SAFEGUARDING THE PROPRIETY OF THE JUDICIARY*

JON P. MCCLANAHAN**

The ABA Model Code of Judicial Conduct and the judicial codes of conduct in nearly every jurisdiction admonish judges to avoid the appearance of impropriety. The North Carolina Code of Judicial Conduct likewise contained a similar prohibition until 2003, when the Supreme Court of North Carolina removed the language and made related amendments to the Code. Although North Carolina is an outlier in this regard, two questions remain: first, whether North Carolina judges are still required to consider appearances in performing their duties; and second, whether judicial codes of conduct should prescribe such a standard at all.

To answer the latter question, this Article draws upon the social psychology theories of cognitive bias and procedural justice. These two theories work together to impact how judges arrive at decisions and how litigants will perceive and respond to those decisions. Both theories militate in favor of including a robust appearance standard in a judicial code of conduct. Moreover, the changes to the North Carolina Code in 2003 simultaneously exacerbated the negative effects of cognitive bias and decreased litigants' perceptions of procedural justice in state courts.

But reinstating the "appearance of impropriety" language to the North Carolina Code alone will not fully ensure judicial propriety, or even the appearance of propriety. Thus, this Article illustrates how an understanding of cognitive bias and procedural justice can inform the introduction of other reforms, using the issue of judicial involvement in plea bargaining and sentencing as one example of how these theories may be applied.

** Clinical Associate Professor of Law, University of North Carolina School of Law. The author wishes to thank Hilary S. Blackwood, Michael J. Gerhardt, Richard E. Myers, II, and Robert J. Smith for their thoughtful comments, as well as Julie Grimley and Dawn Milam for their excellent research assistance.

INTRODUCTION

In the aftermath of *Caperton v. A.T. Massey Coal Co.*,[1] where the Supreme Court of the United States held that Justice Brent Benjamin

1. 556 U.S. 868 (2009).

of the West Virginia Supreme Court violated the Due Process Clause in failing to recuse himself from a case to which he had substantial financial ties,[2] judicial impropriety has become a "hot" topic.[3] Two years ago, judicial disqualification standards served as fodder for national debate when Federal District Court Judge Vaughn Walker, who ruled on the constitutionality of banning same-sex marriage, announced after his retirement that he had been in a long-term, same-sex relationship.[4] Furthermore, as recent challenges to the Affordable Care Act made their way to the Supreme Court, several Justices faced scrutiny over their participation.[5]

Nor have impropriety concerns escaped judges in North Carolina. Judge B. Carlton Terry, Jr., a North Carolina District Court Judge, was publicly reprimanded in 2009 when he participated in an open Facebook exchange with counsel in a pending matter and, thereafter, conducted independent internet research on this "friend's" opposition.[6] Following his win in a highly contested, expensive election to the Supreme Court of North Carolina in 2012,[7] Justice Paul Newby faced unsuccessful calls for recusal in a redistricting case on account of receiving $1.9 million in contributions from an organization having an alleged stake in the matter.[8]

2. *Id.* at 886. At issue in *Caperton* was whether a judge who received substantial campaign contributions from the President, Chairman, and Chief Executive Officer of A.T. Massey Coal Company should have granted a motion for his recusal when a case against Massey came up on appeal. *Id.* at 872–76. In a five-to-four opinion, the Court held the justice's denial of the motion had "rise[n] to an unconstitutional level." *Id.* at 887.

3. *See* Charles Gardner Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671, 672 (2011).

4. *Compare* Tony Mauro, *Parties duel over recusal issue*, NAT'L L. J. (Mar. 25, 2013), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202593209243&Parties_duel_over_recusal_issue&slreturn=20130406150809 (discussing the case against Judge Walker in light of federal ethics standards), *with* Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012) (holding that Judge Walker did not have a duty to recuse himself from the matter simply because "as a citizen, [he] could [have] be[en] affected by the proceeding" (quoting Perry v. Schwarzenegger, 790 F. Supp. 2d 1119, 1122 (N.D. Cal. 2011))), *vacated sub nom.* Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

5. *See* Arlen Specter, *Who Judges the Justices?*, WASH. POST, Mar. 23, 2012, at A17.

6. *See* N.C. JUD. STANDARDS COMM'N, PUBLIC REPRIMAND OF B. CARLTON TERRY, JR., DISTRICT COURT JUDGE, JUDICIAL DISTRICT 22, INQUIRY NO. 08-234, at 1–5 (2009), *available at* http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf; Debra Cassens Weiss, *Judge Reprimanded for Friending Lawyer and Googling Litigant*, A.B.A. J. (June 1, 2009, 6:20 AM), http://www.abajournal.com/news/article/judge_reprimanded_for_friending_lawyer_and_googling_litigant/.

7. *See* Craig Jarvis, *Newby Wins in Close Race—Fueled by Outside Money, Incumbent Defeats Ervin*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 7, 2012, at 1B ("National and state Republican organizations, business interests and other conservative groups lined up behind Newby with more than $2.5 million.").

8. *See* Lynn Bonner & Anne Blythe, *Newby Can Hear Redistricting Case: State*

Yet not every arguable instance of judicial impropriety makes national, or even local, headlines. During a pretrial hearing in 2012, a North Carolina judge stated that he had "no tolerance for men who beat women," and indicated that as the defendant was "habitually beating women," he would fare worse with the judge were he to be convicted at trial than if he accepted a proposed plea agreement.[9] These remarks were the subject of an unpublished opinion of the North Carolina Court of Appeals, which rejected the defendant's claim that the judge had imposed a more punitive sentence because the defendant rejected the proposed plea and exercised his right to trial by jury.[10]

Though similar allegations of judicial impropriety abound, in all but the most egregious of circumstances it is impossible to ascertain whether a judge has actually engaged in impropriety. Indeed, Justice Benjamin defended his decision not to recuse himself in the *Caperton* case on the ground that the campaign contributions did not compromise his ability to rule impartially.[11]

Perhaps because of the difficulties inherent in identifying actual judicial impropriety, the public's perception of judges as impartial decision makers is also far from clear. Although polls suggest that Americans have more trust in the judicial branch than the other branches of government,[12] 76% of respondents in a recent national poll believed that Justices on the Supreme Court of the United States "[s]ometimes let personal or political views influence their decisions."[13]

Given the apparent disconnect between judges' and the public's

Supreme Court Rejects Democrats', NAACP's Case, NEWS & OBSERVER (Raleigh, N.C.), Dec. 18, 2012, at 1B. The Supreme Court of North Carolina later ruled that Newby was not required to recuse himself from the case. *See id.*

9. State v. Oakes, No. COA11-979, 2012 N.C. App. LEXIS 47, at *6–12 (Jan. 17, 2012) (finding no violation of defendant's constitutional right to trial by jury based on this statement and other comparisons between terms of a proposed plea and possible outcomes upon conviction at trial).

10. *See id.* at *12–13.

11. *See* Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 874 (2009) (noting how Justice Benjamin explained his denial of the recusal motion by stating that "he found 'no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial' ").

12. *See* Frank Newport, *Americans Trust Judicial Branch Most, Legislative Least*, GALLUP (Sept. 26, 2012), http://www.gallup.com/poll/157685/americans-trust-judicial-branch-legislative-least.aspx.

13. *Opinions of the Supreme Court*, N.Y. TIMES (June 7, 2012), http://www.nytimes.com/interactive/2012/06/08/us/politics/opinions-of-the-supreme-court.html.

perception of judicial behavior, it is important to consider the extent to which judicial ethics codes provide an effective check on impropriety. Although every state now has a judicial code of conduct,[14] such codes are a relatively recent phenomenon in the United States.[15] The earliest attempts at regulating judges were through a set of purely aspirational norms, which reflected the idea that judges would naturally conduct themselves in an "honorable" fashion, free from suspicion.[16] Over time, however, judicial codes were strengthened in two ways: first, by the replacement of aspirational norms with mandatory requirements; and second, by the inclusion of specific restrictions on judicial activities through mandated disclosures and conflicts-screening procedures.[17]

Contemporary judicial codes of conduct in federal and state jurisdictions are far from uniform, but one concept is nearly universal: judges are required to avoid both actual impropriety and the appearance of impropriety ("the appearance standard").[18] In fact, Justice Kennedy's majority opinion in *Caperton* noted this commonality and explained the importance of such standards, remarking that codes of conduct "serve to maintain the integrity of the judiciary and the rule of law."[19] Thus, it should be no surprise that, for many years, North Carolina maintained the appearance standard in its code of conduct.

In 2003, however, the Supreme Court of North Carolina removed the appearance standard and made other amendments to

14. *See State Judicial Ethics Resources*, ABA., http://www.americanbar.org/groups/professional_responsibility/policy/judicial_code_revision_project/resources_state.html (last visited Aug. 19, 2013) (compiling judicial codes of conduct for all fifty states and the District of Columbia).

15. *See infra* Part I.A.

16. *See* Gabriel D. Serbulea, Comment, *Due Process and Judicial Disqualification: The Need for Reform*, 38 PEPP. L. REV. 1109, 1113–14 (2011) ("[U]nlike civil law countries, in the English courts at the time of America's founding, a judge could only be disqualified for a direct pecuniary interest in the case, and not for bias, perceived bias, or any other mere basis for suspicion. This practice was closely mirrored in the thirteen American colonies.").

17. *See generally* M. Margaret McKeown, *To Judge or Not to Judge: Transparency and Recusal in the Federal System*, 30 REV. LITIG. 653, 659–65 (2011) (explaining the development of the ABA Model Code of Judicial Conduct).

18. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1985 (2010) [hereinafter McKoski, *Judicial Discipline*] (noting that North Carolina and Oregon are the only two states to have abandoned the appearance standard).

19. Caperton v. A. T. Massey Coal Co., 556 U.S. 868, 889 (2009).

the North Carolina Code of Judicial Conduct ("North Carolina Code"), with the overall effect of decreasing the restrictions on judges.[20] North Carolina now stands as one of only two states without the appearance standard in its code of conduct.[21]

Even though North Carolina is an outlier on this front, the appearance standard is not without its share of critics. Some have condemned its vagueness,[22] and others have argued that it unduly restricts the ability of judges to be a part of the society about which they must decide matters.[23] This Article does not purport to consider all of the practical difficulties associated with administering an appearance standard. Rather, the aim of this Article is to evaluate the need for an appearance standard through the lens of social psychology.

Judges, like all decision makers, may be subject to cognitive biases,[24] which may affect their ability both to rule impartially and to recognize the circumstances in which they are unable to do so.[25] At the same time, litigants value dispute resolution mechanisms that are perceived as procedurally fair, and this sense of procedural justice in turn affects how litigants react to decisions and how the public views the legitimacy of the judiciary.[26] This Article concludes that both sets

20. *See infra* Part I.B–C.

21. *See* McKoski, *Judicial Discipline*, *supra* note 18, at 1985.

22. *See, e.g.*, *id.* at 1936 ("The debate over the appearance of impropriety standard as a basis for judicial discipline usually centers on the issue of whether its inherent vagueness violates due process. Opponents assert that the rule is the poster child of statutory imprecision and no judge can be expected to divine when an act would appear improper to a third party."). Alternatively, some might argue that judges are selected precisely because they are expected to rule in particular ways in certain types of cases. Indeed, confirmation hearings for United States Supreme Court nominees often center around such issues. For purposes of this Article, however, it is assumed that the goal is to maintain an impartial judiciary.

23. *See, e.g.*, *id.* at 1951 ("[I]t is undeniable that the uncertainty surrounding application of the appearance standard has resulted in judges declining to exercise constitutionally guaranteed rights.").

24. Cognitive biases are present when "individuals draw inferences or adopt beliefs where the evidence for doing so in a logically sound manner is either insufficient or absent." Martie G. Haselton et al., *The Evolution of Cognitive Bias*, *in* THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 724, 725 (David M. Buss ed., 2005). *See generally infra* Part II.A (identifying and describing cognitive biases that impact judicial decision making).

25. *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, 740–42 (2011) [hereinafter Stempel, *In Praise*] ("Judges are, of course, human beings. Like all humans, they are subject to cognitive constraints . . . .").

26. *See generally* Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007) [hereinafter Tyler, *Procedural Justice*] (explaining the concept of procedural justice

of theories—cognitive bias and procedural justice—militate in favor of including the appearance standard in judicial codes. Furthermore, the Article analyzes the 2003 Amendments to the North Carolina Code and argues that they both exacerbate the likelihood of cognitive biases impacting judicial decisions and thwart the administration of procedural justice. Finally, this Article illustrates how an understanding of cognitive bias and procedural justice can inform other changes to the North Carolina Code and related procedural rules. This Article specifically examines judicial participation in the plea bargaining and sentencing phases of criminal matters to demonstrate how judges' dual roles may compromise the legitimacy of imposed sentences. It also evaluates potential reforms to this problem in terms of their impact on cognitive bias and procedural justice. Although this problem is one of many ethical issues facing North Carolina judges, it is explored in this Article to demonstrate how these concepts can lead to more widespread reforms.

In concluding that North Carolina should reinstate the appearance standard and make further reforms, the Author does not mean to suggest that judicial impropriety is widespread in North Carolina or elsewhere. Rather, these reforms will serve to safeguard and promote judicial propriety by ensuring that decisions are made by impartial judges who are perceived to be fair. The appearance standard can be likened to a vehicle's emergency brake; although not regularly used, it provides security when faced with an extraordinary circumstance on the road. By removing the appearance standard, North Carolina has left its judicial branch vulnerable to an extraordinary circumstance in the courtroom and undermined public confidence in the security of the justice system.

Part I traces the development of standards governing the impartiality of the judiciary and, in particular, the restrictions on the appearance of impropriety. Whereas the ABA Model Code of Judicial Conduct has progressively strengthened its appearance standard, the North Carolina Code has removed appearances from its purview—or at least weakened their import.

Part II describes the theories of cognitive bias and procedural justice. Although cognitive biases may appear in many forms, five are of importance to judicial decision making: the bias "blind spot," egocentric bias, status quo bias, anchoring effect, and confirmation bias. These biases work together to impact a person's ability to be impartial and to identify when he or she cannot do so. Procedural

and its importance to the courts).

justice, on the other hand, refers to how litigants perceive the fairness of decisions. When decisions are perceived to be procedurally fair, litigants tend to be more satisfied with the substantive outcomes, the decision makers, and the system as a whole.

Part III applies the theories of cognitive bias and procedural justice to propose that the appearance standard should be included in judicial codes. Even assuming that the goal of a judicial code is to prohibit actual impropriety, the appearance standard is needed to protect against judges' unconscious biases, while simultaneously ensuring that litigants and the public perceive the judicial process as procedurally fair. Finally, this Part demonstrates the additional problems created by the 2003 Amendments to the North Carolina Code in this regard.

Part IV introduces another ethical issue facing judges in North Carolina: judicial involvement in the plea bargaining and sentencing of criminal defendants. Even if judicial participation is beneficial to defendants at the plea bargaining stage, actual impropriety or an appearance of impropriety may arise when the same judge who participates in plea discussions later sentences the defendant who rejected a proposed plea. This Part concludes with an exploration of how an understanding of cognitive bias and procedural justice may be used to implement reforms, and it proposes measures to limit dual participation and to safeguard against impropriety during sentencing.

I. DEVELOPMENT OF STANDARDS GOVERNING THE IMPARTIALITY OF THE JUDICIARY

Like other aspects of early American jurisprudence, standards governing judicial conduct were initially influenced by the English common-law tradition.[27] There, the practice was "simple in the extreme," in that judges were to be disqualified only if they had a direct pecuniary interest in the cases before them.[28] Judges were not even disqualified on account of familial relationships with litigants, nor did many contemporary legal scholars suggest that judicial bias

27. *See* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 952–53 (noting that "American disqualification law grew directly out of the common law tradition").

28. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609–11 (1947). In his 1920 address to the Cambridge University Law Society, Lord Justice Scrutton explained that "in England people were inclined to treat the incorruptibility of judges as such a matter of course that it was superfluous to mention it." Gordon Borrie, *Judicial Conflicts of Interest in Britain*, 18 AM. J. COMP. L. 697, 706 (1970).

should be grounds for recusal.[29] This practice was in stark contrast to that in civil law countries, which allowed parties to petition for recusal if a judge was under suspicion of being partial in a matter.[30]

Beginning in post-revolutionary America and continuing through the twentieth century, however, the ethical standards governing American judges expanded considerably beyond narrow disqualification rules.[31] For the first time, judges were admonished to avoid actual impropriety and the appearance of impropriety, not only in deciding whether to hear cases, but also in conducting their daily lives.[32] Although state and federal codes of conduct prescribed more specific rules governing judges, such rules were nevertheless targeted at fulfilling the twin aims of avoiding actual impropriety and the appearance of impropriety.[33]

It was against this backdrop that the North Carolina Code of Judicial Conduct was first adopted in 1973.[34] During the next thirty years, the North Carolina Code likewise touted these twin aims.[35] However, the 2003 Amendments to the North Carolina Code ("2003 Amendments") signaled a change in the state's approach to judicial impartiality; most notably, the phrase "appearance of impropriety" was stricken from the Code.[36] A subsequent Supreme Court of North

29. *See* Frank, *supra* note 28, at 615–16; *see also* Inter Brookes and the Earl of Rivers (1668) 145 Eng. Rep. 569 (Exch.) (explaining that "favour" was not to be "presumed" in a judge). In contrast to Blackstone, early English jurist Henry de Bracton advanced the belief that judges should be disqualified on the suspicion of bias. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.2, at 5–6 (2d ed. 2007). Nevertheless, "Bracton's effort to insinuate this civil law notion into English jurisprudence ultimately proved unsuccessful." *Id.*

30. McKeown, *supra* note 17, at 659–60.

31. *See id.* at 660.

32. *See* CANONS OF JUDICIAL ETHICS Canon 4 (1924), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/1924_canons.authcheckdm.pdf. The original Canons of Judicial Ethics stated, "A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach." *Id.*

33. *See* FLAMM, *supra* note 29, § 1.4, at 8–10 ("In accordance with the expanding disqualification right [contained in the federal judicial disqualification statute], the United States Supreme Court read the Constitution to forbid decision-makers from hearing cases not only when they had a personal stake in the outcome, but whenever it could be shown that they were involved in the litigated incidents, or had become personally embroiled with a party. A similar expansion occurred in many American states.").

34. *See* N.C. CODE OF JUDICIAL CONDUCT (1973) [hereinafter 1973 N.C. CODE].

35. *See, e.g.*, N.C. CODE OF JUDICIAL CONDUCT Canon 2 (1998) [hereinafter 1998 N.C. CODE] ("A judge should avoid impropriety and the appearance of impropriety in all his activities.").

36. N.C. CODE OF JUDICIAL CONDUCT Canon 2 (2003) [hereinafter 2003 N.C. CODE] ("A judge should avoid impropriety in all his activities.").

Carolina decision underscored these changes,[37] raising serious doubt about whether North Carolina judges should consider appearances in determining whether self-recusal in a matter was necessary.[38]

This Part traces the history of judicial codes of conduct in the United States, focusing on those provisions relating to the appearance of impropriety. Nearly all such codes now include an appearance standard, similar to the ABA Model Code of Judicial Conduct, in part because of the historical events that spurred the creation of such codes. This historical accuracy is important, for it supports the retention of a robust appearance standard. Next, this Part discusses the development of the North Carolina Code, including the most recent changes relating to the appearance of impropriety. By comparing the amended North Carolina Code to the ABA Model Code of Judicial Conduct, the significance of the 2003 Amendments can be most fully understood. Finally, this Part analyzes the extent to which the North Carolina Code has been interpreted since the 2003 Amendments. While there are some indications that the appearance of impropriety is not completely discounted in disciplinary actions, there is no clear evidence that North Carolina judges are obliged to follow an appearance standard.

