mass. 2018) (denying a recusal motion in a 17,000-word order); *United States v. Sampson*, 148 F. Supp. 3d 75 (D. Mass. 2015) (denying a recusal motion in a 29,000-word order); *United States v. Salemme*, 164 F. Supp. 2d 86 (D. Mass. 1998) (denying a motion to recuse in a 14,000-word order).

<sup>157</sup> See MODEL CODE OF JUD. CONDUCT r. 2.11(A) (AM. BAR ASS'N 2010) ("A judge shall disqualify himself or herself . . .").

<sup>158</sup> *Id.*

<sup>159</sup> See, e.g., 28 U.S.C. § 144 (2012) (providing for reassignment to a successor judge upon a judge's recusal).

<sup>160</sup> MODEL CODE OF JUD. CONDUCT r. 2.11 cmt. 5 (AM. BAR ASS'N 2010).

<sup>161</sup> See *infra* note 164.

may file a disqualification motion independent of any disclosure by the judge.<sup>162</sup> In that event, the judge may again summarily grant the motion, and the case will be reassigned to another judge.<sup>163</sup> Under the proposed procedure, if the judge does not summarily grant the motion, the judge would refer the matter for a big data analysis.

Optimally, big data's conclusion as to whether the judge's impartiality might reasonably be questioned would constitute a mandatory presumption. Thus, if analytics determined that the circumstances created a reasonable question as to the judge's impartiality, recusal would be required. If the analysis determined that no reasonable question of the judge's impartiality existed, the case would remain with the judge. However, courts may resist surrendering the disqualification decision to artificial intelligence.<sup>164</sup> If so, as an alternative, the conclusion arrived at through analytics could serve as a rebuttable presumption, leaving the final recusal decision with the judge.<sup>165</sup>

Most importantly, this disqualification protocol protects the parties and the public if the big data analysis process proves a failure because the parties would be in no worse positions than under current recusal procedures. Under the suggested procedure, a judge only sends a case for a big data evaluation if the judge initially

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<sup>162</sup> See, e.g., RULES OF PROC. OF CAL. ST. BAR, R. 5.46(H) (2019) ("If a judge refuses or fails to disqualify himself or herself, any party may file a motion to disqualify."); TEX. R. CIV. P. 18a(a) (2019) ("A party in a case in any trial court other than a statutory probate court or justice court may seek to recuse or disqualify a judge who is sitting in the case by filing a motion with the clerk of the court in which the case is pending."); W. VA. TRIAL CT. R. 17.01(a) (2019) ("In any proceeding, any party may file a written motion for disqualification of a judge within thirty (30) days after discovering the ground for disqualification. . . ."); see also CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 73 (Fed. Jud. Ctr. et al. eds., 2nd ed. 2010) ("[T]he disqualification process [in federal court] may be triggered by a judge on his or her own initiative, or by a party, on motion.").

<sup>163</sup> See, e.g., ARIZ. R. CIV. P. 42.2(e)(4) (2019) ("If grounds for disqualification are found, the presiding judge must promptly reassign the action."); U.S. Dist. Ct. R. D. Vt., Order 73(h) (2015) ("If a judge is disqualified to hear a case assigned to him/her, the judge will provide the clerk with a disqualification order and the clerk shall reassign the case at random.").

<sup>164</sup> See Tania Sourdin & Richard Cornes, *Do Judges Need to be Human? The Implications of Technology for Responsive Judging*, in THE RESPONSIVE JUDGE: INTERNATIONAL PERSPECTIVES 87 (Tania Sourdin & Archie Zariski eds., 2018) ("[T]he capacity for [artificial intelligence] decisions to be appealed or reviewed by human decision-makers is often cited as a necessary component of any automated decision-making system."); Noel L. Hillmam, *The Use of Artificial Intelligence in Gauging the Risk of Recidivism*, 58 JUDGES' J. 36 (2019), [https://www.americanbar.org/groups/judicial/publications/judges\\_journal/2019/winter/the-use-artificial-intelligence-gauging-risk-recidivism/](https://www.americanbar.org/groups/judicial/publications/judges_journal/2019/winter/the-use-artificial-intelligence-gauging-risk-recidivism/) [<https://perma.cc/4HKF-YZT4>] (arguing that sentencing is a human endeavor and "should not be merely the function of an algorithm").

