Critical Review of “The Elusive Goal of Impartiality”

Debra Lyn Bassett and Rex R. Perschbacher, of Iowa Law Review, analyze judicial recusal at the Federal court level and believe its power to be too constrained due to the standards at which the recusals are accepted, the impact of judge’s background/connections (personal, political, communal), and tied psychology-based issues of being accused (Bassett, Perschbacher, 5). This analysis is done in with the case Caperton v. A.T. Massey Coal Co. as a reference point, pointing out Federal justice, Brent Benjamin’s denial of three disqualification motions and his methods to denying them (Bassett, Perschbacher, 1-3). Bassett and Perschbacher believe this case also raises up three other specific issues on the recusal standard, word play, appearances and public perception, and the duty to sit (Bassett, Perschbacher, 6). After their extensive explanation of the case and issues, they purpose flaws in the system and their own solutions. I find it that while their explanations were detailed, some of their flaws and solutions seem to have flaws in them themselves.

In order to understand the stances of Bassett and Perschbacher, the background upon Caperton v. A.T. Massey Coal Co., Caperton’s arguments for recusal, and Justice Benjamin’s arguments against must be evaluated. Caperton sued Massey for “fraudulent misrepresentation, concealment, and tortious interference with contract” and the destruction of their company (Bassett, Perschbacher, 2). The jury awarded Caperton with $50 million dollars and Massey appealed, and in the appeals case Justice Benjamin was filed a recusal by Caperton as there was knowledge that the president of Massey donated to him $3 million dollars for his judicial campaign (Bassett, Perschbacher, 2). Justice Benjamin refused the recusal, not just once, but two additional times when Caperton was awarded two additional rehearings (Bassett, Perschbacher, 2). The case was then taken on to the Supreme Court, in which Caperton argued that Justice
Benjamin’s participation in the case was against the Due Process Clause and West Virginia law (Bassett, Perschbacher, 2). In a 5 to 4 vote, the Supreme Court reasoned that “Blankenship’s [Massey] campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case,” and that “there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal (Bassett, Perschbacher, 2).” However, the 4 dissenters took the view that “probability of bias” was the factor and that it was not a case of extreme facts, and that the finality of the decision will “erode public confidence in judicial impartiality (Bassett, Perschbacher, 3).” Bassett and Perschbacher deny the dissent’s argument as valid saying that “The Roberts dissent embraces an almost indefensible position (Bassett, Perschbacher, 3).”

The authors then explain the three bases of authority for judicial-disqualification motions, one being the disregard of the Due Process clause and constitutionality, two being the codes of judicial conduct (ABA’s Model Code, and Code of Conduct for United States Judges, and three being state statues (focusing on Sections 47, 144, and 448 of Title 28 of US Code for Federal Judges) (Bassett, Perschbacher, 4-5). They do not focus upon the Due Process Clause authority as it is rare case for constitutionality and the Supreme Court to get involved at all, but focus on the language of the codes of judicial conduct and the state statues. The ABA Model and Code of Conduct both relay that a judge should not conduct in way that undermines the integrity, public confidence, and impartiality of the judicial system, but differ in language when speaking about how to test for bias or impropriety (Bassett, Perschbacher, 4). While the ABA Model says “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality…” while the Code of Conduct requires “knowledge of all the relevant circumstances disclose by a reasonable inquiry (Bassett, Perschbacher, 4-5).” This, I believe, is the most important and
convincing piece to the author’s argument as they argue that the Code of Conduct asks for full and complete information, which undermines the idea that appearances are based on perceptions of impropriety and that the Code of Conduct is too strong of a defense against a recusal (Bassett, Perschbacher, 11). The author’s then mainly focus upon section 455, a statue that applies to federal appellate judges as well as district court judges that says "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned (Bassett, Perschbacher, 5).” The author’s believe this statue to be too broadly stated and believe the federal approach to judicial disqualification, legally and legislatively, relies too extensively upon a judge's self-policing instead of a constitutionally authorized procedure (Bassett, Perschbacher, 5).