A. Evolution of the ABA Model Code of Judicial Conduct

Prior to the twentieth century, there were no comprehensive judicial codes of conduct in the United States. In 1792, the Second Congress of the United States enacted a statutory disqualification provision for federal judges, but its scope encompassed only those judges who had a pecuniary interest in a matter or had previously served as an attorney for a litigant.[39] Matthew Hale, an early American judge, summed up the views of his contemporaries in his own "Rules for Judicial Guidance," noting that judges should not remove themselves absent actual impropriety and urging them to "lay

37. Lange v. Lange, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (concluding that there must be substantive grounds for requiring recusal after the 2003 Amendments, rather than an "inferred perception" that a judge is unable to rule impartially).

38. Michael Crowell, *Recusal*, ADMIN. JUST. BULL. 1, 6 (Sept. 2009), *available at* http://sogpubs.unc.edu/electronicversions/pdfs/aojb0903.pdf.

39. Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S. TEX. L. REV. 911, 913 (2007). The provision explained that upon a satisfactory request for disqualification, a federal district court judge who appeared to be interested in a matter had to "cause the fact to be entered on the minutes of the court," and the court would then take over the matter. *Id.* (citing Act of May 8, 1792, ch. 36, § 11, 1 Stat. 275, 278–79 (repealed 1911)).

aside personal passions while judging."[40] While there were several additions to the federal disqualification standards over the next century, the creation of a comprehensive judicial code of conduct came in response to a scandal that rocked the iconic sport of baseball.[41]

The scandal was twofold. It originated during the 1919 World Series, when the Chicago White Sox lost unexpectedly to the Cincinnati Reds and eight players were indicted for "conspiring to throw" the game.[42] Although the players were ultimately acquitted, the team owners felt a perceived loss in the "public's sense of the integrity of the game."[43] They asked a federal district court judge, Kenesaw Mountain Landis, to become the first Commissioner of Baseball, hoping that his prestige and reputation for independence would ameliorate the fallout from the scandal.[44] To the contrary, Landis' dual role as judge and Commissioner served only to tarnish his own legal reputation.[45] After being censured by the ABA for "undermining public confidence in the independence of the judiciary,"[46] Landis resigned from the judiciary.[47]

In 1922, one year after ordering Landis' censure, the ABA formed the Committee on Judicial Ethics.[48] The Committee proposed the Canons of Judicial Ethics ("the Judicial Canons"), which were ultimately adopted by the ABA in 1924.[49] Unlike modern codes,

40. Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from "Big Judge Davis,"* 99 KY. L.J. 259, 280–81 (2011) [hereinafter McKoski, *Reestablishing Actual Impartialit*y].

41. McKeown, *supra* note 17, at 659–60. For information about the baseball scandal, see generally ELIOT ASINOF, EIGHT MEN OUT: THE BLACK SOX AND THE 1919 WORLD SERIES (1963).

42. Bowie, *supra* note 39, at 915 (noting that the men were ultimately acquitted after "critical evidence disappeared").

43. *Id.* at 916.

44. McKeown, *supra* note 17, at 659–60. For more information about Judge Landis and his impact on baseball, see J. G. TAYLOR SPINK, JUDGE LANDIS AND TWENTY-FIVE YEARS OF BASEBALL (1947).

45. *See* McKeown, *supra* note 17, at 660. Judge Landis' yearly judicial salary totaled $7,500; as Baseball Commissioner, he brought in $42,000 annually. Andrew J. Lievense & Avern Cohn, *The Federal Judiciary and the ABA Model Code: The Parting of the Ways*, 28 JUST. SYS. J. 271, 272 (2007).

46. *Forty-Fourth Annual Association Meeting*, 7 A.B.A. J. 470, 477 (1921) ("[F]rom every bar in this united country there rose up the withering scorn of the profession against the man who had stained its honor.").

47. McKeown, *supra* note 17, at 660.

48. Lievense & Cohn, *supra* note 45, at 273.

49. McKeown, *supra* note 17, at 660. Then-Chief Justice William Howard Taft chaired the Committee, which sought approval of the Canons after incorporating suggestions from both the bench and bar. *See Final Report and Proposed Canons of Judicial Ethics*, 9

which establish mandatory rules and threaten disciplinary action, the Judicial Canons had a different purpose: they stated aspirational norms and were, consequently, merely precatory in nature.[50] Nonetheless, an inspection of the Judicial Canons highlights the importance of maintaining the appearance of propriety. According to the Preamble,

> [T]he American Bar Association, mindful that the character and conduct of a Judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.[51]

Canon 4 further directed judges to be "free from impropriety and the appearance of impropriety" in carrying out their responsibilities and to ensure that their "personal behavior . . . be beyond reproach."[52]

Though the Judicial Canons represented the first attempt at creating a judicial code of conduct, they were ultimately "criticized for their emphasis on 'moral posturing' that proved to be more 'hortatory than helpful in providing firm guidance for the solution of difficult questions.' "[53] For example, in determining whether to recuse themselves from a matter, judges were directed to engage in subjective inquiries of their own partiality.[54] But judges, aware of only their own unique positions in a matter, would be much less likely to consider themselves partial than would outside observers, to whom

A.B.A. J. 449, 449 (1923).

50. *See Final Report and Proposed Canons of Judicial Ethics*, *supra* note 49, at 449 ("The code, however, is not intended to have the force of law; it is the statement of standards, announced as a guide and reminder to the judiciary and for the enlightenment of others, concerning what the bar expects from those of its members who assume judicial office.").

51. CANONS OF JUDICIAL ETHICS, *supra* note 32, pmbl.

52. *Id.* Canon 4.

53. JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 1.03, at 1-5 (4th ed. 2007) [hereinafter ALFINI ET AL. 2007] (citing Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391 (1972)). The authors of this treatise note that while the original Canons were merely precatory, several states adopted them and enforced discrete provisions on occasion. *Id.* at 1-5 n.12 (citing Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 410–11 (1972)).

54. *See* McKeown, *supra* note 17, at 660–61.

the judges could very well appear biased.[55]

In 1972, the ABA replaced the Judicial Canons with the ABA Model Code of Judicial Conduct ("ABA Model Code").[56] The ABA Model Code represented a significant departure from the Judicial Canons in that it created rules in addition to its norm-based canons and "establish[ed] mandatory standards" to which judges would be held, "unless otherwise indicated."[57] Although Canon 2 of the ABA Model Code reiterated the importance of avoiding "the Appearance of Impropriety in All [of the Judge's] Activities," it nevertheless retained the aspirational modifier "should."[58]

On the other hand, the 1972 version of the ABA Model Code did include a rule governing the disqualification of judges, which stated, in part, that "[a] judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned."[59] The introduction of this disqualification rule was significant because it represented a shift from the subjectively based disqualification guidelines of the past to an objectively based disqualification rule.[60] The ABA Committee Reporter Notes to the rule stated that "the general disqualification policy cannot be forgotten, for an *appearance* of impropriety or bias may reasonably cause the judge's impartiality to be questioned," linking the norm-based canon with the new rule.[61]

Over the years, several other changes to the ABA Model Code have strengthened its prohibition on the appearance of impropriety. For example, in the 1990 revisions to the ABA Model Code, both the admonition to avoid the appearance of impropriety and the language of the disqualification rule were changed from the word "should" to the word "shall."[62] A comment was also added in the 1990 version of

55. *See infra* Part II.A (discussing the bias-blind spot and actor-observer differences).

56. McKeown, *supra* note 17, at 660.

57. CODE OF JUDICIAL CONDUCT Preface (1972) [hereinafter 1972 ABA CODE].

58. *Id.* Canon 2; *see also* Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 950–51 (1996) (noting that in contrast to the 1972 Code, the 1990 Code included mandatory language in Canon 2).

59. 1972 ABA CODE, *supra* note 57, Canon 3(C)(1).

60. McKeown, *supra* note 17, at 660–61.

61. C.E. HINSDALE, NORTH CAROLINA AND AMERICAN BAR ASSOCIATION CODE OF JUDICIAL CONDUCT ANNOTATED 10 (1974).

62. *See* Ronald D. Rotunda, *Judicial Ethics, The Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1353–54 (2006) (explaining that while the ABA's 2004 Annotated Model Code of Judicial Conduct described Canon 2 as "aspirational" in nature, the ABA did not explain this assertion, thus "we should not read it as an official gloss on the language"; adding that "many courts would find this statement astonishing, for they use this 'appearances' language to discipline judges, not simply to 'caution' them").

the ABA Model Code to explain that conduct leads to the appearance of impropriety when it "create[s] in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[63] Furthermore, the 2007 revisions to the ABA Model Code incorporated the "appearance of impropriety" language into the title of Canon 1[64] as well as Rule 1.2, entitled "Promoting Confidence in the Judiciary."[65]

Although the ABA Model Code has consistently strengthened the appearance standard throughout the years, such revisions have not been uncontested. In fact, the ABA Joint Commission, charged with proposing the 2007 revisions, recommended against including the "appearance of impropriety" language in a rule as part of its initial Report to the ABA House of Delegates.[66] The Commission further proposed that only rules, not canons, serve as the basis for disciplinary actions.[67] While the latter proposal was ultimately adopted, the former faced fierce opposition by the Conference of Chief Justices of the states' highest courts.[68] Ultimately, the ABA Joint Commission reversed course, and the ABA House of Delegates approved the inclusion of the "appearance of impropriety" language in Rule 1.2.[69]

B. Disappearance of the Appearance Standard in North Carolina

Since its inception, the ABA Model Code has influenced the codes of judicial conduct of every state and the federal jurisdiction.[70]

63. MODEL CODE OF JUDICIAL CONDUCT Canon 2 cmt. (1990).

64. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2008).

65. *Id.* Rule 1.2.

66. Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century?*, 41 LOY. U. CHI. L.J. 285, 286 (2010). The Commission did recommend retaining the "appearance of impropriety" language in Canon 1, but not in Rule 1.2. *Id.*

67. *Id.*

68. *See* CONFERENCE OF CHIEF JUSTICES, RESOLUTION 3: OPPOSING THE REPORT OF THE ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT IN LIGHT OF ITS FAILURE TO PROVIDE FOR ENFORCEABILITY OF THE CANON ON "APPEARANCE OF IMPROPRIETY" (Feb. 7, 2007), *available at* http://www.jurist.law.pitt.edu/pdf/ccjres.doc.

69. Moore, *supra* note 66, at 287.

70. In 2008, Montana became the last state to adopt a version of the ABA Model Code. *See* In the Matter of the 2008 Montana Code of Judicial Conduct, No. AF 08-0203, at 1 (Mont. Dec. 12, 2008), http://supremecourtdocket.mt.gov/view/AF%20080203%20Other%20--%20Order?id={7F2426C5-4E87-4C48-AE15-3E8E997CF8FC}. *See generally State Adoption of the Revised Model Code of Judicial Conduct*, ABA (Dec. 6, 2012), http://www.americanbar.org/groups/professional_responsibility/resources/judicial_

North Carolina is no exception, having modeled its 1973 version of the North Carolina Code after the 1972 version of the ABA Model Code.[71] Included in the earliest version of the North Carolina Code was an identical provision to the then-existing Canon 2 of the ABA Model Code, providing that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities."[72] Likewise, the North Carolina Code directed judges to recuse themselves from matters where their "impartiality might reasonably be questioned."[73] Although the North Carolina Code was amended several times over the next thirty years, both the appearance standard and disqualification rule were left intact in substance.

It seems that the demise of the appearance standard in North Carolina can be traced to the decision by the Supreme Court of the United States in *Republican Party of Minnesota v. White*.[74] Notably, the *White* decision did not concern the constitutionality of an appearance standard, but rather Minnesota's so-called "Announce Clause," which forbade a candidate for judicial office from "announc[ing] his or her views on disputed legal or political issues."[75] In determining that the clause violated the First Amendment, the majority opinion did not hold that maintaining the appearance of impartiality would be insufficient as a compelling interest. Instead, it concluded that the Announce Clause was not narrowly tailored to further such an interest.[76]

Though only eight states had provisions in their codes of conduct similar to the clause struck down in *White*, the decision prompted challenges to speech-related code provisions throughout the country.[77] The North Carolina Code did not include an Announce Clause; nevertheless, the Supreme Court of North Carolina

ethics_regulation/map.html (noting that in the wake of the adoption of the 2007 ABA Model Code of Judicial Conduct, twenty-seven states had approved of a revised code of judicial conduct, sixteen states had established committees to review their codes, and two states had proposed final revisions to their codes).

71. *Compare* 1973 N.C. CODE, *supra* note 34, *with* 1972 ABA CODE, *supra* note 57 (containing similar provisions).

72. 1973 N.C. CODE, *supra* note 34, Canon 2.

73. *Id.* Canon 3(C)(1).

74. 536 U.S. 765 (2002); *See* J.J. GASS, BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 4 (2004), *available at* http://www.brennancenter.org/content/resource/after_white_defending_and_amending_canons_of_judicial_ethics/.

75. *White*, 536 U.S. at 768–70 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)).

76. *Id.* at 775–76 (holding the Announce Clause not narrowly tailored to further impartiality).

77. *See* GASS, *supra* note 74, at 2.

expeditiously amended its code in the wake of the *White* decision.[78] The amendments took effect on April 2, 2003, and they were enacted without any opportunity for public review or comment.[79]

Among the various amendments to the North Carolina Code, three are of primary significance to this Article and remain in effect today. First, the so-called "Pledge or Promise Clause"[80] was removed, which had previously forbidden judicial candidates from "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."[81] Second, the revisions altered how the disqualification rule would be triggered. Prior to the 2003 Amendments, a judge was to "disqualify himself in a proceeding in which his impartiality might reasonably be questioned."[82] The revised rule required disqualification only "[o]n motion of any party."[83] Although the 2003 Amendments still permitted a judge to recuse himself "upon his own initiative," there was no longer any requirement to do so.[84] Third, and most controversially, the "appearance of impropriety" language was removed from Canon 2 of the North Carolina Code. Thus, the revised canon read: "A judge should avoid impropriety in all his activities."[85]

Because the 2003 Amendments were enacted without public input and did not include any commentary or notes, it is impossible to ascertain precisely why any particular change was made. Indeed, had the legal community and the public universally accepted the 2003 Amendments, it is unlikely that we would know anything about the reasons for the changes. There was considerable backlash to them, however, with the most vociferous complaints coming from North Carolina judges themselves.[86] They were upset by the detrimental impact of the changes on "the appearance of an honorable, independent, and impartial judiciary," as well as by the lack of public

78. *Id.* at 4.

79. *Id.*; *see also* Jessica Conser, Comment, *Achievement of Judicial Effectiveness Through Limits on Judicial Independence: A Comparative Approach*, 31 N.C. J. INT'L L. & COM. REG. 255, 275 (2005) (noting that the N.C. Code of Judicial Conduct revisions took place completely "within the walls of the North Carolina Supreme Court").

80. *See* GASS, *supra* note 74, at 3.

81. 1998 N.C. CODE, *supra* note 35, Canon 7(B)(1)(c).

82. *Id.* Canon 3(C)(1).

83. 2003 N.C. CODE, *supra* note 36, Canon 3(C)(1).

84. *Id.* Canon 3(D).

85. *Id.* Canon 2. By contrast, the prior version of Canon 2 provided that "[a] judge should avoid impropriety and the appearance of impropriety in all his activities." 1998 N.C. CODE, *supra* note 35, Canon 2.

86. *See* Matthew Eisley, *Jurists Deplore Relaxed Rules*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 30, 2003, at B1.

input in the process.[87]

In defending against these criticisms, justices of the Supreme Court of North Carolina cited the necessity of amending the North Carolina Code in light of *White* and its progeny.[88] They further stated that the amendments were made "to streamline North Carolina's rules and turn vague, unenforceable guidelines into clearer ones, while also deterring lawsuits by judicial candidates."[89]

Of the three revisions identified above, however, only the removal of the Pledge or Promise Clause directly advances the purpose of deterring lawsuits by judicial candidates in the wake of the *White* decision.[90] The revision in the mechanics of the disqualification rule, while unrelated to free speech concerns, could be interpreted as an attempt to "streamline" the process of judicial recusal—although the impact of the change might be quite substantial, as will be explored later in this Article.[91]

At first blush, the significance of the removal of the "appearance of impropriety" language is more difficult to ascertain. On the one hand, one might argue that an admonition to avoid the appearance of impropriety is implicit throughout the remainder of the North Carolina Code, including the command that a judge "should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned."[92] If that argument were

87. *Id.*

88. *Id.*

89. *Id.*

90. *Cf.* GASS, *supra* note 74, at 2–3 (noting that at least twenty-five states adopted the Pledge or Promise Clause found in the ABA's 1990 Model Code and "more than a dozen other states adopt[ed] variants"). Although one may claim that the appearance of impropriety standard may have been removed on account of First Amendment concerns, the majority opinion in *White* made it clear that the decision was not made on that basis. *See* Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002) (noting that the present case did not entail a consideration of an appearance of impropriety standard). Indeed, earlier Supreme Court jurisprudence had highlighted the importance of maintaining an appearance of impartiality in the judiciary. *See* Mistretta v. United States, 488 U.S. 361, 407 (1989).

91. *See infra* Part III.B.

92. N.C. CODE OF JUDICIAL CONDUCT Canon 3(C)(1) (2006) [hereinafter 2006 N.C. CODE]; *see also* RICHARD D. BONER, MAINTAINING THE APPEARANCE OF IMPARTIALITY: DISQUALIFICATION AND RECUSAL OF JUDGES IN NORTH CAROLINA (2005), *available at* http://www.sog.unc.edu/sites/www.sog.unc.edu/files/200506BonerMaintainingTheAppearance.pdf (implying that Canon 3(C)(1) creates an "appearance of partiality" test). Avoiding the appearance of impropriety has also been linked with the command that judges act "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." 2006 N.C. CODE, *supra* note 92, Canon 2(A); *see also In re* Fuchsberg, 426 N.Y.S.2d 639, 644–45 (N.Y. Ct. Jud. 1978) ("We thus conclude that respondent's purchases of New York City notes while the remittitur was still

accepted, the revision could be seen as another attempt to "streamline" the Code. On the other hand, some have claimed that an appearance standard is itself nothing more than a "vague, unenforceable [guideline] subject to potential abuse."[93] If this latter argument were really the reason for the specific revision at issue, then it would follow that North Carolina judges would not be obliged to avoid the "appearance of impropriety," however that concept is judged.[94]

As noted above in Part I.A, with nearly every revision to the model codes of judicial conduct, the ABA has progressively strengthened the "appearance of impropriety" standard. What began as an aspirational norm has become a mandatory rule. Given the significance placed on these changes by the ABA, together with the degree to which the North Carolina Code otherwise mirrors the ABA Model Code, it is more likely that the removal of the "appearance of impropriety" language was intended to be more than mere judicial code housekeeping. In the next Section, this Article will examine the extent to which appearances are in fact still considered in regulating the conduct of judges in North Carolina.

C. Whether Appearances Still Matter in North Carolina

To ascertain the continued vitality of an appearance standard in the North Carolina Code, this Article will look to two sources: (1) disciplinary opinions issued by the Supreme Court of North Carolina, and (2) formal advisory opinions issued by the Judicial Standards Commission ("JSC"). Less than one year after the 2003 Amendments went into effect, the Supreme Court of North Carolina decided *Lange v. Lange*,[95] a judicial disqualification case.[96] Judge Jones, whose conduct was at issue in *Lange*, had tried a case despite the fact that he jointly owned a vacation home with an attorney for one of the litigants.[97] The motion for his recusal was heard by a second judge,

pending before the court on which he sits created the appearance of impropriety in violation of Canon 2A.").

93. James Podgers, *Judging Judicial Behavior*, A.B.A. J. (Mar. 21, 2007, 3:32 AM), http://www.abajournal.com/magazine/article/judging_judicial_behavior/.

94. This Article does not purport to address potential First Amendment limits on the inclusion of a mandatory appearance standard. But given the later reference to the "appearance of bias" by the Supreme Court of North Carolina in a disciplinary decision, it is doubtful that its removal of the appearance language was solely based on constitutionality concerns. *See infra* notes 1166–17 and accompanying text.

95. 357 N.C. 645, 588 S.E.2d 877 (2003).

96. *Id.* at 646, 588 S.E.2d at 878.

97. *Id.* at 646, 588 S.E.2d at 878–79.

who "concluded that no evidence existed of any bias or partiality by Judge Jones" but "ordered that Judge Jones be recused because the relationship between Judge Jones and [the attorney] was such that it 'would cause a reasonable person to question whether . . . Jones could rule impartially' in the matter."[98]

Because the North Carolina Court of Appeals had ruled that the case was moot, the Supreme Court of North Carolina was not called upon to rule on the merits of the case.[99] Notwithstanding the procedural posture, the supreme court "deem[ed] it appropriate to reiterate the standard for recusal."[100] The court explained that

> the burden is upon the party moving for disqualification to demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially. Thus, the standard is whether grounds for disqualification actually exist.[101]

Notably, the court declined to mention the appearance of partiality as providing a basis for recusal, even though it had done so in a similar case predating the 2003 Amendments.[102]

But the opinion did not merely state the disqualification standard; it instructed how the standard should be applied on remand.[103] It was in these instructions that the court's interpretation of the standard became clear. According to the court, it was implausible for the second judge to find that Judge Jones harbored no actual bias yet simultaneously conclude that a reasonable person could question the judge's impartiality.[104] Such a ruling was, according to the court, "based on inferred perception and not the facts as they were found to exist."[105]

Although the *Lange* opinion did not directly address the continued vitality of the "appearance of impropriety" language, its import is clear. From its inception, the disqualification rule had been aimed at protecting the "appearance of impropriety or bias." In stating that "inferred perception" could not provide a basis for

98. *Id.* at 647, 588 S.E.2d at 879.
99. *Id.* at 646, 588 S.E.2d at 878.
100. *Id.* at 649, 588 S.E.2d at 880.
101. *Id.* (internal citations and quotation marks omitted).
102. *See* State v. Fie, 320 N.C. 626, 628, 359 S.E.2d 774, 776 (1987).
103. *Lange*, 357 N.C. at 649, 588 S.E.2d at 880.
104. *Id.*
105. *Id.*

recusal, the court required the party moving for recusal to demonstrate a risk of actual partiality, rather than merely an appearance of partiality.[106] Moreover, the timing of the opinion and the fact that its author was a member of the very body who revised the North Carolina Code in 2003[107] strongly suggest that judicial misconduct in North Carolina is not based on appearances.

Since *Lange*, the Supreme Court of North Carolina has issued only one decision, *In re Badgett*,[108] mentioning the "appearance of bias" in finding that a judge should be subject to discipline.[109] The facts of that case, however, were nothing short of egregious. Mark Badgett, a district court judge, became notorious for his comments towards a Hispanic litigant in a domestic violence case.[110] After improperly awarding spousal support, Judge Badgett stated, "[Y]ou people always find a way" to obtain money.[111] He continued: "I don't know how you treat women in Mexico, but here you don't treat them that way."[112] He then ordered a bailiff to search the litigant's wallet for money.[113] Later, when under investigation for his conduct, he lied to the investigator and attempted to influence other witnesses.[114]

The court concluded that Badgett's conduct violated a host of North Carolina Code provisions, including Canon 2A, under which a judge "should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[115] In the course of explaining its reasoning, the court quoted the following language from a 1978 decision: "Public confidence in the courts requires that cases be tried by unprejudiced and unbiased judges. A judge must avoid even the appearance of

106. *See id.*

107. The *Lange* opinion was authored by I. Beverly Lake, who served as Chief Justice from 2001 until 2006. *See Justices of the Court*, N.C. SUP. CT. HIST. SOC'Y, http://www.ncschs.net/Justices_of_the_Court.aspx (last visited Aug. 19, 2013).

108. 362 N.C. 482, 666 S.E.2d 743 (2008).

109. *Id.* at 488, 666 S.E.2d at 747.

110. *See, e.g.*, *Judge Removed for Ethnic Comments and Cover-Up*, COURTHOUSE NEWS SERVICE (Oct. 24, 2008, 8:19 AM), http://www.courthousenews.com/2008/10/24/Judge_Removed_for_Ethnic_Comments_and_Cover-Up.htm (recounting Badgett's removal from office). The North Carolina State Bar eventually forced Badgett to surrender his law license in 2010. *See* Mark H. Badgett, 09 DHC 6, (Disciplinary Hearing Comm'n for the N.C. State Bar Apr. 2, 2010), http://www.ncbar.gov/orders/badgett,%20mark%20final%20order%20ocr.pdf.

111. *In re Badgett*, 362 N.C. at 488, 666 S.E.2d at 747.

112. *Id.*

113. *Id.* at 489, 666 S.E.2d at 747.

114. *Id.* at 487, 666 S.E.2d at 746.

115. *Id.* at 488–89, 666 S.E.2d at 747–48 (quoting N.C. CODE OF JUDICIAL CONDUCT Canon 2(A)).

bias."[116] The court then noted that Badgett's statements "raised at least the appearance of bias" against persons of Hispanic ethnicity.[117]

At first glance, *Badgett* seems to suggest that an appearance standard might still be applied to some aspects of the Code. After all, the court quoted from a decision interpreting a prior version of the Code, and it used the phrase "appearance of bias" two times in the opinion. Nevertheless, there are several reasons to discount *Badgett*'s significance. First, the court later determined that Badgett's statements were "indicative of a bias"[118]—meaning that they were evidence of actual bias, in addition to creating the appearance of bias. Indeed, one would be hard pressed to find a more obvious example of actual bias than the direct statements made by Judge Badgett, and it is unclear how a litigant could otherwise prove actual bias. Second, the decision did not address whether the "appearance of impropriety" standard had been retained in the Code; instead, it explained the type of conduct that undermines public confidence in the judiciary.[119] Third, the opinion should be considered in light of the egregious nature of the conduct, as well as the significant media attention it garnered.[120] In that context, the opinion's terse discussion of the "appearance of bias" may have been meant for a broader audience, to explain to the public why judges should be held accountable to ethical standards and codes of conduct.

In the last seven years, the JSC has issued only three formal advisory opinions that mention the appearance of impropriety.[121] The dearth of such opinions lends some support to the inference that the appearance standard does not factor heavily into determinations of what judicial conduct violates the North Carolina Code. Furthermore, the opinions themselves do not actually rely on an appearance standard in concluding whether proposed conduct would violate the

116. *Id.* (quoting *In re* Martin, 295 N.C. 291, 306, 245 S.E.2d 766, 775 (1978) (internal citations omitted)).

117. *Id.* at 488, 666 S.E.2d at 747.

118. *Id.*

119. *See id.*

120. *See, e.g.*, *supra* note 110.

121. Formal Advisory Opinion, 2009-07 (N.C. Judicial Standards Comm'n Sept. 24, 2009), http://www.aoc.state.nc.us/www/public/coa/jsc/formaladvisoryopinions/09-07.pdf; Formal Advisory Opinion, 2009-01 (N.C. Judicial Standards Comm'n Feb. 13, 2009), http://www.aoc.state.nc.us/www/public/coa/jsc/formaladvisoryopinions/09-01.pdf; Formal Advisory Opinion, 2007-02, (N.C. Judicial Standards Comm'n Aug. 10, 2007), http://www.aoc.state.nc.us/www/public/coa/jsc/formaladvisoryopinions/07-02.pdf. *See generally Formal Advisory Opinions*, N.C. CT. SYS., http://www.nccourts.org/Courts/CRS/Councils/JudicialStandards/Opinions.asp (last visited Aug. 19, 2013) (containing links to all formal advisory opinions since 2007).

Code. For example, one advisory opinion addressed whether Canon 5C(2), which forbids a judge from "serv[ing] as an officer, director, or manager of any business," applies to judges who formerly maintained a solo law practice.[122] In the course of explaining why the canon did apply to such conduct, the opinion stated that

> service in any official capacity of a business entity has the potential to reflect adversely on impartiality, demean the judicial office, and interfere with the proper performance of judicial duties, without any counter balancing public benefit. Such service could also create an appearance of impropriety and lead to the misuse of the prestige of judicial office.[123]

Fairly read, the JSC did not conclude that the canon would be violated *because* the conduct would create an appearance of impropriety; rather, the opinion was describing the potential effects of the prohibited conduct. The two other advisory opinions refer to the appearance of impropriety in a similar manner.[124]

Given the mixed signals by the Supreme Court of North Carolina, it is perhaps not surprising that the JSC's formal advisory opinions do not precisely explain how the appearance of impropriety relates to violations of the North Carolina Code. Indeed, judges and scholars alike have acknowledged the ambiguity and reached diverging opinions on its import.[125] It is clear, though, that the appearance standard does not have the same force, if any, that it did prior to the 2003 Amendments. Nor has it served as an independent basis for findings of judicial misconduct.

122. Formal Advisory Opinion, 2009-01, *supra* note 121.

123. *Id.*

124. *See* Formal Advisory Opinion, 2009-07, *supra* note 121 ("[T]he judge's participation in the current proceeding before the Court could provide reasonable grounds to question the judge's impartiality and create the appearance of impropriety."); Formal Advisory Opinion, 2007-02, *supra* note 121 ("When choosing to send letters of recommendation, judges should be mindful of the situation, manner of transmission, appearance and the substance of the letter of recommendation so as to avoid the appearance of lending the prestige of their judicial office to advance the private interests of others.").

125. *Compare* BONER, *supra* note 92 (inferring the continued existence of the appearance test from the "reasonable person" standard, though later admitting that "[t]he North Carolina appellate courts have not always interpreted and applied the recusal test uniformly and consistently"), *with* Crowell, *supra* note 38, at 6 ("[I]t seems less likely now than before that a judge would be expected to recuse if there is an appearance of partiality but no evidence of an actual personal bias, prejudice, or interest.").

II. COGNITIVE BIAS AND PROCEDURAL JUSTICE IN THE JUDICIAL SYSTEM

Although the North Carolina Code differs from the ABA Model Code and almost every other jurisdiction with respect to the inclusion of an appearance standard,[126] it does not necessarily follow that the North Carolina Code is under-inclusive. Rather, it could be that other jurisdictions have included a dictate that is unnecessarily onerous. Some, such as Federal District Court Judge M. Margaret McKeown, have argued that the attention on high-profile incidents of misconduct such as those raised in the Introduction has overshadowed a "robust disqualification regime" in which judges routinely—and correctly—recuse themselves from matters before them.[127] Others have even argued that the expansions of codes of judicial conduct, including those changes relating to the appearance of impropriety, have unduly constrained judges.[128]

The question, then, is whether judicial codes of conduct benefit from the inclusion of an appearance standard. This question could be addressed from a variety of perspectives: historical, economic, or accurateness, just to name a few.[129] A complete treatment of this issue is beyond the scope of this Article.[130] Instead, this Part addresses the question from the perspective of law and social psychology, specifically the theories of cognitive bias and procedural justice.

This Part first identifies and explains the types of cognitive biases to which persons, including judges, are susceptible. Because individuals are unaware of these unconscious biases, their decision making may be systematically skewed. Next, this Part describes procedural justice and its importance to the public's perception of the judiciary. Notably, procedural fairness may impact whether, and to what extent, litigants comply with decisions and are satisfied with the

126. *See supra* Part I.B.

127. McKeown, *supra* note 17, at 654.

128. *See* Bowie, *supra* note 39, at 941 ("[T]he 'zeal for . . . moral purity' tends to remove [judges] further and further from the ordinary incidences of everyday life and has moved [them] ever closer to becoming 'legal monks,' residing in the mythical monastery.").

129. *See, e.g.*, Geyh, *supra* note 3, at 693 ("Since the 1920s, the United States Supreme Court has repeatedly manifested its concern for the risk of judicial bias, the appearance of judicial bias, and temptations that could foster judicial bias, separate and distinct from judicial bias itself."); *see also* Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 12–14 (2007) (positing that, from a practical perspective, the appearance standard encourages both over- and under- deterrence of judicial impropriety).

130. For more information, see generally Moore, *supra* note 66 (arguing that the appearance standard has continuing validity and countering common criticisms leveled against it).

judicial system.

A. The Hidden Dangers of Cognitive Bias

Every jurisdiction in the United States recognizes that an ethical standard must prohibit actual partiality from affecting a judge's decision making.[131] Justification for this prohibition comes from the belief that "[t]he legitimacy of any [government]-imposed dispute resolution system rests upon the promise of a neutral magistrate."[132] In theory, then, if judges could accurately assess their own partiality, they could either separate their beliefs from their decision making or voluntarily recuse themselves from matters in which they knew they could not be impartial.

However, research from the field of social psychology consistently shows that individuals suffer from a multitude of cognitive biases that systematically affect their decision making.[133] Nor are judges immune from cognitive biases by virtue of taking an oath to uphold the law. Cognitive biases operate at an unconscious level,[134] and thus they may impact the decision making of even the most well-intentioned judge. This Section discusses five categories of cognitive biases and their impact on decision making: actor-observer difference and the bias "blind spot," false consensus effect and egocentric bias, status quo bias, anchoring effect, and confirmation bias.

1. Actor-Observer Difference and the Bias "Blind Spot"

Studies suggest that individuals harbor an extensive number of biases,[135] which may range from race-based prejudices to political or

131. *See supra* note 70 and accompanying text.

132. McKoski, *Reestablishing Actual Impartiality*, *supra* note 40, at 324.

133. *See generally* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY 183 (Rüdiger Pohl ed., 2004) (identifying and describing numerous cognitive biases that impact decision making).

134. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006).

135. Stempel, *In Praise*, *supra* note 25, at 741; *see also, e.g.*, Greenwald & Krieger, *supra* note 134, at 966 ("[A] substantial and actively accumulating body of research evidence establishes that implicit race bias is pervasive and is associated with discrimination against African Americans."); *id.* at 951 (noting that implicit biases may be based on race, sex, ethnicity, religion, and age); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007) (presenting the results of an empirical study testing "the hypothesis that judges and jurors misremember case facts in racially biased ways"); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 34–49 (1994) (explaining that judges may be affected by gender bias, racial and ethnic bias, regional bias, and economic or wealth bias).

gender-related leanings.[136] When it comes to assessing bias, however, individuals suffer from a bias "blind spot"; that is, they have a tendency to see bias in others more readily than in themselves.[137] The bias blind spot is an example of an actor-observer difference, whereby actors and observers reach different decisions because of their different perspectives.[138] When assessing whether one's own judgment is tainted by bias, an actor looks inward; however, such an introspective inquiry is unlikely to lead the actor to conclude that a decision is biased because the bias is operating on an unconscious level.[139] By contrast, when assessing whether another's judgment is biased, observers will "rely on their abstract theories about the types of judgments that are likely to be biased."[140] If anything, observers may *overestimate* the degree of bias in others.[141]

Research shows that individuals are more likely to acknowledge their general susceptibility to bias than they are to admit that their bias actually impacted a particular decision.[142] In fact, one may believe that a decision was reached "*in spite* of one's preferences, not because of them."[143]

Finally, there is evidence that individuals may view their personal connections to an issue as making them less-biased decision

136. Stempel, *In Praise*, *supra* note 25, at 741 n.27.

137. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 205 (2011); Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 680, 681 (2005); Emily Pronin & Matthew B. Kugler, *Valuing Thoughts, Ignoring Behavior: The Introspection Illusion as a Source of the Bias Blind Spot*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 565, 565 (2007) [hereinafter Pronin & Kugler, *Valuing Thoughts*].

138. Emily Pronin, *The Introspection Illusion*, *in* 41 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 1 *passim* (Mark P. Zanna ed., 2009) [hereinafter Pronin, *The Introspection Illusion*].

139. *Id.* at 15–16.

140. Ehrlinger et al., *supra* note 137, at 689; *see also* Pronin & Kugler, *Valuing Thoughts*, *supra* note 137, at 570 ("[T]hese results provide further evidence that while people tend to rely on their own inner thoughts and motives when assessing bias in themselves, they are more likely to rely on observable actions when assessing bias in others."); Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 378 (2002) ("[W]e readily apply what we know about specific biases from observing our peers and from the wisdom handed down to us by our sages to diagnose specific failures on their part to see the world 'as it is.' ").

141. *See* Pronin, *The Introspection Illusion*, *supra* note 138, at 9 (explaining that "experiments have shown that people are heavily influenced by partisan ideology when evaluating policy issues, but that they generally deny that influence, even while they see it and even exaggerate it in others").

142. Ehrlinger et al., *supra* note 137, at 681, 689.

143. *Id.*

makers.[144] In one study, individuals of Arab, Muslim, and Jewish descent who had attended rallies and debates pertaining to Israeli-Palestinian relations were asked one of two questions: half of the participants were asked how their personal connections to the Middle East influenced their views on a recent outbreak of Israeli-Palestinian violence, while the other half were asked how the personal connections of those "on the opposite side" influenced those persons' views on the same issue.[145] The participants indicated that they did not believe their own personal connections were a source of bias; indeed, two groups indicated that their personal connections gave them an "illuminating perspective."[146] By contrast, participants indicated that the personal connections of those on the other side were a source of bias.[147]

2. False Consensus Effect and Egocentric Bias

In reaching a decision, individuals are subject to the false consensus effect, which is the tendency "to see their own . . . judgments as relatively common and appropriate to existing circumstances while viewing alternative responses as uncommon, deviant, or inappropriate."[148] Of importance to this Article, the false consensus effect appears to be strongest for decisions in which the choices are subject to one's own interpretation.[149] For example, participants in one study were asked "first whether they preferred music from the 1960s or the 1980s, and then what percentage of their peers would share that preference."[150] The results demonstrated the false consensus effect: individuals disproportionately believed that their peers shared their views, irrespective of whether they preferred music from the 1960s or 1980s.[151] Furthermore, when asked to describe the music from each decade, participants identified standout performers from their preferred decade and less-respected

144. *Id.* at 687.

145. *Id.*

146. *Id.*

147. *Id.*

148. Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social Perception and Attribution Processes*, 13 J. EXPERIMENTAL SOC. PSYCHOL. 279, 280 (1977).

149. *See* Thomas Gilovich, *Differential Construal and the False Consensus Effect*, 59 J. PERSONALITY & SOC. PYSCHOL. 623, 623 (1990).

150. Emily Pronin et al., *Understanding Misunderstanding: Social Psychological Perspectives*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 642 (Thomas Gilovich et al. eds., 2002).

151. *Id.* at 642–43.

performers from the other decade.[152]

The false consensus effect is one category of egocentric bias.[153] Individuals demonstrate egocentric bias when they overestimate the degree to which they have some desirable characteristic.[154] Egocentric bias may occur because individuals want others to associate them with that characteristic, or because they lack comparison data to give themselves an accurate rating.[155]

Several studies of egocentric bias have confirmed that judges are not subject to its effects. In a 2008 study, 142 administrative law judges were asked "to compare themselves to the other attendees on . . . their ability to avoid bias."[156] An astounding 97.2% ranked themselves in the top half of attendees in controlling for bias in their work.[157] Such a result mirrored data collected by Chris Guthrie, Jeffrey Rachlinksi, and Andrew J. Wistrich in a 1999 study of federal magistrate judges.[158] In that study, 155 judges attending a conference responded to this question: "[i]f we were to rank all of the magistrate judges currently in this room according to the rate at which their decisions have been overturned during their careers, [what] would your rate be?"[159] The results demonstrated that "87.7% of the [magistrate] judges believed that at least half of their peers had higher reversal rates on appeal."[160]

These two studies are especially significant because they suggest that susceptibility to bias and substantive accuracy are two "desirable characteristics" for which judges may harbor an egocentric bias.[161] Indeed, Jeffrey Stempel has posited that judges may be even more susceptible to egocentric biases than the public at large due to the "isolation in which [they] work and the pedestal upon which they are placed."[162]

152. *Id.* at 642.

153. *Id.*

154. Defined more broadly, egocentric bias encompasses "limitations in perspective taking." *Id.* at 641–42.

155. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 812 (2001) [hereinafter Guthrie et al., *Inside the Judicial Mind*].

156. Chris Guthrie et al., *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

157. *Id.*

158. Guthrie et al., *Inside the Judicial Mind*, *supra* note 155, at 814.

159. *Id.* at 813 (internal quotation marks omitted).

160. *Id.* at 814.

161. *Id.* at 811.

162. Stempel, *In Praise*, *supra* note 25, at 741.

3. Status Quo Bias

Whereas the previously discussed biases pertain to one's perception of his or her own decision making, status quo bias impacts the substance of the decision itself.[163] Status quo bias refers to an individual's tendency to accept the current state of affairs over competing alternatives.[164] Status quo bias is related to loss aversion, whereby individuals place more value on perceived losses than on perceived gains.[165] Because the status quo is the reference point from which an individual views gains and losses, an individual will tend to favor a decision that comports with the status quo.[166] Recent research indicates that judges are particularly susceptible to status quo bias when their mental faculties are low,[167] as may be the case when they have a busy court docket.

The status quo bias has also been linked to regret theory.[168] Studies show that "individuals predict that greater regret will follow an action that leads to an undesirable result than will follow a failure to act that leads to the same undesirable result."[169] For example, researchers asked participants to estimate the level of regret felt by two hypothetical persons who had made disadvantageous stock market decisions.[170] The first person had considered changing his stock holdings to what later became a more profitable holding, but had declined to do so; the other had changed from one holding to what later became a less profitable holding.[171] Despite the fact that both persons suffered the same economic disappointment, over 90% of the participants indicated that the first person—the one who had remained with the status quo—would experience less regret than the second.[172]

163. Scott Eidelman & Christian S. Crandall, *Bias in Favor of the Status Quo*, 6 SOC. & PERSONALITY PSYCHOL. COMPASS 270, 271 (2012).

164. *Id.*

165. *See* Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP., Winter 1991, at 193, 194 (discussing loss aversion and status quo bias).

166. *See id.* (explaining that status quo bias is, at least in part, an application of the phenomenon of loss aversion).

167. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. OF NAT'L ACAD. OF SCI. 6889, 6892 (2011).

168. *See* Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law*, *in* BEHAVIORAL LAW & ECONOMICS 116, 130–31 (Cass Sunstein ed., 2000).

169. *Id.* (discussing regret theory as an alternative to cost-benefit analysis).

170. *Id.* at 131 (describing the famous study, performed by Daniel Kahneman and Amos Tversky).

171. *Id.*

172. *Id.*

But the status quo is not merely accepted as a default position; "[p]eople are motivated to justify, defend, and support the status quo."[173] This motivation may stem from the fact that the decision maker had been personally involved in setting the status quo, but there is also evidence that individuals will defend the status quo for social systems they did not create.[174] Notably, one's defense of the status quo will increase "[w]hen the social system is threatened . . . or when inescapability of the social system becomes apparent."[175]

4. Anchoring Effect

As with the status quo bias, the anchoring effect impacts the decision maker's final judgment.[176] An anchor is previously encountered information, often numeric, that an individual uses in reaching a final decision.[177] Not all anchors are bad; indeed, a reliable anchor may allow an individual to reach an accurate decision more efficiently.[178] The problem, however, is that an anchoring effect may exist even where participants are informed that the source of the anchor is unreliable or where the value of the anchor is unusually extreme.[179] Furthermore, the anchoring effect has been shown to have temporal robustness and to be resistant to correction, even when individuals have been warned about its effect.[180]

Judges do not appear any more resistant to the anchoring effect than do others; in fact, several studies of the anchoring effect have been conducted with judges as participants.[181] In one such study, judges were given a description of a hypothetical personal injury

173. Eidelman & Crandall, *supra* note 163, at 272.

174. *Id.*

175. *Id.*

176. *See generally* Thomas Mussweiler et al., *Anchoring Effect*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY, *supra* note 133, at 183 (providing extensive background on the anchoring effect).

177. *Id.* at 184–85.

178. *See* Guthrie et al., *Inside the Judicial Mind*, *supra* note 155, at 788 ("In many situations, reliance on an anchor is reasonable because many anchors convey relevant information about the actual value of an item . . . .").

179. Mussweiler et al., *supra* note 176, at 186 (noting that in one study, "estimates for Mahatma Gandhi's age were assimilated to an unreasonably high anchor value of 140 years").

180. *Id.*

181. *See, e.g.*, *id.* at 183 (discussing an anchoring effect study with trial judges as participants). *See generally* Guthrie et al., *Inside the Judicial Mind*, *supra* note 155 (presenting the results of studies on anchoring, framing, hindsight bias, and the representativeness heuristic).

lawsuit filed in federal court under diversity jurisdiction.[182] Half of the judges were told that the defendant had filed a motion to dismiss because the suit did not meet the $75,000 threshold for the exercise of jurisdiction, whereas the other judges received no such anchor.[183] The judges in the first group were then asked to rule on the motion to dismiss and then assume the motion had been denied.[184] Finally, both sets of judges were asked to submit damage awards based on the facts presented.[185] Judges exposed to the anchor ultimately awarded an average of $882,000 in damages, whereas judges who did not receive the anchor awarded an average of $1,249,000 in damages.[186] Moreover, the anchor information itself was not particularly reliable, as only 2.3% of judges receiving the anchor indicated that they would grant the motion to dismiss.[187] Nevertheless, judges apparently used the motion, even if unconsciously, to reach their decision.[188]

5. Confirmation Bias

Confirmation bias relates to how individuals seek out or interpret information in reaching a decision.[189] Sometimes it is appropriate for individuals to "build[] a case" that supports a pre-ordained position, such as an attorney representing to a court that his or her client's position is supported by the law.[190] But confirmation bias "connotes a less explicit, less consciously one-sided case-building process."[191] The starting point for confirmation bias is an individual's hypothesis, from which the individual "tend[s] to seek information that [he or she] consider[s] supportive of favored hypotheses or

182. Guthrie et al., *Inside the Judicial Mind*, *supra* note 155, at 790–91.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 791.

187. *Id.*

188. *See id.* at 791–92 ("The motion had a pronounced effect on the judges at all response levels.").

189. *See* Margit E. Oswald & Stefan Grosjean, *Confirmation Bias*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY, *supra* note 133, at 79, 79 (" 'Confirmation bias' means that information is searched for, interpreted, and remembered in such a way that it systematically impedes the possibility that the hypothesis could be rejected—that is, it fosters the immunity of the hypothesis."); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 6 REV. GEN. PSYCHOL. 175, 175 (1998) ("Confirmation bias, as the term is typically used in the psychological literature, connotes the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand.").

190. Nickerson, *supra* note 189, at 175.

191. *Id.* at 175.

existing beliefs and to interpret information in ways that are partial to those hypotheses or beliefs."[192] When an individual receives information that does not support the hypothesis, that information is either ignored or is interpreted in a way that makes it more consistent with the hypothesis.[193]

For example, researchers asked supporters and opponents of the death penalty to read two empirical studies.[194] One of the studies concluded that the imposition of the death penalty has a deterrent effect, while the other study reached the opposite conclusion.[195] The participants were informed of methodological concerns for both studies and then were asked to rate the studies.[196] The results of the experiment supported the existence of confirmation bias: participants had a more favorable opinion of the study that confirmed their pre-existing beliefs, even when the two studies followed the same methodology.[197] Furthermore, participants indicated that both studies made them *more confident* of their position than they had been previously.[198] Confirmation bias has also been shown to affect a juror's assessment of a defendant's guilt in a criminal proceeding,[199] which suggests that it may impact judicial decision making as well.

Studies have further demonstrated that confirmation bias is prevalent when a hypothesis is motivationally supported, such as a positive assessment of one's own traits, provided that the costs of erroneous acceptance of the hypothesis are low.[200] This may be explained by what is termed the "Pollyanna principle," by which individuals can more effectively process pleasant information than information that is considered to be neutral or unpleasant.[201] On the

192. *Id.* at 177; *see also* Derek J. Koehler et al., *The Calibration of Expert Judgment: Heuristics and Biases Beyond the Laboratory*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 150, at 686, 692–93 (linking confirmatory bias to overconfidence in predictions).

193. Nickerson, *supra* note 189, at 187.

194. Oswald & Grosjean, *supra* note 189, at 80 (presenting the results of a 1979 study performed by Lord, Ross, and Lepper).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *See, e.g.*, Eric Rassin, et al., *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. OFFENDER PROFILING 231, 233 (2010) (describing several studies suggesting that jurors are susceptible to confirmation bias).

200. Oswald & Grosjean, *supra* note 189, at 90–92 (citing several such studies).

201. *See* Nickerson, *supra* note 189, at 197 (linking confirmation bias and the Polyanna principle); *see also* Margaret W. Matlin, *Pollyanna Principle*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY, *supra*

other hand, confirmation bias is less likely to occur when the costs of making an incorrect decision are perceived to be high.[202]

B. The Value of Procedural Justice

Whereas the previous Section discussed decision making from the perspective of the individual charged with making the decision, this Section considers the perspectives of those persons who are subject to a decision maker's authority, as well as of other third-party observers. These perspectives cannot be discounted, for they impact how judicial decisions will be viewed and ultimately accepted by litigants and the public.

Of course, the substantive fairness of decisions is necessary to a well-functioning judicial system, but substantive fairness is not sufficient on its own.[203] In his concurrence in *Republican Party v. White*, Justice Kennedy wrote,

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.[204]

Thus, the power of the courts rests upon perception, and a judge who is viewed as partial undermines the legitimacy of the entire system. Indeed, as discussed in Part I.A, the push for judicial codes of conduct in the United States stemmed from the actions of a single judge whose conduct had "undermin[ed] public confidence in judicial independence."[205]

While high-minded statements and historical perspectives are

note 133, at 255, 255 (explaining the principle as a state of mind in which "pleasantness predominates").

202. Oswald & Grosjean, *supra* note 189, at 91 ("With higher perceived costs of an erroneous decision, people are more motivated to test their hypothesis.").

203. *See, e.g.*, Rebecca Hollander-Blumoff, *The Psychology of Procedural Justice in Federal Courts*, 63 HASTINGS L.J. 127, 127 (2011) (underscoring the importance of "subjective perceptions about the fairness of [legal] process" to "assessments of [judicial] legitimacy and deference to legal authority"); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. PSYCHOL. 117, 124 (2000) [hereinafter Tyler, *Social Justice*] (noting that approaches to justice "based upon an understanding of people's views about fair decision-making procedures have been very successful in gaining deference to decisions and to rules, authorities, and institutions more generally").

204. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

205. McKeown, *supra* note 17, at 660; *see supra* text accompanying notes 42–50.

informative, they do not fully explain why or how the public comes to respect the judiciary. To answer those questions, this Article draws upon the theory of procedural justice, itself the subject of a wealth of social psychology research.

Procedural justice proceeds from the idea that the way a decision maker handles a dispute affects how participants and others react to the outcome.[206] Tom Tyler, a prominent researcher in this area of social psychology, has identified four factors that influence one's perception of procedural justice.[207] First, individuals value the opportunity to participate in the deliberative process; they want to have a "voice."[208] Second, individuals want to be heard by a neutral decision maker; "[t]hey believe that authorities should not allow their personal values and biases to enter into their decisions, which should be made based upon rules and facts."[209] Third, individuals consider whether they feel they are being treated with dignity and respect.[210] Fourth, individuals value a trustworthy decision maker, meaning one who cares about the persons with whom he or she is dealing and tries to do what is best for all involved.[211]

Research by John Thibaut and Laurens Walker, two of the first to examine this phenomenon, showed that individuals were more likely to accept decisions if they believed the procedure was fair, regardless of the outcome.[212] Furthermore, studies have shown that procedural justice has a greater impact than substantive outcome on individuals' short- and long-term acceptance of decisions.[213] These effects remain irrespective of a litigant's race/ethnicity, socioeconomic status, or whether the litigant is the plaintiff or defendant in the case.[214]

206. Tyler, *Procedural Justice*, *supra* note 26, at 26.

207. Hollander-Blumoff, *supra* note 203, at 135 (summarizing Tyler's work).

208. *Id.*; Tyler, *Social Justice*, *supra* note 203, at 121–22 ("[P]eople feel more fairly treated when they are given an opportunity to make arguments about what should be done to resolve a problem or conflict."). *See generally* Tom R. Tyler, *Conditions Leading to Value-Expressive Effects in Judgments of Procedural Justice: A Test of Four Models*, 52 J. PERSONALITY & SOC. PSYCHOL. 333 (1987) (summarizing early research and advancing the literature on the tendency of "persons affected by the decisions made by third parties [to] evaluate the decision-making process more favorably if they have an opportunity to state their case before decisions are made").

209. Tyler, *Social Justice*, *supra* note 203, at 122.

210. *Id.*

211. *Id.* ("People value having respect shown for their rights and for their status within society.").

212. Tyler, *Procedural Justice*, *supra* note 26, at 28.

213. *Id.*

214. *Id.*

Similarly, procedural justice has been linked both to individuals' views on the long-term legitimacy of the legal system and to their compliance with authority. In one study, participants who had been arrested for drunk driving were asked about their views on the fairness of the proceeding and the legitimacy of the system.[215] They were then tracked and interviewed two years later to determine whether they had reoffended.[216] Those participants who had initially believed the proceeding to be fair likewise viewed the legal system as more legitimate, in both the initial and subsequent interviews.[217] The same participants who believed the proceeding to be fair also reoffended at a rate that was four times lower than their counterparts.[218]

Initially, social psychologists theorized that individuals valued procedural justice solely because they believed it was the best way to ensure a substantively fair outcome, indicating that economic interests were actually driving the effect.[219] This so-called "instrumental model" is no longer accepted, however.[220] It has been largely replaced by a "group value model," which proffers that by providing a fair process, an "authority figure conveys positive information to an individual about that individual's status in society."[221] This positive information in turn affects an individual's satisfaction with both the decision maker and the system of which the decision maker is a part.[222]

In fact, fair process may affect outcome satisfaction in another way as well.[223] A study authored by Kees van den Bos and colleagues

215. *Id.* at 27 (presenting the results of a study conducted in Australia).

216. *Id.*

217. *Id.*

218. *Id.*

219. Hollander-Blumoff, *supra* note 203, at 136–37 (citing JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 81, 89–90 (1975)).

220. *Id.*

221. *Id.* at 137. *See generally* E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 221–42 (1988) (introducing the group-value model).

222. *See* Tom Tyler et al., *Understanding Why the Justice of Group Procedures Matters: A Test of the Psychological Dynamics of the Group-Value Model*, 70 J. PERSONALITY & SOC. PSYCHOL. 913, 927 (1996) ("Procedural justice not only encourages people to accept unfavorable decisions, but it also promotes commitment, loyalty, and effort on behalf of the larger group. . . . Fair and respectful treatment by authorities who represent important groups communicates feelings of respect and pride. Feelings of respect and pride, in turn, are related to self-esteem, feelings of obligations to group authorities, and the desire to help the group beyond what is required.").

223. Kees van den Bos et al., *Evaluating Outcomes by Means of the Fair Process Effect: Evidence for Different Processes in Fairness and Satisfaction Judgments*, 74 J.

indicated that "when people receive outcomes that are better or worse than expected, they . . . use procedural fairness—as a heuristic substitute—to assess how to react to their outcome."[224] Thus, whether participants were asked hypothetical questions by researchers or experienced an outcome firsthand, their responses to survey questions suggested that "people may react differently when dealing with issues related to outcome fairness as opposed to outcome favorability."[225] This study was the first to directly bolster the belief that people need "social-comparison-based equity information" to assess outcomes.[226]

The impact of procedural justice reaches further than a single litigant's interaction with a single authority, for it may extend to those who are not directly involved in legal proceedings.[227] In a study conducted by the State of California, residents were asked about their confidence in and approval of the state court system.[228] The results showed that "[h]aving a sense that court decisions are made through processes that are fair is the strongest predictor by far of whether members of the public approve of or have confidence in California courts."[229] The study also revealed high levels of dissatisfaction with "low-stakes court[s]," which suggests that the fairness of procedures must be considered for all levels of the legal system.[230]

Implicit in the concept of procedural justice,[231] but not fully explored until recently, is the impact of timing on the perceptions of fairness and legitimacy.[232] For instance, a judge's decision to recuse

PERSONALITY & SOC. PSYCHOL. 1493, 1494 (1998).

224. *Id.* at 1501.

225. *Id.* at 1502.

226. *Id.* For more information on the "fairness heuristic theory," see Kees van den Bos et al., *How Do I Judge My Outcome When I Do Not Know the Outcome of Others? The Psychology of the Fair Process Effect*, 72 J. PERSONALITY & SOC. PSYCHOL. 1034, 1034 (1997).

227. *See, e.g.*, Tyler, *Procedural Justice*, *supra* note 26, at 28–29 ("[P]rocedural justice judgments are also a key factor in the evaluations made by the general public of the courts as institutions.").

228. TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: PUBLIC COURT USERS AND JUDICIAL BRANCH MEMBERS TALK ABOUT THE CALIFORNIA COURTS 43–49 (2006) (reporting on phases one and two of the study).

229. *Id.* at 36.

230. TRUST AND CONFIDENCE IN THE CALIFORNIA COURTS: A SURVEY OF THE PUBLIC AND ATTORNEYS 18 (2005) (reporting on phase one of the study).

231. *See* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 183–90 (2004) (discussing ex-ante versus ex-post views of procedural fairness).

232. *See* Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943, 950 (explaining that "[a]lthough the empirical data . . . is very limited, some preliminary research suggests that once the public has perceived conditions that create impartiality or bias, the recusal decision alone cannot fully restore

himself or herself from a case comes after "the public has already observed the conduct and the events that negatively affect its perception of the judiciary."[233] In a recent study, James Gibson and Gregory Caldeira created a hypothetical scenario in which a state supreme court justice had received campaign funds from an interested party to a case (similar to the actual facts underlying the *Caperton* decision).[234] Participants were then told that the justice had been asked to recuse himself; half were informed that the judge did recuse himself, while the other half were informed that the judge declined to recuse himself.[235] The participants were thereafter asked both whether the justice "can serve as a fair and impartial judge" and whether the state supreme court "itself is a legitimate institution."[236]

When participants were told that the justice had recused himself, their perceptions of the judge's impartiality and the legitimacy of the court increased; however, their perceptions were not restored to the same level as if there had been no conflict of interest.[237] Indeed, the study concluded that "recusal is only a weak palliative for conflicts of interests created by [campaign] contributions."[238] Thus, the results of the study suggest that an individual's perceptions of procedural justice may be disproportionately influenced by the earliest observations of and interactions with authorities.[239]

III. MAKING A CASE FOR AN APPEARANCE STANDARD IN NORTH CAROLINA

Although the ABA Committee on Judicial Ethics did not explicitly rely upon the social psychology theories of cognitive bias and procedural justice in drafting the 1924 Judicial Canons, it recognized the importance of establishing ethical standards that reflect "what the people have a right to expect from them."[240] This

public confidence" in the courts).

233. *Id.* at 973.

234. James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?*, 74 J. POL. 18, 21 (2012).

235. *See id.* at 22, 25.

236. *Id.*

237. *Id.* at 32–33.

238. *Id.* at 19.

239. *Cf.* Tom R. Tyler & Jeffrey Fagan, *Legitimacy And Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 231 (2008) ("Legitimacy itself is found to be linked to the justice of the procedures used by the police to exercise their authority."); *id.* at 256 ("[P]rior legitimacy is directly related to later judgments . . . that the procedures were fair.").

240. CANONS OF JUDICIAL ETHICS, *supra* note 32, pmbl.

recognition may explain why the Judicial Canons and all later versions of the ABA Model Code have admonished judges to avoid "the appearance of impropriety."[241]

Whereas the inclusion of an appearance standard may have initially been based on the drafters' intuitive understanding of human nature and recognition of the responsibility entrusted in the judiciary, this Article has identified the social psychology theories of cognitive bias and procedural justice in order to methodically analyze whether an appearance standard need be included in a judicial code of conduct such as the North Carolina Code. Specifically, this Part focuses on the issues of judicial partiality and recusal, although these theories could apply with equal force to other judicial ethics issues.

First, this Part will demonstrate how cognitive biases may distort judges' perceptions of their own partiality, particularly when called upon to recuse themselves in cases before them. A standard based on actual impropriety alone will fail to adequately safeguard against instances in which judges cannot accurately identify or assess their own unconscious biases. By contrast, judges will be more likely to recuse themselves under an appearance standard; such an outcome should positively affect not only the substantive accuracy of decisions, but also litigants' perceptions of procedural justice. Next, this Part will address the 2003 Amendments to the North Carolina Code and show how they both exacerbate the effects of cognitive bias and negatively impact the public's perception of North Carolina's judicial system.

A. Inclusion of an Appearance Standard

The first issue to address in determining the validity of an appearance standard is whether the absence of such a standard would have detrimental impacts on the judiciary and public. For example, one could argue that when it comes to disqualification, judges should only recuse themselves when they are actually partial in a matter. But even assuming that the sole purpose of recusal is to ensure that bias does not affect the outcome of a proceeding, a standard based on actual partiality is under-inclusive for several reasons.

First, in making a recusal decision, a judge will be required to assess his or her own partiality. But because individuals have a bias

241. *Id.* Canon 4 ("A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach."); MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) ("A judge . . . shall avoid impropriety and the appearance of impropriety.").

"blind spot," a judge will be less likely to believe that he or she will be biased in ruling on a matter.[242] This will likely be even more true when a party files a disqualification motion, since the judge will be more introspective in reaching the decision.[243] To the extent that a judge has a personal connection to an issue, he or she may believe that those connections will make him or her a better decision maker and, if anything, that he or she will reach an impartial decision despite any potential sources of bias.[244]

Second, once judges conclude that they harbor no biases, they are likely to believe that all other persons would reach the same conclusion about their neutrality, due to the false consensus effect. This would be particularly true in the context of recusal decisions since the decisions would be dependent on facts that could be subject to a variety of interpretations.[245] Indeed, judges view themselves as neutral decision makers, even when compared to their peers.[246]

Third, even if a judge could assess his or her partiality accurately, a recusal decision would still be less likely due to the effect of the status quo bias and the presence of strong anchors militating against recusal. Many judicial canons are framed in the negative, commanding a judge to refrain from conduct under certain circumstances.[247] But such restrictions are pitted against the status quo. Judges generally do not choose which cases they take; they are assigned cases and are expected to remain on a case until it has been decided.[248] Thus, a judge will be inclined to continue on a case rather

242. Some have proposed that judges should not be allowed to rule on their own disqualification motions, due in part to bias blind spot concerns. *See, e.g.*, Ben P. McGreevy, Comment, *Heeding the Message: Procedural Recusal Reform in Idaho After* Caperton v. A.T. Massey Coal Co., 46 IDAHO L. REV. 699, 726–27 (2010).

243. *See supra* Part II.A.1.

244. *See supra* notes 143147 and accompanying text.

245. *See supra* notes 1491522 and accompanying text.

246. *See supra* notes 1566160 and accompanying text.

247. *See, e.g.*, MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011) ("A judge . . . shall avoid impropriety and the appearance of impropriety."); *id.* Rule 1.3 (2011) ("A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.").

248. *See* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 47 (2009) ("Lotteries are a key part of the case assignment procedure in many federal district courts, in the federal courts of appeals, in many state trial courts and appellate courts, in federal immigration courts, and elsewhere. Randomization in this form touches perhaps millions of cases per year."); *see also* Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 815 (2009) [hereinafter Stempel, *Chief William's Ghost*] (explaining that judges tend to believe they have the duty to preside over the entirety of cases unless grounds for their disqualification "are undeniably clear").

than recuse himself or herself and experience a perceived loss, especially if the judge believes that he or she either harbors no bias or can control for bias.[249]

There are also several anchors that may unconsciously lead judges to decline to recuse themselves. The first is the "duty to sit," a historical doctrine which "emphasizes a judge's obligation to hear and decide cases unless there is a compelling ground for disqualification."[250] Although few jurisdictions follow this doctrine today, some argue that it still exerts pressure on judges to err on the side of not recusing themselves.[251] A second potential anchor may come from statements from prominent judges who have declined to recuse themselves in matters, such as Justice Antonin Scalia. Scalia's twenty-one page memorandum explaining his decision to participate in *Cheney v. United States District Court*, despite going on a duck hunting trip with Dick Cheney while the case was pending at the trial court, attracted national attention.[252] While some may argue against the validity of Scalia's position, that may not preclude judges from using it as a presumptive anchor against recusal. Finally, judges may use previously decided disqualification motions as anchors, particularly if a judge considered such motions to be frivolous or strategic.[253]

Fourth, assuming a judge's initial hypothesis is that he or she harbors no actual bias, that judge may remember events that confirm this hypothesis, while simultaneously ignoring or distorting evidence that could contradict it.[254] If anything, confirmation bias will be more prevalent when judges are asked to assess their own bias since

249. Stempel, *In Praise*, *supra* note 25, at 801–03.

250. Stempel, *Chief William's Ghost*, *supra* note 248, at 814.

251. *See e.g.*, *id.*; Luke McFarland, Current Development 2010–2011, *Is Anyone Listening? The Duty to Sit Still Matters Because the Justices Say It Does*, 24 GEO. J. LEGAL ETHICS 677, 680–81 (2011).

252. *See Scalia Rejects Recusal Request in Cheney Case*, PBS (Mar. 18, 2004, 3:00 PM), http://www.pbs.org/newshour/updates/law/jan-june04/scalia_03-18-04.html; Bill Mears, *Scalia Won't Recuse Himself From Cheney Case*, CNN (May 6, 2004, 11:39 AM), http://www.cnn.com/2004/LAW/03/18/scalia.recusal/; *Scalia Won't Stand Aside in Cheney Energy Case*, NBC NEWS (Mar. 18, 2004, 11:20 PM), http://www.nbcnews.com/id/4554682/#.UR59TqV8wlI.

253. This theory relates to the representativeness heuristic. *See* Karl H. Teigen, *Judgments by Representativeness*, *in* COGNITIVE ILLUSIONS: A HANDBOOK ON FALLACIES AND BIASES IN THINKING, JUDGMENT, AND MEMORY, *supra* note 133, at 165. "Representativeness is not in itself a bias (or an illusion), but a procedure for estimating probabilities by means of similarity or typicality of judgments." *Id.* at 180. Accordingly, judges may interpret the validity of current recusal requests by comparing them to previous requests.

254. *See supra* notes 192193 and accompanying text.

neutrality is considered to be a positive trait—and even more so among judges.[255] Furthermore, the effects of erroneously deciding to remain on a case are likely low; self-recusal decisions are reviewed deferentially and rarely reversed on appeal, which means that it is highly unlikely that the decision will bear any future cost.[256] By contrast, the psychological cost of admitting to partiality in a case could be quite high.[257]

Given these cognitive biases, it is unlikely that even a well-intentioned judge could accurately assess his or her own partiality. Although the adoption of an appearance standard does not guarantee that a judge would recuse himself or herself in all cases in which it was appropriate, such a standard will lessen the effects of cognitive biases that skew recusal decisions. In effect, the move to an appearance standard will shift the judge's perspective from that of an actor to an observer.[258] This shift should increase a judge's reliance on abstract theories about the types of circumstances that produce bias, which in turn should make it more likely that a judge could identify himself or herself as being perceived as biased.

The adoption of an appearance standard should also lessen the effect of egocentric bias. Under an appearance standard, a judge will be able to "withdraw for perceived partiality without having to concede actual bias . . . [and so the process should be] less stigmatizing."[259] This means that judges can decide to recuse themselves from a case while still maintaining the belief that they in fact are neutral decision makers. By the same token, judges will be less motivated to interpret the circumstances so as to decline recusal because those decisions will not be inextricably tied to judges' self-

255. *Cf.* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 121 (1921) (conveying the message that a good judge must "disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature").

256. *See* Stempel, *In Praise*, *supra* note 25, at 755–63 (explaining that most states and a substantial number of federal courts apply the harmless error standard when reviewing recusal determinations and exploring other reasons why such determinations are rarely reversed on appeal).

257. *See* Steven J. Heine et al., *Is There A Universal Need for Positive Self-Regard?*, 106 PSYCHOL. REV. 766, 766 (1999) ("People have a need to view themselves positively. This is easily the most common and consensually endorsed assumption in research on the self. In fact, positive self-regard is thought by many to be essential for achieving mental health."); *cf.* Bassett & Perschbacher, *supra* note 137, at 205 ("Some potential bases for disqualification are more socially acceptable than others.").

258. *See supra* Part II.A.1 (discussing the differences between the perceptions of an actor and observer and why the former suffers from a bias blind spot).

259. Geyh, *supra* note 3, at 691–92.

perceptions.[260]

In one respect, an appearance standard can be viewed as a prophylactic safeguard against actual impropriety, insofar as it puts judges in a more neutral position to evaluate their conduct. But in addition to promoting substantive fairness, an appearance standard also better ensures procedural justice. Two of the factors that individuals consider in assessing the fairness of a dispute resolution mechanism are neutrality and trust.[261] If litigants believe that a judge is biased against them—despite the judge's decision to the contrary—they will perceive the judge as not doing what is best for the parties (declining to hear the case) and not deciding the case according to neutral principles (on account of the perceived bias). Because procedural justice is based on a litigant's subjective perceptions,[262] it does not matter whether a judge is actually partial in deciding a case; the negative impact on procedural justice will be the same.

Thus, a standard based on actual impropriety alone cannot ensure that the public will perceive that the legal system values fairness. An appearance standard, by contrast, signals to the public that neutrality and fairness are important;[263] it "brands" the judiciary as impartial.[264] In turn, the standard should increase litigants' acceptance and compliance with decisions, litigants' satisfaction with outcomes, and the public's confidence in the judicial system.[265]

B. Reinstating an Appearance Standard in North Carolina

The foregoing discussion considered the perspective of a jurisdiction determining whether to include an appearance standard in its judicial code of conduct. While all those same arguments weigh in favor of including an appearance standard in the North Carolina Code, the 2003 Amendments, and the manner in which they were enacted, further weakened the safeguards against judicial impropriety

260. Bassett & Perschbacher, *supra* note 137, at 205.

261. *See supra* text accompanying notes 210, 212.

262. *See* Hollander-Blumoff, *supra* note 203, at 134 (explaining that procedural justice, as the theory is used in social psychology, depends upon the subjective perceptions of those who come into contact with legal authorities).

263. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1245–46 (2002) ("[P]ublic confidence in the judiciary does not result from the judiciary's perception of impartiality; it results from the public's perception of impartiality.").

264. *But see* McKoski, *Reestablishing Actual Impartiality*, *supra* note 40, at 262 (arguing that courts need to brand themselves with impartiality, but claiming that this can only be accomplished if they embrace an actual impartiality standard).

265. *See supra* Part II.B.

and the public's perception of the North Carolina judiciary. This Section will analyze the impact of the 2003 Amendments in light of their effects on cognitive bias and procedural justice.

As an initial matter, the 2003 Amendments were made without public input and without commentary or notes. This opaque process raises several serious procedural justice concerns. Two circumstances impacting one's conception of procedural justice are the extent of the opportunity to participate in the proceedings and the degree of transparency in the process.[266] Neither was present in the enactment of the 2003 Amendments, which may explain why many expressed dissatisfaction with the Amendments soon after their enactment.[267] By comparison, the ABA Joint Commission eventually abandoned its recommendation to turn the "appearance of impropriety" language into an aspirational norm because of the negative public reactions to its recommendation.[268] Therefore, the Supreme Court of North Carolina's unilateral decision to remove the "appearance of impropriety" language, without thorough explanation, could itself be viewed as procedurally unfair and negatively impact the public's perception of the judiciary.

When the 2003 Amendments are considered as a whole, the revisions arguably send several signals to judges and the public. From the standpoint of a judge deciding whether to recuse himself or herself on a matter, the revisions may produce a strong anchoring effect against recusal. Not only was the "appearance of impropriety" language removed, but the Supreme Court of North Carolina thereafter concluded that a judge need not be disqualified from a case when a finding of partiality "was based on inferred perception."[269] Taken together, North Carolina judges could construe these actions as a signal from the Supreme Court of North Carolina that they should be disqualified only in the extraordinary circumstance in which they, in fact, cannot be impartial. At the same time, these changes could have two negative effects on procedural justice. First, the public could perceive that the legal system does not highly value neutrality. Second, by extension, they could believe that judges themselves will not remain neutral in deciding matters.[270]

The lack of clarity in the interpretation of the 2003 Amendments leads to other problems as well. For example, if a judge is unsure

266. *See supra* text accompanying notes 208–211.
267. *See supra* notes 86–87 and accompanying text.
268. *See supra* notes 66–69 and accompanying text.
269. Lange v. Lange, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).
270. *See supra* Part II.B.

whether the standard for recusal should be based on actual partiality or the appearance of partiality, he or she will likely adopt an actual partiality standard for at least two reasons. First, a judge will tend to favor an interpretation that supports the status quo, which in this context means remaining on a case. Accordingly, a judge will likely limit recusal to instances of actual partiality since that interpretation increases the likelihood that the judge will not be required to recuse himself or herself. Second, a judge may fear that recusal could be interpreted by outsiders as tantamount to admitting actual bias. Although admitting a financial conflict of interest may be socially acceptable, "[w]hen an alleged lack of impartiality . . . is less objectively quantifiable or more personalized the risk of denial and self-deception increases."[271] This also means that a judge may search for and interpret evidence in a way that confirms a decision to remain on a case.[272]

The changes to the disqualification rule, although perhaps less controversial than the removal of the appearance language, nevertheless may also have a profound impact on the likelihood of recusal and the way it is perceived by litigants. Prior to the 2003 Amendments, a judge was required to recuse himself when "his impartiality might reasonably be questioned."[273] Although the language of the standard did not change in the 2003 Amendments, judges are no longer required to recuse themselves unless a party moves for recusal.[274] In terms of cognitive bias theory, individuals are even more likely to support the status quo when it has been attacked,[275] such as when an attorney files a motion challenging a judge's partiality in a matter. Furthermore, a lawyer who files such a motion risks offending the judge hearing the matter.[276] If the judge denies the motion, the lawyer may fear personal retribution, whether it be a recommendation of sanctions or otherwise.[277] The lawyer may

271. Bassett & Perschbacher, *supra* note 137, at 205.

272. *See supra* notes 200–202 and accompanying text (discussing the high likelihood of conformation bias when a hypothesis is motivationally supported).

273. 1998 N.C. CODE, *supra* note 35, Canon 3(C)(1).

274. *See* 2003 N.C. CODE, *supra* note 36, Canon 3(C)(1).

275. *See supra* note 176 and accompanying text.

276. Geyh, *supra* note 3, at 692.

277. Bassett & Perschbacher, *supra* note 137, at 204. In an extreme case from Texas, a federal judge imposed sanctions and recommended criminal charges be filed against lawyers who questioned his impartiality in a matter involving golf club patents. Debra Cassens Weiss, *Federal Judge Recommends Criminal Charges for Lawyers Who Questioned His Impartiality*, A.B.A. J. (Jan. 11, 2011, 6:30 AM), http://www.abajournal.com/news/article/federal_judge_recommends_criminal_charges_for_lawyers_who_questioned_his_im.

also worry that this newly created bias could affect the case—and the client in the matter—from that point forward.[278]

Furthermore, even if a judge were to grant a litigant's disqualification motion, recent social psychology research suggests that the decision would not fully restore that litigant's perception of the judge's propriety or the litigant's views of the legitimacy in the system that created the recusal procedure.[279] While the North Carolina Code permits a judge to recuse himself or herself "on the judge's own initiative," there is nothing in the Code that requires—or even encourages—that a judge consider whether recusal is appropriate absent such a motion.[280] Given that judges overwhelmingly think of themselves as being personally immune to bias,[281] it is unlikely that they would consider whether recusal was appropriate sua sponte.

In sum, the 2003 Amendments to the North Carolina Code likely had a more profound negative impact on substantive and procedural fairness than one might initially imagine. While the reintroduction of the "appearance of impropriety" language to the North Carolina Code, along with an opportunity for public input and explanatory commentary, would be a first step towards achieving those goals—and one that this Article proposes—that act alone will not fully ensure the actual or apparent propriety of the North Carolina judiciary. It is to this broader issue that this Article next turns.

IV. USING COGNITIVE BIAS AND PROCEDURAL JUSTICE TO SUGGEST PLEA BARGAINING AND SENTENCING REFORMS

As explained in Part III, there are significant benefits to the inclusion of a robust appearance standard in a judicial code of conduct, both in terms of limiting the effect of cognitive bias and increasing the public's perception of procedural justice. In enacting the 2003 Amendments, the Supreme Court of North Carolina not only removed this standard from the North Carolina Code but also introduced other changes that arguably exacerbate the effects of cognitive bias at the expense of procedural justice.

Although it would be relatively easy to restore the "appearance of impropriety" language to the North Carolina Code, such a reversion would not ensure that judges would always recognize their

278. Geyh, *supra* note 3, at 692.
279. *See supra* notes 233–39 and accompanying text.
280. *See* 2006 N.C. CODE, *supra* note 92, Canon 3(D).
281. *See supra* Part II.A.2.

own implicit biases, nor would it guarantee that they could identify when their conduct created an appearance of impropriety. Furthermore, even if a judge did properly recuse himself or herself upon a litigant's motion, research suggests that the detrimental impact caused by the creation of an appearance of impropriety would not be fully erased.[282]

Thus, in addition to a rollback of the 2003 Amendments, this Article proposes that North Carolina policymakers consider further changes to promote the propriety of the judiciary and the appearance of such among its constituents. While there are a number of areas that could benefit from reform,[283] this Part will explore the issues raised by judicial involvement in plea bargaining and sentencing of criminal defendants. It is the Author's hope that by demonstrating how this issue can be evaluated from the standpoint of social psychology principles, North Carolina policymakers and proponents of judicial reform can use this approach to consider reforms in other areas as well.

This Part first discusses plea bargaining in the criminal justice system, both in theory and practice. In contrast to other jurisdictions, judges in North Carolina often take a very active role in plea negotiations.[284] While there may be advantages to judicial involvement during that phase, problems may arise when a judge sentences a defendant who had rejected an earlier plea offer in which the judge had participated. Next, this Part explains the current approach taken by North Carolina courts in determining whether a trial judge improperly considered a defendant's rejection of a plea offer during sentencing. Although there are some clear cut rules, recent cases illustrate the difficulties in evaluating a judge's remarks during sentencing. Finally, this Part evaluates the current North Carolina approach and possible alternatives in light of the theories of cognitive bias and procedural justice. Ultimately, this Article

282. *See supra* notes 232–239 and accompanying text.

283. Two such issues were raised in the Introduction to this Article: (1) the degree to which judges should be free to engage in social networking with attorneys, and (2) how campaign contributions from particular sources may create an appearance of impropriety. For a listing of several resources related to the first issue, see generally *Social Media and the Courts: Resource Guide*, NAT'L CTR. FOR STATE CTS., http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/Resource-Guide.aspx (last visited Aug. 19, 2013). For an article providing a social psychology perspective on how campaign contributions influence judicial decision making, see generally Thomas M. Susman, *Reciprocity, Denial, and the Appearance of Impropriety: Why Self-Recusal Cannot Remedy the Influence of Campaign Contributions on Judges' Decisions*, 26 J.L. & POL. 359 (2011).

284. *See infra* notes 2900–98 and accompanying text.

proposes two recommendations to ensure that judges remain actively involved in plea negotiations, without allowing that involvement to taint later proceedings should the defendant decide to exercise his or her right to trial by jury.

A. Judicial Involvement in Criminal Trials Following Unsuccessful Plea Bargaining

1. Plea Bargaining and Sentencing Generally

Plea bargaining is a ubiquitous phenomenon in the criminal justice system; more than 95% of criminal convictions in federal courts result from guilty pleas.[285] Likewise, North Carolina courts rely heavily on plea bargaining as a tool for disposing of criminal cases. During the 2010–2011 fiscal year, 28,818 out of 29,446 (97.8%) felony criminal convictions in North Carolina resulted from guilty pleas.[286] Although plea bargaining has its critics,[287] it is nevertheless viewed as an effective means of achieving judicial economy through the avoidance of full-scale trials.[288]

Plea bargaining can vary by jurisdiction, but it generally results in a "negotiated agreement [in which] the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, . . . a more lenient sentence or a dismissal of the other charges."[289] In order to better understand the

285. *See Sourcebook of Criminal Justice Statistics Online*, UNIV. AT ALBANY, STATE UNIV. OF N.Y. (2011), http://www.albany.edu/sourcebook/pdf/t5242009.pdf; LINDSEY DEVERS, U.S. DEP'T OF JUSTICE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), *available at* https://www.bja.gov/Publications/PleaBargaining ResearchSummary.pdf (noting that in 2003, about 95% of cases disposed of in federal district courts were by plea).

286. ASHLEY GALLAGHER ET AL., N.C. SENTENCING & POLICY ADVISORY COMM'N, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2010/11 8 (2012), *available at* http://www.nccourts.org/Courts/CRS/Councils /spac/Documents/statisticalrpt_fy10-11.pdf.

287. *See, e.g.*, Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 753–54 (1998) (outlining common criticisms of the bargaining process but arguing that "plea bargaining is not an inherently flawed system").

288. *See* Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.").

289. BLACK'S LAW DICTIONARY 1270 (9th ed. 2009). For more information on plea

judicial impropriety concerns of criminal defendants in North Carolina, it is important to first explain the role of the state's trial judges during plea bargaining and sentencing. Unlike some other jurisdictions, North Carolina allows judges to take an active role in the plea bargaining phase.[290] Trial judges are authorized to participate in discussions between the prosecution and defense about guilty pleas and the potential terms of an agreement.[291] Parties may also present judges with the terms of proposed pleas before those terms are tendered for official judicial approval.[292] Furthermore, there are statutory procedures that judges must follow when accepting pleas in order to ensure that the pleas have been made both knowingly and voluntarily.[293] One such mandate is to address defendants personally and ask them a battery of questions before accepting a plea.[294] Although there is some variation in the degree to which North Carolina judges participate in plea bargaining, it appears that many are heavily involved in the process.[295]

When plea negotiations prove unfruitful, however, the judge, pursuant to his active role in the process, may advise the defendant of the possible consequences of rejecting a proposed plea agreement.[296] Indeed, such a practice appears quite common among North Carolina judges.[297] Moreover, the same judge who participated in the

bargaining in North Carolina courts, see generally Jessica Smith, *Pleas and Plea Negotiations in North Carolina Superior Courts*, ADMIN. JUST. BULL., July 2005, at 1, 2, *available at* http://www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0503.pdf (summarizing "the constitutional, statutory, and case law regarding pleas and plea negotiations in superior court").

290. *See generally* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1069, 1122 (1976) (detailing four types of plea bargaining systems and proposing how an " 'ideal' system of bargaining might be structured").

291. N.C. GEN. STAT. § 15A-1021(a) (2011).

292. *Id.* § 15A-1021(c).

293. *See id.* § 15A-1022(a)–(b); State v. Sinclair, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980); Smith, *supra* note 289, at 9–18 (discussing plea procedure in North Carolina).

294. *See* N.C. GEN. STAT. § 15A-1022(a)–(b).

295. A recent study by the North Carolina Sentencing and Policy Commission reveals that judges' roles vary by district; in some, the prosecutors and defense attorneys determine the type and length of sentence on their own, with the judge acting as a stamp of approval, whereas in others, the prosecutors and defense attorneys agree to the charges and leave the sentencing to the discretion of the judge, provided that the judge does not reject the proposed agreement. DEBORAH DAWES ET AL., N.C. SENTENCING & POLICY ADVISORY COMM'N, SENTENCING PRACTICES UNDER NORTH CAROLINA'S STRUCTURED SENTENCING LAWS, at iv (2002), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/disparityreportforweb.pdf.

296. *See, e.g.*, State v. Haymond, 203 N.C. App. 151, 153, 691 S.E.2d 108, 113 (2010) ("The trial court . . . advised defendant as to the consequences of accepting or rejecting the plea arrangement offered by the State.").

297. *See e.g.*, State v. Hueto, 195 N.C. App. 67, 75–76, 671 S.E.2d 62, 67–68 (2009)

unsuccessful plea negotiations may preside over the trial and ultimately sentence the defendant.[298] This dual role has the potential to create concerns of judicial impropriety.

During the sentencing phase, a North Carolina judge must explain to a convicted defendant the reasons for selecting a particular sentence; this explanation becomes part of the record upon which a defendant may later challenge the sentence.[299] Even with the adoption of structured sentencing in North Carolina,[300] there are further limits on the permissible bases on which a judge may sentence a defendant. Specifically, "[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant did not agree to a plea offer by the state and insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result."[301] The difficulty lies in how that standard will be evaluated by an appellate court reviewing the interactions between a judge and defendant.

2. Drawing the Line Between Explanations and Motivations

To determine whether a trial court judge impermissibly considered during sentencing a defendant's earlier rejection of a plea offer, North Carolina appellate courts distinguish between a colloquy "for the purpose of ensuring that the defendant understands and fully appreciates the nature and scope of the available options,"[302] which is

(recounting the trial court's extensive advice to the defendant about the consequences associated with pleading guilty to multiple felonies instead of proceeding to trial).

298. *See, e.g.*, *Haymond*, 203 N.C. App. at 170, 691 S.E.2d at 123; *Hueto*, 195 N.C. App. at 76–77, 671 S.E.2d at 68.

299. N.C. GEN. STAT. § 15A-1241.

300. Article 15A, Chapter 81B of the General Statutes of North Carolina, entitled "Structured Sentencing of Persons Convicted of Crimes," was first enacted in 1994 and remains in effect today. *See* N.C. Gen. Stat. §§ 15A-1340.10 to 15A-1340.23.

301. State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

302. State v. Pinkerton, 205 N.C. App. 490, 498–99, 697 S.E.2d 1, 6 (2010), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011). Although *Pinkerton* was reversed, the dissent agreed with the majority's characterization of the law. *Id.* at 505, 697 S.E.2d at 10 (Hunter, J., dissenting); *see also* State v. Tice, 191 N.C. App. 506, 513, 664 S.E.2d 368, 373 (2008) ("A review of this colloquy, however, reveals that the trial judge was ensuring that defendant was fully informed of the risk he was taking given that he had previously rejected a plea . . . ."); State v. Crawford, 179 N.C. App. 613, 619–20, 634 S.E.2d 909, 914 (2006) ("The trial court's statements, taken as a whole, do not allow a reasonable inference to be drawn that defendant's sentence was based on his refusal to plead guilty and to instead pursue a jury trial."); State v. Poag, 159 N.C. App. 312, 324, 583 S.E.2d 661, 670 (2003) (stating that the record did not indicate that the trial judge imposed a consecutive sentence because of the defendant's decision to reject a plea offer).

permissible, and an "express indication of improper motivation,"[303] which merits reversal.

Over time, some rules of thumb have emerged. Appellate courts will invariably find error if a judge indicates that a defendant will receive a "penalty" for insisting on a jury trial[304] or that the judge will be "compelled" to impose a particular sentence because a defendant "persisted in his plea of not guilty and did not accept a lesser plea."[305] In other words, error will be found when a judge indicates that he or she will impose a particular sentence if a defendant declines a plea offer and is convicted at trial, thereby giving the inaccurate impression that he or she will later have no discretion in imposing a sentence.[306]

In *State v. Young*,[307] for example, the judge made the following statement before trial: "[I]f you pled straight up I'd sentence you at the bottom of the mitigated range. . . . Now, if [the defendant] go[es] to trial and he's convicted, I'll be perfectly honest with you, . . . he would definitively get a sentence in the presumptive range. I probably won't go back to the mitigated range since I'm offering this now prior to trial."[308] Then, during sentencing, the trial judge referenced the earlier interaction: "I believe I previously indicated what the Court's position would be at sentencing, but I'll still consider whatever you have to say."[309] In its decision granting a new sentencing hearing, the North Carolina Court of Appeals framed the pretrial statements as a "warn[ing]" about the consequences that would result if the defendant exercised his right to a jury trial, and the sentencing colloquy as an affirmation that the judge intended to carry out the earlier warning.[310]

On the other side of the spectrum, a judge's pretrial recitation of the terms of a possible plea agreement, standing alone, does not serve

303. State v. Johnson, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987).

304. *See Cannon*, 326 N.C. at 39, 387 S.E.2d at 451 (inferring that the defendant's sentence was imposed, at least in part, as punishment for insisting on trial by jury, and concluding that the defendant's "constitutional right to trial by jury [was] abridged").

305. State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977); *see also* State v. Hueto, 195 N.C. App. 67, 77–78, 671 S.E.2d 62, 68 (2009) (finding error in the trial court's statement that if the defendant were to reject the plea, the court would be compelled to impose a greater sentence).

306. *See, e.g.*, *Hueto*, 195 N.C. App. at 78, 671 S.E.2d at 68 ("[I]f they find you guilty of the charges against both of these young girls, it will compel me to give you more than a single B-1 sentence . . . .").

307. 166 N.C. App. 401, 602 S.E.2d 374 (2004).

308. *Id.* at 411–12, 602 S.E.2d at 380.

309. *Id.* at 412, 602 S.E.2d at 380.

310. *Id.* at 412–13, 602 S.E.2d at 381.

as a basis for reversal—even if the judge later imposes a considerably more punitive sentence.[311] Indeed, pretrial statements related to plea bargaining are viewed more deferentially than statements made during sentencing.[312] In *State v. Crawford*,[313] for instance, the judge informed the defendant of the disparity between the proposed plea bargain and the sentencing range if the defendant were to be convicted at trial.[314] The judge then told the defendant, "I just want to make sure you understand that so in the event you are convicted, I don't want you to think that no one gave you an opportunity to *mitigate your losses.*"[315] Although this reference to mitigation could be construed to mean that the defendant would fare worse if he were to go to trial, the North Carolina Court of Appeals nevertheless found no error.[316]

Likewise, a reference to a rejected plea offer during sentencing does not automatically give rise to an inference that a judge improperly considered the rejected plea.[317] However, these later references are viewed less deferentially than those that occur prior to

311. *See, e.g.*, State v. Poag, 159 N.C. App. 312, 324, 583 S.E.2d 661, 670 (2003) ("The trial court's decision to state that it would impose a concurrent sentence as part of an accepted plea bargain was an effort to make the plea bargain more definitive and eliminate any question that defendant might have about the resulting sentence that the trial court would impose in its discretion. There is nothing in the record that indicates that the trial court imposed a consecutive sentence on defendant as punishment for his rejection of the plea offer.").

312. *See, e.g.*, State v. Crawford, 179 N.C. App. 613, 619, 634 S.E.2d 909, 914 (2006) ("Unlike in *Young*, where no plea bargain had been offered, and the trial court specifically referenced the pretrial discussion during sentencing and made reference to the trial court's previous stated position on sentencing, here the trial court allowed both attorneys to speak as to aggravating and mitigating factors without comment.").

313. 179 N.C. App. 613, 634 S.E.2d 909 (2006).

314. *Id.* at 617, 634 S.E.2d at 913.

315. *Id.* at 618, 634 S.E.2d at 913 (emphasis added).

316. *Id.* at 620, 634 S.E.2d at 914. The North Carolina Court of Appeals has found no error in similar circumstances, where a trial judge suggested that a defendant's choice to go to trial seemed foolhardy. *See* State v. Smith, Nos. 09-CRS-6643-44 and 09-CRS-6646-47, 2011 N.C. App. LEXIS 892, at *10 (finding the following statement did not violate the defendant's right to trial by jury: "I just want you to be aware you're looking at an awful lot of time. You will be an old man when you get out of jail if you're convicted. I want you to understand that. And you will have to serve all the time. You don't get out early anymore. . . . This ain't Vegas. Okay.").

317. *See, e.g.*, State v. Pinkerton, 205 N.C. App. 490, 504, 697 S.E.2d 1, 10 (2010) (Hunter, J., dissenting), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011) ("I detect no indication of improper motivation by the trial court judge in imposing defendant's sentence."); State v. Gantt, 161 N.C. App. 265, 273, 588 S.E.2d 893, 898 (2003) ("As it does not appear that defendant was prejudiced by the trial court's imposition of a sentence that fell between the requested minimum and maximum of the presumptive range, he is not entitled to a new sentencing hearing.").

trial. In *State v. Gantt*,[318] the trial judge noted that he "gave [the defendant] one opportunity where [he] could have exposed [himself] probably to about 70 months but [he] chose not to take advantage of that."[319] The appellate court did not find that the defendant's constitutional rights were violated, but it did express "disapprov[al] of the trial court's reference to defendant's failure to enter a plea agreement."[320] The court went even further in *State v. Pavone*,[321] though, and ordered a new sentencing hearing after a judge made several references to failed plea negotiations and told the defendant that "having moved through the jury process and having been convicted, [this] is [now] a matter in which you are in a different posture. . . . You tried the case out; this is the result."[322]

Recently, however, challenges based on judicial commentary have not fit within the above paradigms.[323] This has left appellate courts struggling to determine whether it can "reasonably be inferred . . . that the sentence was imposed at least in part because defendant did not agree to a plea offer."[324] Two cases, *State v. Tice*[325] and *State v. Pinkerton*,[326] aptly illustrate this point.

3. *Tice* and *Pinkerton*: Poor Taste or Prejudice?

Prior to being tried on firearm and assault charges, Michael Tice was offered—and refused—two proposed plea agreements.[327] At the beginning of trial, the presiding judge discussed both rejected offers, and the following interaction ensued:

> The Court: Now you understand that if you go to trial and if you are convicted of both of these charges then instead of a possible sentence of not less than 28 months nor more than 43 months that you could be looking at a sentence of not less than 66 months nor more than 89 months. Do you understand that,

318. 161 N.C. App. 265, 588 S.E.2d 893 (2003).
319. *Id.* at 272, 588 S.E.2d at 898.
320. *Id.*
321. 104 N.C. App. 442, 410 S.E.2d 1 (1991).
322. *Id.* at 446, 410 S.E.2d at 3.
323. *See supra* Part IV.A.3. *See generally, e.g.*, State v. Oakes, No. COA11-979, 2012 N.C. App. LEXIS 47 (Jan. 17, 2012) (finding no error or no more than harmless error where "the trial court merely informed defendant of any potential situations that might arise from not taking the plea bargain and then subsequently sentenced defendant in the upper level of the presumptive range.").
324. State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).
325. 191 N.C. App. 506, 664 S.E.2d 368 (2008).
326. 205 N.C. App. 490, 697 S.E.2d 1 (2010), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011).
327. *Tice*, 191 N.C. App. at 511, 664 S.E.2d at 372.

> sir?
>
> A. Yes, sir.
>
> The Court: Okay. And so what you are telling the Court . . . is that understanding the significant increase in the possible sentence that you could get, that you are still rejecting the State's offer; is that correct, sir?
>
> Yes, sir.[328]

This interaction, on its own, would undoubtedly be permissible under prior jurisprudence. Although the judge made several references to the rejected plea offers in the course of the interaction, the statements were cast in terms of "possible" outcomes and accurately reflected the disparity between the terms of the proposed plea agreement and the sentence if convicted of all charges.[329] Indeed, the North Carolina Court of Appeals concluded that this interaction was intended to ensure "that defendant fully understood the possible ramifications of his rejection of the plea."[330]

But the judge's remarks were not limited to that phase of the proceedings. During sentencing, the judge addressed the defendant in the following manner:

> Mr. Tice, I imagine you've got to be feeling awfully dumb . . . right now. You've had ample opportunity to dispose of this case. The State has given you ample opportunities to dispose of it in a more favorable fashion and you chose not to do so. And I'm not sure if you thought that you were smarter than everybody else or that everybody else was just dumb.[331]

Despite the judge's remarks, the North Carolina Court of Appeals concluded that they did not "indicate an improper motivation."[332] In reaching this conclusion, the court relied on the fact that the judge had also commented on both the lack of credibility of the defendant's witnesses and the weight of the State's evidence.[333]

A close reading of the *Tice* opinion, however, reveals weaknesses in the court's reasoning and suggests that the court may have

328. *Id.* at 512–13, 664 S.E.2d at 373.
329. *See id.*
330. *Id.* at 513, 664 S.E.2d at 373.
331. *Id.*
332. *Id.* at 515, 664 S.E.2d at 374.
333. *See id*. ("The totality of the trial judge's remarks reveals that he was not sentencing defendant more severely for choosing to reject a plea bargain, but rather the trial judge was focusing on his conclusion that defendant had submitted false testimony and 'fabricated' testimony from other witnesses.").

struggled in its decision. First, the court admitted that the judge's remarks were similar to those of an earlier case in which a judge's remarks were deemed improper, but it distinguished that earlier case on the ground that the judge had "specifically referenced the defendant's request for a jury."[334] While it is true that the judge in *Tice* did not explicitly refer to the defendant's request for a jury trial, he nevertheless remarked on the defendant's choice to decline the "ample opportunity to dispose of [the case] in a more favorable fashion,"[335] necessarily implicating the defendant's exercise of his right to trial by jury.

Second, the court viewed the *Tice* judge's remarks as "an unfortunate comment on [the] defendant's strategic gamble to forego a plea to a misdemeanor in favor of defending against substantial evidence with fabricated evidence."[336] Although the court ultimately concluded that the sentence was based on consideration of permissible factors, it did not adequately account for the context in which the judge's statements were made.[337] The judge's discussion of the foregone plea came at the outset of the sentencing phase,[338] which suggests that they were at the forefront of the judge's mind as he decided upon the sentence. Furthermore, the remarks were not the judge's first discussion of the rejected plea offers; he had made repeated references to them at the outset of trial.[339] While those statements were not themselves improper, as the court correctly noted, when considered in light of the later remarks, they suggest that the judge was punishing the defendant for refusing to accept a plea bargain.

Third, the appellate court "caution[ed]" trial judges "to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not."[340] The court's inclusion of this caution suggests it was concerned with the judge's remarks. But the import of this caution is even more troubling because it suggests that the "appearance" of impropriety does not necessarily give rise to an inference that the trial judge improperly considered the defendant's

334. *Id.* at 516, 664 S.E.2d at 375 (referencing State v. Peterson, 154 N.C. App. 515, 518, 571 S.E.2d 883, 885 (2002)).

335. *Id.* at 513, 664 S.E.2d at 373.

336. *Id.* at 514, 664 S.E.2d at 374.

337. *But see id.* at 515, 664 S.E.2d at 374 ("We do not believe that the remarks in this case, when viewed in context, indicate an improper motivation.").

338. *Id.* at 513, 664 S.E.2d at 373.

339. *See supra* note 329 and accompanying text.

340. *Tice*, 191 N.C. App. at 516, 664 S.E.2d at 375.

rejection of a plea offer during sentencing.

Similar to *Tice*, the judge presiding over the *Pinkerton* case extensively discussed the terms of the rejected plea at the outset of trial.[341] After the defendant was convicted of sexual offenses against a minor, and immediately prior to declaring a sentence, the judge addressed the defendant:

> Now, Mr. Pinkerton, prior to calling the jury in, you had an opportunity to plead guilty in a plea bargain where the Court offered you the minimum sentence for one crime which would have been about 22 years, and you explained to me that you thought 22 years or 200 years was the same, that it was a life sentence for you.
>
> . . .
>
> But, if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this. You would have pled guilty, and you didn't. That's your choice.
>
> . . .
>
> I'm not punishing you for not pleading guilty. I am not going to punish you for not pleading guilty. I would have rewarded you for pleading guilty.[342]

The North Carolina Court of Appeals, by a two-to-one decision, concluded that the judge's remarks violated the defendant's constitutional rights.[343] In reaching this conclusion, the majority opinion focused on two aspects of the remarks. It first noted that the judge had admonished the defendant for his "choice" to plead not guilty, thereby forcing the child-victim to endure the trial.[344] Yet the majority would have been willing to overlook that comment had it not been followed by the judge's statement that he "would have rewarded [the defendant] for pleading guilty."[345] Despite the judge's

341. *See* State v. Pinkerton, 205 N.C. App. 490, 494–97, 697 S.E.2d 1, 4–6 (2010), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011).

342. *Id.* at 497–98, 697 S.E.2d at 5–6.

343. *Id.* at 501, 697 S.E.2d at 8.

344. *Id.* at 502, 697 S.E.2d at 8.

345. *See id.* ("Although we might have been able to treat this comment as an expression of the trial court's failure to believe Defendant's claim that he would 'like to apologize' and that he 'loved [everyone]' . . . the fact that the next thing that the trial court said was that 'I'm not punishing you for not pleading guilty' and that 'I would have rewarded you for pleading guilty' convinces us that the trial court did, in fact, base the sentence that was imposed upon Defendant at least in part on the fact that he chose to exercise his right to trial by jury.").

earlier assurance that he was "not punishing [the defendant] for not pleading guilty," the majority concluded that casting the foregone plea as a "reward" was tantamount to "an acknowledgement that Defendant's sentence was heavier than it otherwise would have been had Defendant not exercised his right to trial by jury."[346]

The dissent, on the other hand, viewed the judge's reference to a reward as nothing more than a "truthful assertion" about the nature of plea bargaining, rather than an implication that the defendant would be treated more harshly for exercising his right to trial by jury.[347] Indeed, the dissent found "nothing in the trial judge's comments" to support the conclusion that the judge had improperly considered the defendant's rejection of the proposed plea.[348]

The majority and dissenting opinions in *Pinkerton* highlight the difficulties in evaluating these types of remarks. Because North Carolina judges take an active role in plea bargaining from the outset, any remarks by a judge at sentencing may simply be an attempt to explain why the forthcoming sentence will be significantly different from other sentencing options discussed at the earlier stage. But one could alternatively perceive the remarks as an expression of frustration or contempt against the defendant for delaying the inevitable. Even a judge's assertion that he is "not punishing [the defendant] for not pleading guilty"[349] may be viewed with suspicion, particularly when paired with a statement that the defendant would have been "reward[ed]"[350] otherwise.

Ultimately, the decision by the North Carolina Court of Appeals in *Pinkerton* was reversed by the Supreme Court of North Carolina;[351] however, its per curiam opinion merely stated that the decision was

346. *Id.* at 502, 697 S.E.2d at 9. North Carolina courts have traditionally viewed plea bargaining through classical contract theory. *See, e.g.*, State v. Collins, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980) ("[I]t is clear that plea agreements normally arise in the form of unilateral contracts. The consideration given for the prosecutor's promise is not defendant's corresponding promise to plead guilty, but rather is defendant's actual performance by so pleading."). The *Pinkerton* decision may call into question this view, as the dissent from the North Carolina Appeals (implicitly accepted by the Supreme Court of North Carolina in its later reversal) considered a plea bargain as a reward: "[E]very plea bargain serves to reward the defendant for admitting his or her guilt and saving the State the time and expense of trial. . . . In approving the bargain reached between the State and the defendant, the trial court is then, in effect, rewarding the defendant with a sentence that is presumably less than it would have been had the defendant been convicted by a jury." *Pinkerton*, 205 N.C. App. at 506, 697 S.E.2d at 11 (Hunter, J. dissenting).

347. *Pinkerton*, 205 N.C. App. at 506, 697 S.E.2d at 11 (Hunter, J., dissenting).

348. *Id.* at 507, 697 S.E.2d at 11.

349. *See supra* note 342 and accompanying text.

350. *See supra* note 342 and accompanying text.

351. State v. Pinkerton, 365 N.C. 6, 708 S.E.2d 72 (2011) (per curiam).

reversed "for the reasons stated in the dissenting opinion [below]."[352] In fact, the Supreme Court has not squarely ruled on this issue since 1990,[353] which has left judges and litigants with little guidance regarding the types of conduct that would be considered improper—as well as the extent to which the appearance of impropriety may be considered in making the determination.

B. Possible Reforms and Recommendations

1. Evaluating the Current Approach in North Carolina

Judicial involvement in plea bargaining and sentencing is akin to a double-edged sword. Whereas judicial involvement during plea bargaining may facilitate an efficient disposition of the case, that investment of time and energy may also lead to actual—or apparent—unfavorable treatment during sentencing.[354] Thus, the question is whether the current system in North Carolina strikes an appropriate balance.

During plea bargaining, judicial involvement should increase a defendant's belief that the process is procedurally fair. In fact, each of the factors that influence one's perception of procedural justice should be positively affected.[355] Both judges' required and discretionary interactions with defendants[356] should allow defendants to feel that they have a voice at this stage of the proceedings. To be sure, many have highlighted the one-sided nature of plea bargaining as a general matter,[357] but that criticism is more properly aimed at

352. *Id.* at 6, 708 S.E.2d at 72.

353. *See* State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

354. *See supra* Part IV.A.2–3 (discussing various cases of actual or apparent bias in sentencing hearings in North Carolina courts). The author does not suggest that the appearance of judicial bias must automatically constitute a violation of a defendant's constitutional rights; rather, the focus of this Section is on reforms to safeguard judicial propriety and the appearance of propriety.

355. *See supra* Part II.B (explaining that individuals generally consider four factors in assessing procedural justice: whether they have been given a voice in judicial proceedings; whether their cases are heard by a neutral decision maker; whether they are treated with dignity and respect by judges; and whether their judges appear trustworthy).

356. *See, e.g.*, Allen Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL'Y 39, 57 (1989) (reporting that in North Carolina, "[j]udicial participation in the plea negotiation process, in varying forms, is widespread").

357. *See, e.g.*, Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2298–99 (2006) ("When plea bargaining is available, the prosecutor can reach a guilty plea in almost every case, even a very weak one. When the case is weak, meaning when the probability that a trial would result in conviction is relatively small, she can assure a conviction by offering the defendant a substantial discount—a discount big enough to compensate him for foregoing the possibility of being found not guilty."). *But*

how plea bargaining is conducted between the prosecution and defendant, rather than the judge and defendant.

Judges (and other government representatives) are also prohibited from "bring[ing] improper pressure upon a defendant to induce a plea of guilty or no contest."[358] Although trial records indicate that judges provide opinions on the favorability of potential pleas,[359] such advice would not necessarily negate a defendant's belief that the judge was neutral during the plea bargaining phase. If anything, North Carolina judges are incredibly transparent regarding the consequences of accepting a plea, as compared to the possible sentences that could result if the defendant were to be convicted.[360]

It is more difficult, however, to determine the precise effects of judicial involvement during plea bargaining on whether the defendant feels that he or she is being treated with dignity and respect, and on whether the defendant feels that the judge cares about him or her. These two factors influencing procedural justice necessarily depend upon the quality of interactions between the judge and defendant.[361] Nevertheless, plea bargaining is one of the few times that a judge has an opportunity to interact with a defendant directly. While an interaction also may occur during sentencing, the two actors are in much different circumstances.

Given the potentially positive effects of judicial involvement

see Jeff Palmer, Note, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 520 (1999) ("Because of the pressure of numbers, there is often a unanimity among defense counsel, trial judge, and prosecutor in pushing criminal defendants through the system as quickly as possible." (quoting DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 182 (1988))).

358. N.C. GEN. STAT § 15A-1021(b) (2011).

359. *See, e.g.*, State v. Hueto, 195 N.C. App. 67, 75, 671 S.E.2d 62, 67 (2009) ("[I]n all seriousness I am very concerned about the evidence against you and about your chances of winning this trial and being found not guilty of all charges. This is the point in the trial where you still possibly have some control over the outcome of the trial or control over your fate, because the attorneys have indicated to me that they are willing to trust me to sentence you at this point fairly if you were to decide to plead guilty to some or all of the charges. And I would see to it that I gave you a fair sentence but one that would most likely be a lesser amount of time than if you are convicted.").

360. *See, e.g.*, State v. Pinkerton, 205 N.C. App. 490, 495, 697 S.E.2d 1, 4 (2010), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011) ("If you're convicted of all the crimes, you could be sentenced to a maximum minimum of 178-and-a-half years with a maximum of 219-and-a-half years. I think it's safe to say none of us are going to live that long."); State v. Tice, 191 N.C. App. 506, 512–13, 664 S.E.2d 368, 373 (2008) (explaining the significant sentence increase that the defendant could receive were he to proceed to trial instead of accepting the plea agreement); State v. Crawford, 179 N.C. App. 613, 617, 634 S.E.2d 909, 913 (2006) ("[Y]ou [are] guaranteed to be sentenced to at least two more years if you're convicted by a jury of first degree burglary versus whether you plead.").

361. *See supra* notes 210–11 and accompanying text.

during plea bargaining on a defendant's perception of procedural justice, one might wonder why the practice is not more widespread. The Federal Rules of Criminal Procedure and the procedural rules of some states do not allow for much substantive participation during plea bargaining.[362] One possible danger of permitting judicial involvement is that it introduces another "participant," one that is often thought of as a neutral third-party observer and decision maker.[363] In fact, a defendant's perception of a judge as neutral might cause a defendant to give more weight to a judge's recommendation to accept a proposed plea offer, thus undercutting the purpose behind the statutory prohibition on improper pressure.[364]

A second issue to consider in this regard is the type of advice that a judge will likely give at the plea bargaining phase. While the cases identified in this Article may represent a skewed sample of the full population of plea negotiations, judges appear to be vocal proponents of proposed pleas.[365] Their enthusiasm is not unexpected, however, in light of cognitive psychology. Through the introduction of structured sentencing, judges have been provided definitive guidance as to the sentences that should be imposed based on the types of convictions and other related factors.[366] In the absence of other cues (e.g., evidence that may be introduced at trial), these ranges will likely serve as strong anchors.[367] Often, a proposed plea agreement will carry a substantially lower sentence than if the defendant were convicted at trial;[368] thus, a judge's initial hypothesis should be that

362. *See* FED. R. CRIM. P. 11(c)(1); COLO. REV. STAT. § 16-7-302(1) (2012) (providing that "[t]he trial judge shall not participate in plea discussions"); WASH. REV. CODE ANN. § 9.94A.421 (West 2010) (providing that "[t]he court shall not participate in any discussions under this section").

363. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear* Pro Se*: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 426 (2004) ("It is a truism that there is no concept more fundamental to the common law and United States legal systems tha[n] judicial neutrality. Without such neutrality, the entire legitimacy of the legal system, indeed its reason for existence within the democratic experiment, fall.").

364. *See* N.C. GEN. STAT § 15A-1021(b) (2011).

365. *See, e.g.*, Palmer, *supra* note 357, at 521 ("The judge is . . . motivated to plea bargain because of overflowing court dockets, as well as political pressures."); *see also* LAWRENCE S. WRIGHTSMAN, PSYCHOLOGY AND THE LEGAL SYSTEM 220 (1991) ("Judges will often encourage settlements, placing greater pressure on prosecutors to resolve disputes before trial.").

366. *See generally* N.C. SENTENCING & POLICY ADVISORY COMM'N, A CITIZEN'S GUIDE TO STRUCTURED SENTENCING (2012), http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/citizenguide2012.pdf (explaining how structured sentencing operates in North Carolina).

367. *See supra* Part II.A.4 (explaining the anchoring effect).

368. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.

the proposed plea will provide a better outcome for a defendant. At that point, a judge would likely construe the circumstances to confirm this hypothesis by unconsciously weighing the evidence or the characteristics of the defendant.[369]

While there are risks to allowing extensive judicial participation during plea bargaining, it is not until a defendant rejects an offer and is convicted at trial that those risks are fully realized. First, even with a robust appearance of impropriety standard in place, it is extremely unlikely that any judge would fathom that participation in the earlier plea bargaining phase would make him or her biased during sentencing.[370] It is perhaps not surprising that there are no reported cases of self-recusal in North Carolina on that basis. But even if judges were to consider the possibility of bias in a particular proceeding, it is unlikely that they would conclude that they harbored any bias. Indeed, they may construe their earlier participation in the proceedings as giving them an "illuminating perspective,"[371] and rationalize their decisions as ones made in spite of the possibility of bias, rather than because of it.[372] Comments such as "I am not going to punish you for not pleading guilty"[373] may be evidence of this type of post-hoc rationalization.

Furthermore, the existence of structured sentencing and lists of permissible factors to consider likely make it more difficult to detect when a judge is basing a sentence on a defendant's failure to accept a plea agreement. Because the sentencing ranges provide such a strong anchor,[374] it is likely that the actual sentence will be within these ranges. Although an imposed sentence within the presumptive range may be reversed if it is proven that the judge reached the decision on account of a rejected plea offer,[375] such a finding may be difficult to

J. 1909, 1909 (1982) ("Defendants who bargain for a plea serve lower sentences than those who do not.").

369. *See supra* Part II.A.5.

370. *See supra* Part II.A.1 (discussing the bias blind spot and one's tendency to believe in the impact of bias generally rather than in specific instances).

371. *See supra* notes 144–47 and accompanying text.

372. *See* Ehrlinger et al., *supra* note 137, at 687.

373. State v. Pinkerton, 205 N.C. App. 490, 498, 697 S.E.2d 1, 6 (2010), *rev'd per curiam*, 365 N.C. 6, 708 S.E.2d 72 (2011).

374. *See supra* Part II.A.4 (discussing the tendency for individuals to use previously encountered information as anchors).

375. *See, e.g.*, State v. Boone, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) ("A sentence within the statutory limit will be presumed regular and valid. However, such a presumption is not conclusive. If the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of defendant's rights. . . . The statement of the trial judge, expressed by him in open court, indicated that the sentence

prove or be perceived as too futile to pursue. Recent decisions by the North Carolina Court of Appeals employ a lenient, totality-of-the-circumstances test in ascertaining whether a judge acted improperly.[376] Therefore, if a judge mentions a foregone plea offer, as in *Tice* or *Pinkerton*,[377] but also identifies other, proper bases on which to sentence a defendant, a reviewing court will likely find no error.

On the flipside, when a judge advises a defendant to accept a proposed plea agreement prior to trial, that earlier interaction may lead the defendant to believe that the judge will later impose a harsher sentence if he or she refuses to accept the advice—even were the judge not to mention the rejected plea during sentencing. But when the judge explicitly mentions the rejected plea during sentencing, even by way of explanation, the defendant may interpret this reference as evidence of judicial bias.[378] Moreover, the fact that the judge imposed a more punitive sentence than that which had been contemplated under the proposed plea agreement may be perceived by the defendant as an indication that the judge no longer cares about the defendant, precisely because the defendant did not heed the advice.[379] Finally, judicial remarks that express disappointment,[380] frustration,[381] or even anger[382] towards the defendant for rejecting a plea offer serve to lessen the defendant's feeling that he or she is being treated with dignity and respect.

2. Alternatives to the Current Approach

Given the considerable risks identified above, the North

imposed was in part induced by defendant's exercise of his constitutional right to plead not guilty and demand a trial by jury. This we cannot condone.").

376. *See, e.g.*, State v. Tice, 191 N.C. App. 506, 515, 664 S.E.2d 368, 374 (2008) (applying a totality of the circumstances approach on review and finding no error).

377. *See supra* Part IV.A.3 (exploring the *Tice* and *Pinkerton* cases).

378. *See supra* Part II.A.1 (discussing the actor-observer difference).

379. *Cf. supra* note 211 and accompanying text (discussing how a litigant's perception that a decision maker cares about the parties positively affects procedural justice).

380. *E.g.*, State v. Gantt, 161 N.C. App. 265, 272, 588 S.E.2d 893, 898 (2003) ("At the beginning of the trial I gave you one opportunity where you could have exposed yourself probably to about 70 months but you chose not to take advantage of that. I'm going to sentence you to a minimum of 96 and a maximum of 125 months in the North Carolina Department of Corrections.").

381. *E.g.*, State v. Pavone, 104 N.C. App. 442, 446, 410 S.E.2d 1, 3 (1991) ("The substance of the judgment, Ms. Pavone, is that you would serve a six years [sic] active sentence. I think that is appropriate. You tried the case out; this is the result.").

382. *E.g.*, State v. Tice, 191 N.C. App. 506, 513, 664 S.E.2d 368, 373 (2008) ("I'm not sure if you thought that you were smarter than everybody else or that everybody else was just dumb.").

Carolina legislature and courts should consider changing the role of judges in plea negotiations and sentencing. The most drastic change would be to prohibit judges from participating in plea negotiations at all, other than clarifying whether a defendant's acceptance of an offer has been made both knowingly and voluntarily.[383] Although such a proposal would reduce the likelihood that a judge felt invested in the outcome of a proposed plea agreement, it would come at the expense of allowing a meaningful interaction between the judge and defendant. As noted in the previous Section, such an interaction should increase the defendant's perception of procedural justice and positively influence the defendant's view of the judicial system.[384] Moreover, since nearly 98% of felony cases in North Carolina are disposed of by guilty plea, concerns about adverse consequences related to rejected plea offers arise in 2% of cases at most.[385] Thus, this proposal seems overly inclusive and restrictive.

With this more drastic proposal off the table, there are two other possible solutions to the concerns raised by judicial involvement in plea bargaining and sentencing. The first solution, one that the Supreme Court of North Carolina could adopt, would be to change the standard by which judicial commentary during sentencing is evaluated on review. Part of the current problem lies in determining when "it can reasonably be inferred from the language of the trial judge that the sentence was imposed because defendant did not agree to a plea offer by the state."[386] If the Supreme Court were to adopt a more bright-line standard, such as the inclusion of a rebuttable presumption that *any* reference to a rejected plea bargain during sentencing violates a defendant's constitutional rights, trial judges would have clearer guidance regarding the types of remarks that would likely result in reversible error. At the same time, the State would still have an opportunity to rebut this presumption by showing that the sentence was the result of legitimate factors revealed at trial.[387]

383. *See* N.C. GEN. STAT § 15A-1022(a)–(b) (2011).

384. *See supra* Part IV.B.1 (explaining how such an interaction could affect the four factors influencing one's perception of procedural justice).

385. *See supra* note 286 and accompanying text (citing statistics from the North Carolina Sentencing & Policy Advisory Commission).

386. State v. Cannon, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990).

387. *See* Richard Klein, *Due Process Denied: Judicial Coercion in the Plea Bargaining Process*, 32 HOFSTRA L. REV. 1349, 1418 (2004) ("The only instance where this commentator concludes it is appropriate to impose a greater sentence post-trial than that which was offered to the defendant were he to have pled guilty pre-trial is if the judge did indeed learn of some aggravating factors during the course of the trial that he had not

There are several advantages to introducing a rebuttable presumption that a judge who makes remarks about a rejected plea offer during sentencing has improperly based that sentence on the defendant's rejection of the proposed plea. First, trial court judges are already familiar with this type of presumption in a related context. When a defendant successfully challenges his or her initial conviction and is later retried, convicted, and receives a harsher sentence, reviewing courts presume that the later sentence was the result of judicial "vindictiveness" in contravention of the Fourteenth Amendment Due Process Clause.[388] This shift in the burden of proof, known as the *Pearce* presumption, has been justified because of the "institutional pressure [that may] subconsciously motivate a vindictive . . . judicial response to a defendant's exercise of his right to obtain a retrial of a decided question,"[389] and it "may be overcome only by objective information in the record justifying the increased sentence."[390]

Although the Supreme Court of the United States has declined to apply the *Pearce* presumption where a judge imposes a greater sentence after a defendant's earlier guilty plea has been vacated,[391] it does not follow that the Supreme Court of North Carolina should not apply this type of presumption to safeguard due process concerns in North Carolina—at least when a judge who actively participated in plea negotiations later references the foregone plea during sentencing.

Such a rebuttable presumption would also promote procedural justice to a greater extent than the current approach because it would signal to defendants that the judicial system will not tolerate this type of bias. Of course, by the time the defendant would have the

known of during plea negotiations.").

388. *See* North Carolina v. Pearce, 395 U.S. 711, 725–26 (1969) (articulating the vindictiveness standard and explaining how it may be rebutted), *overruled in part by* Alabama v. Smith, 490 U.S. 794 (1989); *cf.* Blackledge v. Perry, 417 U.S. 21, 27 (1974) (extending the vindictiveness doctrine to prosecutorial misconduct), *overruled in part by Smith*, 490 U.S. 794.

389. United States v. Goodwin, 457 U.S. 368, 377 (1982).

390. *Id.* at 374 (summarizing *Pearce*); *see, e.g.*, United States v. Bello, 767 F.2d 1065, 1069 (4th Cir. 1985) (applying a presumption of judicial vindictiveness and finding that the presumption could not be rebutted because "the sentencing judge identified no other factors that would rebut the presumption").

391. Alabama v. Smith, 490 U.S. 794, 799–800 (1989). The Court declined to apply the presumption because it found that there was no "reasonable likelihood that the increase in sentence is the product of actual vindictiveness on the part of the sentencing authority." *Id.* at 799 (citations omitted). The Court went on to explain that, when the *Pearce* presumption does not apply, "the burden remains upon the defendant to prove actual vindictiveness." *Id.* at 799–800.

opportunity to take advantage of the rebuttable presumption, it would be too late to repair completely the defendant's perception of the judiciary;[392] the judge would have already sentenced the defendant and referenced the foregone plea offer. Yet such an outcome would still be preferable to the current approach, in which judges, prosecutors, and defense attorneys alike do not know what types of comments will be deemed impermissible until after the fact.

Critics of a rebuttable presumption may argue that the rule would be over-inclusive because it would cover judicial commentary of an explanatory or instructive nature. Consider an example in which a judge had been heavily involved in plea negotiations and then had to explain to the defendant the reasons for the greater sentence imposed. The judge might be inclined to remind the defendant of the prior plea offer in order to put the imposed sentence into proper perspective. Indeed, the North Carolina Court of Appeals has employed similar reasoning in several decisions in which it found no error by the trial judge.[393] If such circumstances were to arise, however, the State would have an opportunity to rebut the presumption with evidence that the judge's comments were taken out of context. This is analogous to the type of evidence used to rebut the *Pearce* presumption, which "must be based upon objective information concerning identifiable conduct on the part of the defendant."[394] Furthermore, judges could be required to explain the reasons for greater sentences through written findings of fact, similar to the requirements for imposing sentences outside of the presumptive sentencing ranges.[395]

On the other hand, from the perspective of social psychology, the troubling aspect of a rebuttable presumption is whether such a presumption would actually produce a more substantively fair outcome. The jurisprudence is littered with formalistic rules, particularly in criminal proceedings, that may not actually create a fair process. Take, for example, the notorious *Miranda* warnings. While every avid *Law & Order* viewer can recite the familiar phrases,[396] their ubiquity does not mean that defendants actually

392. *See supra* notes 232–39 and accompanying text.

393. *See, e.g.*, *supra* Part IV.A.3 (exploring the *Tice* and *Pinkerton* cases).

394. North Carolina v. Pearce, 395 U.S. 711, 726 (1969).

395. *See* N.C. GEN. STAT. § 15A-1340.16(c) (2011) ("The court shall make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences specified [by statute].")

396. *See* Miranda v. Arizona, 384 U.S. 436, 479 (1966) ("[A defendant] must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and

understand their import or that government officials actually conform their conduct to them.[397] By analogy, introducing a rebuttable presumption in this context would not ensure that judges did not impermissibly consider a foregone plea; rather, it would ensure only that judges did not subtly inform defendants that they had in fact considered a foregone plea. In one respect, the current system gives a defendant some insight into a judge's reasons for imposing a sentence; the alternative would give a defendant no grounds to challenge that sentence. And since most cognitive biases exist at an unconscious level,[398] there would be no other way to identify or control for them.

Given that judicial involvement in plea negotiations appears to provide benefits but raises concerns should negotiations break down, the second proposal identifies a procedural change in the handling of criminal cases. This proposal is inspired, in part, by a practice begun in Connecticut. As with North Carolina judges, Connecticut judges are permitted to conduct plea negotiations[399] so long as "the defendant is free to reject the plea offer [made after negotiations conducted by one judge] and go to trial before a [second] judge who was not involved in or aware of those negotiations.[400] Through the use of different judges in the plea negotiation and sentencing phases, Connecticut has reconciled the importance of active plea negotiations[401] with the need to maintain the integrity and propriety of the criminal trial, which can become suspect when the same judge participates in both phases.[402]

that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement."). The *Miranda* warnings have reached an iconic level. *See* George C. Thomas III & Richard A. Leo, *The Effects of* Miranda v. Arizona*: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 206–08 (2002).

397. *See, e.g.*, Geoffrey S. Corn, *The Missing* Miranda *Warning: Why What You Don't Know Really Can Hurt You*, 2011 UTAH L. REV. 761, 762–63; Thomas & Leo, *supra* note 396, at 206–08.

398. *See supra* note 134 and accompanying text.

399. *See* State v. Revelo, 775 A.2d 260, 268 (Conn. 2001) ("[T]his court expressly has approved judicial involvement in plea discussions . . . .").

400. *Id.* (internal quotations omitted). Connecticut courts also require that the defendant "is not subject to any undue pressure to agree to the plea agreement, and the impartiality of the judge who will sentence him in the event of conviction after trial is not compromised." *Id.* (internal quotations omitted).

401. *See id.* at 267.

402. *See* State v. D'Antonio, 877 A.2d 696, 735 (Conn. 2005) (Katz, J., dissenting) ("[A]lthough we recognize that pretrial or plea negotiations play a critical role in the criminal justice system, and the disposition of charges after plea discussions is highly

Prior to 2005, Connecticut courts considered it plain error[403] when the same judge participated in plea negotiations and later presided over the defendant's trial. However, in *State v. D'Antonio*,[404] the Supreme Court of Connecticut weakened its hard line approach towards dual participation.[405] Now, whenever a Connecticut judge fails to disqualify himself or herself, the defendant must demonstrate actual harm on account of the judge's dual participation.[406]

While in one sense the effect of the *D'Antonio* decision represents a change in the burden of proof, its actual impact is more profound. Indeed, it is unclear how this standard is much different from that employed in North Carolina. A judge must first decide whether self-recusal is proper.[407] If the judge fails to do so, the defendant has the burden of proof, which invariably means that the appellate court will review the same types of judicial remarks to determine whether the judge impermissibly considered the defendant's rejection of the proposed plea offer.[408]

In order to produce a significant change to the current system in North Carolina, this Article proposes that the North Carolina General Assembly adopt Connecticut's approach into the State's Criminal Procedure Act,[409] but with two modifications. First, if a judge is involved as a participant in plea bargaining and sentencing, such dual participation should be considered reversible error (as in Connecticut prior to *D'Antonio*). Second, a procedure should be created to automatically assign a new judge to preside over a trial when plea negotiations reach an impasse, thereby alleviating a judge from deciding whether self-recusal is proper.

Compared to the current system in North Carolina, this second proposal fares quite favorably in terms of its effects on cognitive bias and procedural justice. At the outset, both systems operate in nearly

desirable[,] we also recognize that the legitimacy of that process and the integrity of the trial immediately become suspect when both proceedings are conducted by the same judge." (citations omitted)).

403. *See, e.g.*, State v. Falcon, 793 A.2d 274, 278 (Conn. 2002) (finding plain error where the same judge who engaged in plea negotiations also sentenced the defendant), *overruled by* State v. D'Antonio, 877 A.2d 696 (Conn. 2005).

404. 877 A.2d 696 (Conn. 2005).

405. *Id.* at 701 ("We conclude that, under the facts and circumstances of this case, the trial court's presiding at the hearing, trial and sentencing of the defendant after it had participated in plea negotiations, although improper, was not plain error requiring reversal.").

406. *See id.* at 722.

407. State v. Webb, 680 A.2d 147, 185 (Conn. 1996).

408. *See D'Antonio*, 877 A.2d at 722.

409. Criminal Procedure Act, N.C. GEN. STAT. ch. 15A (2011).

identical fashions during the plea bargaining phase. Under this proposal, judges are still permitted to take an active role in plea negotiations, and perhaps even more so than under the current approach since they would know that they would not preside over a trial should negotiations break down.

The real advantages to the proposal, however, lie in the sentencing phase. Because the judge presiding over the trial would not be involved in the initial plea negotiations, this second judge would be less likely to consciously or unconsciously consider the rejected plea offer in imposing a sentence. Indeed, it is not clear that the second judge would need to be privy to any of the details of the pretrial plea negotiations,[410] which would lessen the likelihood that the information could unconsciously affect the sentence imposed. Granted, the second judge would be aware that the defendant had refused an earlier plea offer, simply by virtue of being assigned to preside over the trial. But the second judge would be less susceptible to confirmation bias, in part because the sentence imposed would not be as motivationally supported as it would have been had the judge been heavily involved in the plea bargaining phase.

In terms of procedural justice, one could argue that a defendant would negatively perceive the process of replacing one judge for another. After all, if judges are supposed to behave in a neutral fashion,[411] why would a judge be required to recuse himself or herself for participating in a common pretrial procedure? While that argument is not wholly without merit, it may be countered by the fact that this system-wide change in procedure would be a prophylactic measure to ensure judicial propriety, rather than a reflection on the propriety of any individual judge. Furthermore, it would be just as likely that a defendant would view the current system as more problematic, especially if the presiding judge had advocated vigorously in favor of a plea offer that the defendant ultimately rejected.

Perhaps the strongest criticism of this second proposal is that it would increase administrative costs, both in terms of the number of cases handled by an individual judge and the costs of having a second judge become familiar with a case. Since one of the purposes of plea bargaining is to dispose of cases efficiently, two separate processes

410. It appears that this has been the standard practice in Connecticut. *See supra* note 400 and accompanying text.

411. *See supra* note 209 and accompanying text (explaining neutrality as a factor affecting one's perception of procedural justice).

could be seen as counterproductive when there are already a limited number of judges to handle overflowing dockets.[412] With respect to the increased caseload assigned to an individual judge, it is important to keep in mind that guilty pleas are entered in the vast majority of criminal cases;[413] thus, this two-step process would be an infrequent exception rather than the norm. Furthermore, a judge would not be replaced unless he or she actually had been involved in the plea bargaining phase, which would further reduce the number of cases in which this two-step process would be triggered. Although it might take a new judge some time to become familiar with a case, judges are no strangers to managing a heavy caseload and swiftly preparing for trial.[414]

The timing of this two-step process could minimize duplicative efforts as well. Many of the pretrial discussions, and particularly the plea negotiations, would not need to be addressed by the second judge presiding over the trial. In that manner, the role of first judge could be likened to that fulfilled by a United States Magistrate Judge in some federal cases: a judge who would handle many of the preliminary aspects of trials but not ultimately preside over the trial itself.[415]

3. Recommendations

Due to the risks involved in permitting North Carolina judges to participate in both plea negotiations and sentencing, this Article

412. *See* Jennifer Marquis, Casenote, State of Connecticut v. D'Antonio*: An Analysis of Judicial Participation in the Plea Bargain Process*, 25 QUINNIPIAC L. REV. 455, 457 (2006) (explaining that the current number of courtroom staff "could never provide a full trial in every case pending in the system"); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 39 (2002) (stating that judges face "major caseload pressures").

413. *See supra* notes 285–88 and accompanying text.

414. For example, North Carolina judges "have a substantially higher incoming caseload with the median number (3085) being nearly three times greater than the national incoming caseload per judge (1626)." Douglas L. Yearwood, *Criminal Justice Funding in North Carolina: A System in Crisis*, 1 J. ALTERNATIVE PERSP. SOC. SCI. 672, 682 (2009). More generally, "[t]he average [federal] district court judge has more than 400 newly filed cases to contend with each year. In addition to trial, judges conduct sentencings, pretrial conferences, settlement conferences, motions hearings, write orders and opinions, and consider other court matters both in the courtroom and in their chambers." *Frequently Asked Questions*, U.S. COURTS, http://www.uscourts.gov/Common/FAQS.aspx (last visited Aug. 19, 2013).

415. *See generally* Leslie G. Foschio, *A History of the Development of the Office of United States Commissioner and Magistrate Judge Systems*, 1999 FED. CTS. L. REV. 4 (1999) (describing the development of the federal magistrate judge system and the varied roles of magistrate judges in handling cases).

suggests two related courses of action. First, the North Carolina General Assembly should consider adopting the second proposal, in which the same judge would not be involved in plea negotiations and sentencing.[416] This approach would allow judges to continue actively participating at the plea negotiation phase—which has potential benefits from the standpoint of procedural justice[417]—while also ensuring that such participation would not adversely affect later judicial decision making, or create the appearance of an adverse effect, should the process break down.

Even with the adoption of this proposal, however, the second judge could still comment on a rejected plea agreement during sentencing.[418] Again, such a comment could create an appearance of impropriety, in that a defendant might reasonably believe that the judge imposed a harsher sentence based on the defendant's exercise of the right to trial by jury. But unlike cases in which the same judge had been involved in both the pretrial proceedings and the trial, there would be few reasons for the second judge to comment on a rejected plea if this proposal were to be adopted. The second judge would not have been involved in the plea negotiations, and thus the judge would presumably have no need to explain why the imposed sentence was different than that of a proposed plea offer with which the judge had no involvement.

Therefore, in addition to the second proposal, this Article also recommends that the Supreme Court of North Carolina adopt a rebuttable presumption that a judge has improperly considered a rejected plea offer whenever that judge mentions a rejected plea during sentencing. From a practical perspective, this additional presumption will give defendants an advantage on appeal should a judge mention a foregone plea. Perhaps more importantly, however, such a presumption will further safeguard judicial propriety during sentencing.

CONCLUSION

When it comes to judicial propriety in North Carolina, as elsewhere, appearances matter. From the standpoint of a judge determining whether his or her circumstances warrant recusal, an appearance standard makes it more likely that the judge will identify potential sources of bias that could otherwise unconsciously affect his

416. *See supra* Part IV.B.2 (discussing the Connecticut approach and its limitations).
417. *See supra* Part IV.B.2.
418. *See supra* Part IV.B.2.

or her decision making. At the same time, such a standard will positively impact litigants' perceptions of the legitimacy of the judiciary, which will in turn increase their acceptance of and compliance with decisions.

Through its adoption of the 2003 Amendments, the Supreme Court of North Carolina has removed this important safeguard on the integrity of the judiciary—much like the removal of a vehicle's emergency brake. Although there have been a few high-profile incidents of judicial impropriety in North Carolina following the revisions, this Article does not suggest that judicial impropriety is rampant. But the judicial branch has left itself vulnerable to the unconscious biases of North Carolina judges—its own drivers—as well as increased scrutiny from litigants and third party observers—the others on the road. But an appearance standard can only go so far, given the variety of situations in which judicial propriety may be compromised. For that reason, this Article identifies other ways to ensure that the propriety of the judiciary is preserved, through specific reforms that simultaneously reduce the likelihood that judges' cognitive biases will adversely affect their decision making and increase litigants' perceptions of procedural justice. Using judicial involvement in plea bargaining and sentencing as an example of how to evaluate possible reforms, this Article demonstrates how a similar process can be employed in other areas of ethical concern for the judiciary.