<sup>165</sup> Presumptions are not unknown in judicial disqualification jurisprudence. See, e.g., GA. CODE OF JUD. CONDUCT R. 2.11 cmt. 9 (2019) ("There is a rebuttable presumption that there is no per se basis for disqualification where the aggregate [campaign] contributions are equal to or less than the maximum allowable contribution permitted by law.").

decides to keep the case. For example, assume that a party files a disqualification motion that the judge believes lacks merit. Under the suggested procedure, the judge could not deny the motion without referring the matter for a big data evaluation. The outcome of the analysis may confirm the judge's determination that the circumstances do not create an appearance of partiality. But even if big data's conclusion is wrong, the parties are in no worse position because the judge had initially denied the motion for disqualification. On the other hand, if big data analytics erroneously concludes that the circumstances create an appearance of partiality, the parties are no worse off because the only consequence of the erroneous finding is that the case is assigned to another judge who is presumed to be impartial.<sup>166</sup> And, while parties have a right to an impartial judge, they have no right to a particular judge.<sup>167</sup> In the end, regardless of the accuracy of the big data analysis, the parties receive an impartial judge and the public benefits from a truly objective disqualification decision.

An examination of disqualification issues that arise from contributions by lawyers and litigants to a judicial candidate's election campaign illustrates how analytics can help cure the deficiencies in appearance-based disqualification and provide an objective determination of when a judge's impartiality might reasonably be questioned.

### III. CAMPAIGN CONTRIBUTIONS AND JUDICIAL DISQUALIFICATION: A BIG DATA APPROACH

The disqualification of judges because of contributions made by lawyers, litigants, and interest groups to the judges' election campaigns supplies the perfect test for disqualification decisions informed by big data. That is so for two reasons. First, the effect of campaign contributions on a judge's impartiality—in fact and appearance—continues to perplex the courts, commentators, and the public.<sup>168</sup> There simply is no generally accepted method of determining when a judge should be barred from hearing a contributor's case or when a judge's impartiality might

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<sup>166</sup> The transfer of a case to a successor judge may cause a delay in the proceedings but that delay is present every time a judge is disqualified or otherwise removed from a case.

<sup>167</sup> *United States v. Sampson*, 148 F. Supp. 3d 75, 122 (D. Mass 2015) (“Litigants are entitled to a judge who is, and to a reasonable person appears to be, impartial. However, they are not entitled to a judge of their own choosing.”); *State v. Harris*, 735 N.W.2d 774, 782–83 (Neb. 2007) (“[W]hile a defendant may be entitled to an impartial judge, a defendant does not have the right to have his or her case heard before any particular judge.”).

<sup>168</sup> See Matthew W. Green, Jr. et al., *The Politicization of Judicial Elections and Its Effect on Judicial Independence*, 60 CLEV. ST. L. REV. 461, 505 (2012) (concluding that campaign contributions to judges presents a difficult problem with no easy solutions); Aman McLeod, *If at First You Don't Succeed: A Critical Evaluation of Judicial Selection Reform Efforts*, 107 W. VA. L. REV. 499, 521 (2005) (noting the “ineffectiveness” of reforms intended to diminish the appearance of partiality caused by judges receiving campaign contributions).

reasonably be questioned because of a person or entity's financial support of a judge's election bid.<sup>169</sup> Second, there is an enormous amount of highly relevant public information that, with the aid of big data analytics, can make campaign contribution disqualification decisions uniform, consistent, and reliable.<sup>170</sup>

A simple rule could eliminate any appearance of bias created by campaign contributions. The rule would automatically disqualify a judge from a case in which a lawyer or litigant contributed to the judge's campaign in a sum greater than an amount predetermined by the jurisdiction to cause the lay observer to reasonably question the judge's impartiality. The ABA has suggested this approach since 1999.<sup>171</sup> A simple approach, however, is not necessarily a popular approach. Only five states have taken the ABA's advice and require a judge's recusal after the judge's campaign receives a contribution above a preset limit.<sup>172</sup> Utah's Code of Judicial Conduct provides for mandatory recusal when a judge receives contributions totaling more than \$50.00 from a lawyer or litigant in a three-year period.<sup>173</sup> States without a judicial code provision setting an automatic recusal amount rely on the general "might reasonably be questioned" standard to determine when a contribution creates a disqualifying appearance of partiality.<sup>174</sup> Courts in

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<sup>169</sup> See *infra* notes 171–175 and accompanying text.

<sup>170</sup> See *infra* notes 187–204 and accompanying text.

<sup>171</sup> MODEL CODE OF JUD. CONDUCT Canon 3(E)(1) (AM. BAR ASS'N 1999).

<sup>172</sup> Alabama, Arizona, California, Mississippi, and Utah all mandate disqualification when contributions reach a certain amount. See NAT'L CTR. FOR STATE COURTS CTR. FOR JUD. ETHICS, JUDICIAL DISQUALIFICATION BASED ON CAMPAIGN CONTRIBUTIONS (Nov. 2016), <https://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Disqualificationcontributions.ashx> [<https://perma.cc/KF3V-GBC7>]. The Arizona judicial code requires disqualification in matters involving a party or lawyer who has "within the previous four years made aggregate contributions to the judge's campaign an amount that is greater than the amounts permitted [by state law]." ARIZ. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2009); see also Ryan M. Mcinerney, Note, *Rethinking Judicial Disqualifications Based on Campaign Contributions: A Practical Critique of Post-Caperton Proposals and a Call for Greater Transparency*, 11 NEV. L.J. 815, 821 (2011) ("[M]ost states have been hesitant to adopt [ABA] Model Rule 2.11(A)(4) or similar disqualification language that takes into account campaign support, no matter how large.").

<sup>173</sup> UTAH CODE OF JUD. CONDUCT R. 2.11(A)(4) (2018).

<sup>174</sup> See, e.g., Pa. Jud. Conduct Board, Statement of Policy Regarding Disqualification Based on Campaign Contributions Under Rule 2.11(A)(4), at 5 (Nov. 4, 2016), <http://judicialconductboardofpa.org/wp-content/uploads/11-04-2016-Press-Release-Board-Issues-Statements-of-Policy-Regarding-Investigations-of-Campaign-Contributions-Electronic-Communications.pdf> [<https://perma.cc/MCF8-4LS5>] [hereinafter Pa. Statement of Policy] (stating the Pennsylvania Supreme Court "eschewed" any rule automatically requiring disqualification upon a contribution above a fixed amount); see also WIS. SUP. CT. R. 60.04(7) (2014) ("A judge shall not be required to recuse himself or herself in a proceeding based solely on any endorsement or the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding.").

those states often provide a nonexclusive list of factors to help a judge decide if a contribution necessitates disqualification.<sup>175</sup>

The amount of money contributed to a judge's campaign usually tops the list of relevant factors.<sup>176</sup> But even more important than the amount itself is the amount of the contribution in relation to the total amount of money raised by the judicial candidate.<sup>177</sup> Thus, a \$2,000 contribution when a candidate raises a total of \$4,000 might be more significant than if the \$2,000 contribution is part of a candidate's two million dollar war chest.<sup>178</sup> The timing of a contribution may also affect the public's perception of a judge's impartiality<sup>179</sup> because "the effect of contributions will generally dissipate over time."<sup>180</sup> Similarly, a contribution might increase the perception of bias if made close in time to the filing of a lawsuit or the setting of a trial date.<sup>181</sup> Although admittedly difficult to gauge, courts consider the impact of a contribution on the outcome of an election.<sup>182</sup> Thus, if a lawyer or litigant makes a sizable contribution to underwrite an extensive media campaign in the final stages of a close contest, that contribution may be more likely to create an appearance of bias than if the candidate uses a similar contribution early in the campaign for a voter

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<sup>175</sup> See, e.g., GA. CODE OF JUD. CONDUCT R. 2.11(A)(4) (2019).

<sup>176</sup> See, e.g., *id.* R. 2.11(A)(4)(a).

<sup>177</sup> See WASH. CODE OF JUD. CONDUCT R. 2.11(D)(1) (2013) (identifying a relevant factor to be "the total amount of financial support provided by the party relative to the total amount of the financial support for the judge's election"); Pa. Statement of Policy, *supra* note 174, at 6 (suggesting one factor to be "the amount of contribution[s] in relation to the total amount of contributions received by the judge. . .").

<sup>178</sup> See *Ivey v. Eighth Judicial Dist. Ct.*, 299 P.3d 354, 358 (Nev. 2013) (finding disqualification unnecessary where the trial judge received \$10,000 in campaign contributions from a party and the party's lawyer and the contribution constituted 14% of the total raised by the judge).

<sup>179</sup> See *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 886 (2009) ("The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical.").

<sup>180</sup> Pa. Statement of Policy, *supra* note 174, at 2 ("[T]he effect of contributions will generally dissipate over time. The larger the contribution, the longer it will take to dissipate.").

<sup>181</sup> *Id.* at 9; see also TENN. CODE OF JUD. CONDUCT R. 2.11 cmt. [7](3) (2015) (identifying one relevant factor to be "[t]he timing of the support or contributions in relation to the case for which disqualification is sought."); Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. TIMES (Oct. 1, 2006) <https://www.nytimes.com/2006/10/01/us/01judges.html> [<https://perma.cc/ARQ5-YFBN>] ("On scores of occasions, the [Ohio Supreme Court] justices' campaigns took contributions after a case involving the contributor was argued and before it was decided—just when conflicts are most visible and pointed.").

<sup>182</sup> See *Caperton*, 556 U.S. at 884 (stating that the disqualification inquiry centers in part on "the apparent effect such contribution had on the outcome of the election").

registration drive.<sup>183</sup> The nature of the judicial office sought might also influence the public's perception of a donation because the public expects and tolerates larger contributions for higher judicial offices.<sup>184</sup>

While important, the factors identified by the courts appear to be limited by what information the courts believe that the parties can reasonably assemble on the disqualification issue. Except for the impact of a particular contribution on an election outcome, all of the information identified as relevant to a contribution-related disqualification question is available on campaign disclosure websites.<sup>185</sup> In the era of big data, however, there is no reason to exclude other highly relevant information simply because it is much too voluminous for the parties to gather or make sense of. For example, a donor's history of contributions in all judicial campaigns would certainly be relevant to a judge's recusal decision. Has the contributor donated a similar amount to every judge running for election or retention? Has the donor only contributed to judges before whom the donor has cases? Is the contribution in question part of a pattern of contributions from similarly situated donors like plaintiffs' lawyers or the insurance industry?<sup>186</sup> How does the contribution amount compare in size and timing to contributions received statewide, region-wide, and nationwide by other judicial candidates, adjusted for differences in population, geographic area, and cost of living in the various election districts?<sup>187</sup>

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<sup>183</sup> Cf. *id.* at 897 (Roberts, C.J., dissenting) (“What if the supporter’s expenditures are used to fund voter registration or get-out-the-vote efforts rather than television advertisements?”).

<sup>184</sup> See Pa. Statement of Policy, *supra* note 174, at 6.

<sup>185</sup> See, e.g., *Campaign Finance Database*, FLA. DEPT. OF STATE, <https://dos.elections.myflorida.com/campaign-finance/contributions> [<https://perma.cc/CM24-Q48T>] (providing a searchable database for Florida state candidates from 1996–2018); *Steve Parks for Judge 2014*, MICHIGAN SECRETARY OF STATE, MICHIGAN CAMPAIGN FINANCE SEARCHABLE DATABASE, <https://cfrsearch.nictusa.com/committees/516682> [<https://perma.cc/L8NX-DBAW>]; *id.* at *Campaign Statement Contributions*, <https://cfrsearch.nictusa.com/documents/387975/details/filing/contributions?schedule=1A&changes=0> [<https://perma.cc/E7JD-KSXJ>] (identifying campaign contributions by date, amount, donor name, donor address, and donor occupation; identifying expenditures by date, amount, nature of the expenditure, payee; identifying debts and obligations); see also *Contributions and Expenditures Databases*, N.Y. STATE BOARD OF ELECTIONS, <http://www.elections.ny.gov/contribandexp.html> [<https://perma.cc/VJ6G-WULS>]; WIS. SUP. CT. R. 60.04(7) cmt. (2014) (requiring the public reporting of all campaign contributions).

<sup>186</sup> See Catherine Turcer & Mia Lewis, *Can Money Buy Justice? Contributions to Ohio Supreme Court Candidates 2018*, COMMON CAUSE OHIO (Oct. 1, 2018), [https://www.commoncause.org/ohio/wp-content/uploads/sites/23/2018/10/OhioSupremeCourt\\_WEB\\_r1.pdf](https://www.commoncause.org/ohio/wp-content/uploads/sites/23/2018/10/OhioSupremeCourt_WEB_r1.pdf) [<https://perma.cc/DK2B-SDNK>] (listing the top donors, and amounts donated to four state supreme court candidates).

<sup>187</sup> See generally *Newspaper Ad Prices – by State*, GABLER.COM, <http://www.gabler.com/newspaper-ad-rates.htm> [<https://perma.cc/E5JN-EWQS>] (last visited Sept. 18, 2019) (listing newspaper advertising rates for urban, suburban, and rural publications).

Under some circumstances, campaign contributions made by the judge sought to be disqualified may be relevant.<sup>188</sup>

In addition to detailed campaign contribution histories, big data can supply relevant litigation information.<sup>189</sup> What is the win-loss record of the contributor before the judge?<sup>190</sup> How often does the contributing party or lawyer appear before the judge?<sup>191</sup> Is the issue before the judge likely to affect other cases, or is it unique to the contributor's case?<sup>192</sup> Has the judge ruled on the issue previously? Did the

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<sup>188</sup> Cf. Brian T. Fitzpatrick, *The Ideological Consequences of Selection: A Nationwide Study of the Methods of Selecting Judges*, 70 VAND. L. REV. 1729, 1735–36 (2017) (assessing the ideological preferences of judges, in part, by examining whether a judge contributed to Democrat or Republican candidates).

<sup>189</sup> For example, LexisNexis describes its “Context for Judges” as “a new offering from the Lexis Analytics™ suite” where “legal language analytics are deployed across tens of millions of Lexis Advance case law documents” to produce and correlate judges’ rulings on “100 different motion types.” *Context for Judges: Know the Language. Write a Persuasive Motion*, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/context/judges.page> [<https://perma.cc/B9J2-3RES>] (last visited Sept. 17, 2019). The director of LexisNexis product management explains, “No-one else can begin to do this—we’re not just saying ‘did the judge grant this or deny that’ but what is the exact language he or she used. We take every sentence and turn it into a data point that can be studied.” *LexisNexis Launches Well-Trailed Judge and Expert Witness Analytics Solution Context*, LEGAL IT INSIDER (Nov. 29, 2018, 1:28 PM), <https://www.legaltechnology.com/latest-news/lexisnexis-launches-well-trailed-judge-and-expert-witness-analytics-solution-context> [<https://perma.cc/6QWL-A9S4>] (quoting LexisNexis director of product management Mark Koussa). “Context” provides court records for all federal judges and some state court judges. See LEXIS ADVANCE, LEXISNEXIS CONTEXT SEARCH, <https://advance.lexis.com/contexthome?cbc=0&crd=e4212ebb-aa97-4936-ab0a-c85266f9a951#> [<https://perma.cc/3AFS-RKAA>] (last visited Sept. 17, 2019).

<sup>190</sup> See Ronald D. Rotunda, *Constitutionalizing Judicial Ethics: Judicial Elections After Republican Party of Minnesota v. White, Caperton, and Citizens United*, 64 ARK. L. REV. 1, 25 n.111 (2011) (listing private attorneys who were major donors to the campaigns of Illinois Supreme Court Justices and the contributors’ win and loss records before the court after the donations); see also Andrew L. Frey & Jeffrey A. Berger, *A Solution in Search of a Problem: The Disconnect Between the Outcome in Caperton and the Circumstances of Justice Benjamin’s Election*, 60 SYRACUSE L. REV. 279, 287–88 (2010).

<sup>191</sup> Rotunda, *supra* note 190, at 22 (“[F]ewer than 4% of the lawyers or parties who appeared before the Illinois Supreme Court made a contribution to a winning candidate”); see also Frey & Berger, *supra* note 190, at 286 (suggesting that whether a contributor is a “repeat litigant” before the judge is of equal importance to whether the contributor has a case pending before the judge at the time of the contribution).

<sup>192</sup> See *Woodland Hills Residents Ass’n. v. City Council of Los Angeles*, 609 P.2d 1029, 1036 (Cal. 1980) (Bird, C.J., concurring and dissenting) (recognizing that “the significance of the issue being considered, would be relevant in judging the appearance of bias”); see also N.D. CODE OF JUD. CONDUCT R. 2.11 cmt. 4 (N.D. SUP. CT. 2012) (directing the judge to consider “the issues involved in the proceeding” when deciding a recusal issue involving campaign contributions); Nicholas Almendares & Catherine Hafer, *Beyond*

judge campaign on the issue at stake, or has the judge written, spoken, or tweeted about the issue?<sup>193</sup> Has the judge disqualified herself from other cases involving the same party or lawyer, or from cases in which a party or lawyer contributed a similar amount?<sup>194</sup> Big data can supply the reasonable person with this information.<sup>195</sup>

Big data can also help evaluate “the apparent effect [a] contribution had on the outcome of the election.”<sup>196</sup> While the U.S. Supreme Court has recognized the importance of this factor, the Court also conceded that requiring a judge to determine “what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion.”<sup>197</sup> Because weighing this factor amounts to nothing more than uneducated guesswork, some courts pay lip service to the effect of a contribution on the election outcome but ignore the factor in evaluating the disqualification issue.<sup>198</sup> Analytics could legitimize this consideration by providing an educated assessment of the “apparent effect” of a contribution by evaluating factors known to influence the success or failure of judicial candidates. These factors could include, the size and timing of the contribution in question; other financing; the use to which the contribution is put; advertising efforts; budget; name; gender; name recognition; voter turnout; voter roll-off; ballot position; negative campaign tactics; political and economic environment; endorsements by newspapers, political groups, individuals, unions, and trade associations; and “blue” and “red” waves.<sup>199</sup>

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Citizens United, 84 FORDHAM L. REV. 2755, 2786 (2016) (identifying one factor as “the stake the contributor has in the policy at hand.”).

<sup>193</sup> See Request to Recuse the Hon. Sharon Kennedy, Capital Care Network of Toledo v. State Dep’t Department of Health, 153 Ohio St. 3d 362, 2018-Ohio-440, 106 N.E. 3d 1209 (Aug. 17, 2017), [http://supremecourt.ohio.gov/pdf\\_viewer/pdf\\_viewer.aspx?pdf=829404.pdf](http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=829404.pdf) [<https://perma.cc/B9QM-E6T9>] (seeking disqualification of a state supreme court justice from a case involving an abortion provider in part because the judge (1) was the keynote speaker at a right to life function; (2) stated in a questionnaire that life begins at fertilization; and (3) stated that the Ohio Constitution contains no provision intended to require the use of public funds for abortion).

<sup>194</sup> See Robinson Nursing & Rehab. Ctr. v. Phillips, 502 S.W.3d 519, 523 (Ark. 2016) (noting that the judge had recused from cases involving “significant contributions” after previous elections).

<sup>195</sup> Cf. Frey & Berger, *supra* note 190, at 280 (criticizing Caperton for “its unwillingness to evaluate the entire universe of facts”).

<sup>196</sup> Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 886 (2009).

<sup>197</sup> *Id.* at 885; see also Frey & Berger, *supra* note 190, at 282–92 (discussing the difficulty in determining what influences an election outcome).

<sup>198</sup> See, e.g., Ivey v. Eighth Judicial Dist. Ct., 299 P.3d 354, 357–59 (Nev. 2013) (mentioning the “apparent effect” factor, but never applying it to the facts of the case).

<sup>199</sup> See Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J. L. & POL. 643, 644 (2002); see also John Council, ‘Blue Wave’ Hits Texas Judiciary as Democrats Win Seats on Four Appellate Courts, TEX. LAW. (Nov. 7, 2018) (“In upsets that few political observers . . . expected, Democrats took five seats each on Houston’s all-Republican First Court of Appeals and all-Republican

The algorithms developed to interpret big data in recusal matters could integrate the public's view of judicial elections and campaign contributions. On one hand, the public overwhelmingly supports selecting judges by election rather than by appointment. A Harris poll disclosed that 55% of respondents favored elected judges while 19% favored appointed judges.<sup>200</sup> An Alabama survey found that 85% of voters preferred elected judges.<sup>201</sup> On the other hand, polls consistently reveal that approximately three-quarters of voters believe that campaign contributions have some effect on judicial decisions.<sup>202</sup> The relative weight assigned to these factors by a particular jurisdiction in a big data analysis could vary widely.<sup>203</sup> Regardless of the different weights assigned by the states, the inclusion of public survey results would allow public perceptions of elected judges and campaign contributions to play some role in the disqualification equation.

The point here is not to identify the precise nature of the information included in the dataset or to assign weights to factors incorporated into a disqualification algorithm. The point is that using analytics to determine whether the average person might reasonably question a judge's impartiality facilitates consistent, uniform, and objective disqualification decisions, something that has eluded the legal system since the origin of appearance-based disqualification in 1972. The impact of

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Fourteenth Court of Appeals, eight seats on Dallas' all-Republican Fifth Court of Appeals, four seats on Austin's all-Republican Third Courts of Appeals and four seats on San Antonio's Fourth Court of Appeals." See generally Albert J. Klumpp, *Judicial Primary Elections in Cook County, Illinois: Fear the Irish Women!*, 60 DEPAUL L. REV. 821 (2011) (discussing the effect of political party slating, endorsements from newspapers and bar associations, ballot cues, and money on judicial election success).

<sup>200</sup> *Most Americans Want State Judges to be Elected*, HARRIS INTERACTIVE (Oct. 20, 2008), <https://theharrispoll.com/wp-content/uploads/2017/12/Harris-Interactive-Poll-Research-Electing-judges-2008-10.pdf> [<https://perma.cc/FQ8M-RAEE>].

<sup>201</sup> Editorial, *Mixed Signals: People Want to Elect Judges but Don't Know Them*, BIRMINGHAM NEWS, Mar. 26, 2000, at 2C.

<sup>202</sup> See *Republican Party of Minnesota v. White*, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring) ("Even if judges were able to refrain from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary."); see also 20/20 INSIGHT, NATIONAL REGISTERED VOTERS FREQUENCY QUESTIONNAIRE 2-4 (2011), [http://www.justiceatstake.org/media/cms/NPJE2011poll\\_7FE4917006019.pdf](http://www.justiceatstake.org/media/cms/NPJE2011poll_7FE4917006019.pdf) [<https://perma.cc/8YF6-WJ2Z>] (finding that 83% of respondents believed that campaign contributions have a "great deal" or "some" effect on a judge's decision); GREENBERG QUINLAN ROSNER RESEARCH & AMERICAN VIEWPOINT, JUSTICE AT STAKE FREQUENCY QUESTIONNAIRE 4 (2001), <http://www.brennancenter.org/analysis/national-polls-justice-stake> [<https://perma.cc/C5TR-XD25>] (reporting result of national public opinion survey that 76% of registered voters believe that campaign contributions have "a great deal" or "some" influence on judicial decisions).

<sup>203</sup> For example, based on the comments to Rule 60.04(7) of the Wisconsin Code of Judicial Conduct, Wisconsin may choose to give more weight the public's desire for an elected judiciary than the public's fear that contributions taint judicial decisions. See WIS. SUP. CT. R. 60.04(7) (2019).

campaign contributions on public trust in the judiciary, together with the volume of pertinent public information, coalesce to produce a perfect platform for an experiment with a big data-based disqualification process. The use of big data to evaluate other circumstances that often form the basis of claims that a judge's impartiality might reasonably be questioned, including friendships and other relationships with litigants, lawyers, and witnesses, could be subsequently addressed.

#### CONCLUSION

The appearance-based disqualification regime established in the 1972 ABA Code of Judicial Conduct and subsequently adopted by every federal and state jurisdiction is “crumbling.”<sup>204</sup> The demise is not surprising. The ABA hoped to increase the reliability of disqualification decisions by instituting an objective test that empowered the fully informed, reasonable, layperson to decide whether the circumstances created the perception that a judge's impartiality “might reasonably be questioned.” The 1972 ABA recusal test suffered from vagueness, the fiction that the average person was fully informed of the legal and factual minutia necessary to the disqualification decision, and the unrealistic assumption that the challenged judge could serve as both the object and interpreter of the appearance standard. These inherent defects prevent appearance-based recusal from achieving the ABA's goals. If anything, the standard established in the 1972 Code made disqualification decisions less predictable and more arbitrary.<sup>205</sup>

The band-aid approaches to fixing appearance-based disqualification—including requiring written recusal decisions and assigning disqualification motions to independent judges—have failed because they do not address the underlying flaws of the doctrine. The preemptory removal of one trial judge at the request of a party might help solve part of the problem if automatic disqualification replaced the “might reasonably be questioned” standard. But the nineteen states permitting preemptory disqualification of trial judges have retained the “might reasonably be questioned” test, requiring judges to apply the impossible standard when independently evaluating their ethical obligations and when ruling on disqualification motions. Other reforms that directly address the shortcomings of appearance-based disqualification, such as empaneling a jury of “outsiders” to decide whether the circumstances create a perception of partiality, have not received serious consideration.

Big data cures the major deficiencies plaguing appearance-based disqualification. Big data makes the fully informed, reasonable person a reality rather than an embarrassing fiction. It also adds a measure of objectivity to the

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<sup>204</sup> Geyh, *supra* note 16, at 675 (“I argue that the dominant regime that has structured judicial disqualification in the state and federal courts for nearly forty years . . . is crumbling, and the struggle for a successor regime has begun.”).

<sup>205</sup> See McKoski, *supra* note 18, at 433 (“The appearance-based disqualification scheme adopted by the ABA, Congress, and the states has failed on every level.”).

disqualification decision by replacing the challenged judge as the decision-maker or, alternatively, by supplying the challenged judge with an objective assessment of the circumstances. Best of all, the danger of erroneous decisions is absent when big data is used in disqualification decisions because a judge does not engage big data analytics unless the judge first determines that disqualification is not required. If big data analytics confirms the judge's conclusion, the judge remains on the case. Assuming the big data decision is wrong, the parties suffer no change of position because even without analytics, the case would have stayed with the judge. On the other hand, if analytics disagrees with the judge and concludes that a reasonable question exists as to the judge's impartiality, a new judge is assigned. Even if the big data analysis is wrong in determining that a new judge is necessary, the parties suffer no adverse consequences because a presumption of impartiality attaches to the successor judge. And, most importantly, in a disqualification regime controlled by appearances, the algorithmic-based outcome will appear objective to the public because it will be made by a truly fully informed outsider free from the judge's biases and preconceptions.