After the legal and legislative standards for recusal were addressed, the authors referred to four additional issues that arise in the US judicial system that undermines recusals. First is word play in which lawyers and judges use various literature and law to substitute their own interpretations of the law in the boundaries of the system. Justice Benjamin used this extensively applying it to the state code of judicial conduct saying, "specifically applies to activities or conduct of the judge, ... not activities or conduct of third-parties or litigants which are outside the judge's control” and "succinctly dispel any contention that appearance-based judging should supersede judging based on actualities (Bassett, Perschbacher, 7).” The authors argue that such word play leads to the dismal of the ABA’s Model standard test of the “appearance of impropriety” and disables the proper recusal standard (Bassett, Perschbacher, 7). The authors then explain the importance of the “appearance of impropriety” in the issue of appearances and public perception. The authors argue that “appearances by their very nature include a perception component” and that public opinion can be used as in the reasonableness standard, as if public
perception was disregarded in the appearance-of-impropriety test, the standard would not be one of appearance but a test requiring actual proof of bias (Bassett, Perschbacher, 8). The issue of duty to sit, a pre-1974 regulation in which an assigned judge had to hear a case unless there was an unambiguous extrajudicial bias which Justice Benjamin used in his defense, is addressed rather easily by the authors as they point out that Congress abolished the doctrine to fit in mold with the ABA Model Code which had no requirement for judges even in pre-1974 (Bassett, Perschbacher, 8, 11). The final issue that is presented is psychology based issues, in which the authors point out that “a disqualification motion has the potential to antagonize the challenged judge, either consciously or subconsciously… that moving litigants and their counsel may suffer…” and that it is a human tendency to think themselves more objective, ethical, and fair and that this is a recurring problem for judges (Bassett, Perschbacher, 9). The authors state that public confidence should not be the result of a judge’s perception of being impartial but rather from the public’s perception of what is partial, and believe this failure of realizing their own human partiality creates serious problems to recusal motions and the goal of reaching impartiality in the judiciary (Bassett, Perschbacher, 9).

Bassett and Perschbacher offer several possible solutions including reforms on recusal standards and duty to sit and solutions to judges that intentionally or unconsciously reject the recusal standard. They first say that the Code of Conduct’s language should be changed to match the language of the ABA Model to create a clearer standard on “appearance of impartiality” rather than “knowledge of all the relevant circumstances disclose by a reasonable inquiry” as this presumes a complete and concrete detail of proof of bias is required rather than a perception of it, and the change would guarantee a strengthened recusal power based on public perception and therefore, a correct definition of impartiality (Bassett, Perschbacher, 10). The authors once again
bring up the issue of the duty to sit, but only repeat it to enforce the notion that such a rule was abolished long ago by Congress as it is an improper reasoning of denying a disqualification motion (Bassett, Perschbacher, 11). The authors then purpose peremptory challenges, which makes sure a new judge is assigned to hear a proceeding when a party in “district court makes and files a timely and sufficient affidavit” showing that the judge before them is likely to have personal bias or prejudice, for federal courts as well (Bassett, Perschbacher, 12). This system, the authors argue, would provide an increase in litigants’ and publics’ confidence in the judiciary, while boosting the power of a recusal motion, and not promoting judge-shopping (picking a favorable judge) as the next judge is randomly chosen. In order to address the problem of psychology and the prevailing believe of self-impartiality, the authors purpose the use of alternative or additional decision makers by multiple checks upon a recusal motion by another judge if the recusal is refused (Bassett, Perschbacher, 13). They claim that this solves the problem of the “extraordinarily limited potential for subsequent review (Bassett, Perschbacher, 13).

I agree with most of Bassett and Perschbacher’s arguments, reasoning, and solutions, but have crucial criticisms of some of their thinking. First of all, I agree with the authors’ main claim that in recusal standards the appearance of impartiality test in the ABA Model Code should be used and done with the addition of public perception, and that their solution to aligning the Code of Conduct is the correct solution. A clear cut standard should be created in all regulations of impartiality in order for there to be understanding in what seems to be a very subjective idea (impartiality, I mean). The author’s argument that “appearances by their very nature include a perception component (Bassett, Perschbacher, 7)” and that the Code of Conduct limits the power of recusal and elevates the power of the judge’s own perception of impartiality highlights the
problem of defining what impartiality is, and empowers the democratic ideal that it should be defined by the people. However, their idea that impartiality should stay more subjective than to the objectivity of a judge also limits the power of defining what impartiality is, as America itself is a diverse group of ideologies and different beliefs of what is ideal. My criticism here is then, how are judges supposed to be impartial when the appearance of impartiality seems to change every day? While I agree that democracy and fairness are ideals to strive for and that the standards should be more aligned and clear cut, the authors said themselves that “Psychological studies have repeatedly confirmed that individuals may harbor unconscious stereotypes, beliefs, biases, and prejudices (Bassett, Perschbacher, 10).” I see this as a mistake in their thinking and reasoning, as this includes other judges that are being additional decision makers for recusal motions (one of their solutions), the rest of the public who they say should be making what impartiality means through appearance. I cannot myself have created the solution for solving the impartiality of judges, define impartiality, or based on what the authors say, say what the impartiality of the public is and how that would translate to the appearance of impartiality standard in the ABA Model Code. It seems rather strange for the authors to have chosen this route of argumentation, as they write too simply about a complex problem with the help of an extremely biased case, *Caperton v. A.T. Massey Coal Co.* in which the Supreme Court already ruled as “facts of the case [being] extreme” and a problem of the Due Process Clause, which they claim is rare (Bassett, Perschbacher, 2). Self-perceptions and partiality, if defined as an all-humans-inclusive quality as the authors have done, cannot be a criticism created for just judges on reducing the power of recusals. However, the authors do a fine job of pointing the issues of word play and the duty to sit, offering simple technical solutions, such as aligning of ABA’s Model Code to the Code of the Conduct so judges cannot word play as much, and reemphasizing
that Congress already abolished the duty to sit. These technical solutions I agree with completely, as they are simply improvement on definitions that go a long way in solving limiting factors to recusal power. The best solution the authors offer is that the peremptory challenge provision of the district courts should be utilized in federal courts as well, and I fully back this solution as well for 3 main reasons. First, the authors state that it was Congress’s intention before section 144’s recodification to make a judicial peremptory challenge for the federal courts, which means the system was/is working in the district court systems and therefore proves to be a stable and reliable system to upkeep recusal power (Bassett, Perschbacher, 12). Second, this solution boosts exactly the standards of both ABA Model Code and the Code of Conduct that a judge should conduct in a matter that maintains the integrity and impartiality of the judiciary, and boosts litigants and public confidence in the impartiality of the judiciary. The authors show that there are limits to recusals and standards to them in this process as they must be “timely and sufficient affidavit(s),” and shows they must be legitimate in order to disqualify a judge (Bassett, Perschbacher, 12). The solution encourages responsible recusal motions, while still allowing a party to pursue impartiality without the decision of qualification of impartiality being solely in the hands of the judge. Third, the authors show that the greatest argument against the judicial peremptory challenge provision being used in federal courts, judge-shopping, is null because the next judge is random and can be more or less biased against the party that asked for disqualification. However, even the opportunity of a party to disqualify a judge with sufficient evidence and having even the chance of getting a less impartial judge makes the process fairer than it is done in the present system in which you might be stuck with an impartial judge.
In conclusion, the authors address what their opinion of unjust limits of recusal motions are, well by providing sufficient evidence and solutions. However, they make generalizations on human psychology that they cannot use to complement their argument, as it affects all humans.

Citations: