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Where Lies the Emperor’s Robe?
An Inquiry into the Problem of
Judicial Legitimacy

I. Why Judicial Legitimacy Matters and Why It Is
Difficult to Define 1102

II. Narratives of Problematic Judicial Conduct 1109

 A. Roland Amundson 1109

 B. Sol Wachtler..... 1110

 C. Walter Steed 1111

 D. Roy Moore..... 1112

 E. Antonin Scalia 1113

III. The Problem of Interpreting Components of Judicial
Legitimacy..... 1114

 A. Compliance with the Law 1114

 B. Impartiality 1122

 C. Avoiding the Appearance of Impropriety 1126

IV. The Promise of Community Values and Narratives in
Defining Judicial Legitimacy 1134

 A. Facts..... 1136

 B. Interpretation 1141

 C. Community 1143

 D. Judge Hunter Revisited 1147

Conclusion 1150

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“Hurricane Katrina took his house . . . and . . . his faith in the way his city treats poor people facing criminal charges.”¹ This particular glimpse of New Orleans’s tattered legal system post-Hurricane Katrina describes neither a public defender nor a professional political activist, but a judge, Arthur L. Hunter, Jr.² Nearly a year after the storm, hundreds of incarcerated defendants “had no access to lawyers . . . because the public defender system [was] desperately short of money and staffing, without a computer system or files or even a list of clients.”³

Judge Hunter, a criminal court judge, responded to the crisis in a way that would, for better and worse, bring him national attention: “[He] let some of the defendants without lawyers out of jail. He . . . suspended prosecutions in most cases involving public defenders. And, alone among a dozen criminal court judges, he . . . granted a petition to free a prisoner facing serious charges without counsel, and is considering others.”⁴ Judge Hunter justified his unorthodox approach to the situation by claiming that it was “his duty under the Constitution” and that his conscience demanded it: “Something need[ed] to be done, it’s that simple . . . I’m the lightning rod, yes.”⁵

While some local jurists supported Judge Hunter’s stand,⁶ others strongly disagreed. The local district attorney’s office objected to Judge Hunter’s policy, arguing that it did more harm than good.⁷ Said Assistant District Attorney David S. Pipes,

¹ Leslie Eaton, *Judge Steps in for Poor Inmates Without Justice*, N.Y. TIMES, May 23, 2006, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* (internal quotation marks omitted). Among Judge Hunter’s numerous declarations of disgust at the plight of local criminal defendants, one stands out for its passionate conviction: “Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking in the basic professional standards of legal representation and a mockery of what criminal justice should be in a Western civilized nation.” Laura Parker, *New Orleans Judge May Free Dozens*, USA TODAY, Apr. 2, 2007, at 3A (internal quotation marks omitted).

⁶ For example, Judge Calvin Johnson, chief judge of the criminal court in New Orleans, applauded Judge Hunter’s position: “‘You have to have some guy out there rattling the saber, absolutely,’ Judge Johnson said. ‘I think the message was loud, clear and necessary.’” Eaton, *supra* note 1.

⁷ *Id.*

“The proper solution for someone who does not have an attorney is to get them an attorney. Releasing them does not cure anything and does not protect their rights.”⁸ Pipes was especially critical of Judge Hunter for considering the release of a man who had been arrested ten times since 1990 and had “pleaded guilty to previous drug and theft charges.”⁹ This only compounded local prosecutors’ opinion of Judge Hunter as “being too soft on defendants, and of having too high an acquittal rate in nonjury trials.”¹⁰

From the standpoint of judicial ethics, how are we to assess Judge Hunter’s conduct? More precisely, does his behavior enhance or undermine his credibility and the public’s trust in the judicial system?

One might argue that Judge Hunter is dangerously activist, taking the law into his own hands simply to prove a point. Thus, the judge creates the appearance of impropriety by failing to comply with his judicial duty to follow established, if imperfect, procedures, and by departing from the ideal of judicial impartiality by favoring the putative rights of criminal defendants over the safety of a community riddled with crime.¹¹

On the other hand, one might argue that Judge Hunter is, as he insists, acting to ensure the constitutionality of criminal procedures and to do justice under uniquely difficult circumstances. In this way the judge promotes confidence in the judiciary, by actually complying with the law and by trying impartially to balance defendants’ rights and community safety.

Alternatively, one might view Judge Hunter’s conduct from a kind of middle perspective. While he may have pushed the boundaries of rules and standards of judicial ethics, his treatment of criminal defendants in this situation is at least somewhat justified because he is acting out of laudable personal conviction.

⁸ *Id.* (internal quotation marks omitted).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Ann M. Simmons, *Judge on Offensive Against Poor Defense*, L.A. TIMES, June 27, 2007, at A12 (describing New Orleans as “a city battling record levels of violent crime”). According to the president of Victims and Citizens Against Crime, Beverly Siemssen, whose daughter was murdered in 1990, “The community is in outrage. . . . What’s he solving by doing this, other than releasing people to commit crimes again?” *Id.* (internal quotation marks omitted).

In short, one might see Judge Hunter as morally admirable despite his civil disobedience.

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

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

[C]ritics accuse Hunter of grandstanding and using the issue to play politics.

"It is improper for the judge to use his position as a judge in a thinly veiled publicity stunt to generate media attention," said Rafael Goyeneche, president of the Metropolitan Crime Commission, a citizens' watchdog group in Louisiana. "It is an inappropriate abuse of his judicial authority to pursue a political agenda in this way."¹²

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

African-American judge, Arthur Hunter Jr. of Orleans Parish is a typical African-American token. This idiot judge knows that what they are doing in New Orleans to poor people is wrong and illegal but he does it anyway. Poor black people that look like him are being lynched and held in death cells without so much as a phone call! This judge talks big but dose [*sic*] not manifest not one drop of constitutional respect or backbone. He keeps making threats to not hold poor people captive when they do not have any public defenders but it never really happens. What are you afraid of Judge Hunter? I

¹² *Id.*

mean, you got the Constitution to back you up or is [sic] you planning on Uncle Tomming it for your entire judicial career? Judge Hunter should know that when these citizens start litigating against the Federal Government it will be his black butt that will get demonized by history. These white judges could care less about poor black people being held in makeshift American concentration camp like Tribunals!¹³

Judge Hunter's public excoriation is representative of the larger, national phenomenon of serious partisan attacks on judges.

The focal point of such highly politicized public battles is the national judiciary's fundamental independence, the precious quality that distinguishes the judicial from the executive and legislative branches of government. Examples of such controversies include politicians' pious calls for political retribution in response to embattled judicial decisions (e.g., in the Terri Schiavo case);¹⁴ recent state ballot initiatives calling for "Jail-4 Judges" who do not render decisions ideologically

¹³ Ted Duplessis, *Corrupt Judge Hunter in New Orleans Corrupt Court System*, CREOLE FOLKS, Oct. 15, 2006, http://creoleneworleans.typepad.com/creole_folks/2006/10/token_judge_hun.html.

¹⁴ See, e.g., Tim Harper, *Republican Leader Warns Judges: You Will Answer for This*, TORONTO STAR, Apr. 1, 2005, at A04. The day after forty-one-year-old Terry Schiavo died following the removal of her feeding tube two weeks earlier, the majority leader of the U.S. House of Representatives, Republican Tom DeLay of Texas, blamed various state and federal judges for her death. See *id.* At different stages of a prolonged battle over control of Schiavo's life support, Florida state judges had ordered the removal of her feeding tube in accordance with her husband's decision as Terry's legal guardian, and the Florida Supreme Court, the U.S. Court of Appeals for the Eleventh Circuit, and the U.S. Supreme Court refused to hear appeals. See *Bush v. Schiavo*, 885 So.2d 321 (Fla. 2004), *cert. denied* 543 U.S. 1121 (2005). DeLay claimed that Congress had

shirked its responsibility to hold the judiciary accountable. No longer.

We will look at an arrogant, out of control, unaccountable judiciary that thumbed their nose at the Congress and president when given jurisdiction to hear this case anew and look at all the facts . . . The time will come for the men responsible for this to answer for their behavior . . .

Harper, *supra* (first omission in original). For a succinct summary of the complicated legal story that ended with Terry Schiavo's death, see *Terri Schiavo Has Died*, CNN.COM, Mar. 31, 2005, <http://www.cnn.com/2005/LAW/03/31/schiavo/index.html>. To read DeLay's impassioned remarks to the conservative Family Research Council on March 18, 2005, claiming that the judicially sanctioned death of Terri Schiavo was part of a broad attack on religious conservatives, see Karen Tumulty, *Tom DeLay: "It Is More Than Just Terri Schiavo,"* TIME.COM, Mar. 23, 2005, <http://www.time.com/time/nation/article/0,8599,1040968,00.html>. For a critique of Tom DeLay's conduct in the Terri Schiavo spectacle, see William Saletan, *Deathbed Conversion: The Lesson of Tom DeLay's Mortal Hypocrisy*, SLATE, Mar. 28, 2005, <http://www.slate.com/id/2115879/>.

satisfactory to some groups;¹⁵ the beleaguered and nearly intractable confirmation process for federal judges;¹⁶ and the legacy of *Bush v. Gore*,¹⁷ which left many Americans convinced that the judiciary is not the impartial branch it once was, or should be.¹⁸

Yet such examples of the judiciary's embattled cultural status obscure the problem at the root of the situation: there is no consensus on what judicial legitimacy *means*. Precisely what makes courts and judges worth respecting, trusting, and obeying is unclear. Moreover, if the embattled status of the judiciary is

¹⁵ See Stephanie Francis Ward, *Referendum Results Are No End to the Battles*, A.B.A. J. E-REPORT, Nov. 10, 2006.

¹⁶ See, e.g., Peter Baker, *Alito Nomination Sets Stage for Ideological Battle*, WASH. POST, Nov. 1, 2005, at A1; *Critics, Supporters Battle over Roberts*, CNN.COM, Aug. 25, 2005, <http://www.cnn.com/2005/POLITICS/08/24/roberts.nomination/index.html>; T.R. Goldman, *With Alito Nomination, Interest Groups Brace for the Battle Royal*, LAW.COM, Nov. 11, 2005, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1131640458045>.

¹⁷ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁸ Retired Supreme Court Justice Sandra Day O'Connor recently warned of the perils of undermining the independence of the judiciary. In a surprisingly candid speech at Georgetown University on March 9, 2006, Justice O'Connor

took aim at Republican leaders whose repeated denunciations of the courts for alleged liberal bias could, she said, be contributing to a climate of violence against judges.

Ms O'Connor, nominated by Ronald Reagan as the first woman supreme court justice, declared: "We must be ever-vigilant against those who would strong-arm the judiciary."

She pointed to autocracies in the developing world and former Communist countries as lessons on where interference with the judiciary might lead. "It takes a lot of degeneration before a country falls into dictatorship, but we should avoid these ends by avoiding these beginnings."

Julian Borger, *Former Top Judge Says US Risks Edging Near to Dictatorship*, GUARDIAN (London), Mar. 13, 2006, at 19. Justice O'Connor also directly rebuked DeLay for having called for the impeachment of the judges involved in the Terri Schiavo case, arguing that such accusations "pose a direct threat to our constitutional freedom." *Id.* (internal quotation marks omitted). She then reminded her audience of the inherent relationship between judicial legitimacy and the public perception of judges: "Statutes and constitutions do not protect judicial independence—people do." *Id.* (internal quotation marks omitted); see also Blaine Harden, *O'Connor Bemoans Hill Rancor at Judges*, WASH. POST, July 22, 2005, at A15 ("In all of the years of my life, I don't think I have ever seen relations as strained as they are now between the judiciary and some members of Congress. It makes me very sad to see it." (quoting Sandra Day O'Connor, Former Ass. Justice, Supreme Court of the United States)); Sandra Day O'Connor, Former Ass. Justice, Supreme Court of the United States, Remarks at the Arab Judicial Forum: The Importance of Judicial Independence (Sept. 15, 2003), available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm>.

symptomatic of uncertainty and disagreement about the meaning of judicial legitimacy itself, then that uncertainty also surrounds the principles that constitute judicial legitimacy and thus collectively anchor our judicial system. Among these supporting (and overlapping) principles are legal compliance, impartiality, and—the product of these first two—avoiding the appearance of impropriety.

Part I of this Article explores the concept of judicial legitimacy and why it tends to remain difficult to apprehend clearly, like the riverbed of a deep, rushing river. As suggested above, exploring the difficulty of defining judicial legitimacy requires the interpretation of at least three key components: (1) judicial compliance with the law; (2) judicial impartiality; and (3) judicial avoidance of the appearance of impropriety. Part II illustrates these three core components by invoking past and current narratives of putative judicial misconduct.

Scrutinizing these examples, Part III explains how two closely related defects, vagueness and indeterminacy, prevent, like the shifting currents of that rushing river, clear apprehension and thus meaningful discussion of judicial legitimacy and its core components. Those components remain vague because, generally, they are not considered in factual context; such lack of factual context results in indeterminacy as the public has difficulty interpreting the meaning of basic terms of judicial legitimacy. The conceptual debates and judicial narratives examined in this Article reveal that the degree to which the public perceives that judges honor the three components largely determines the public's confidence in the judiciary and thus consolidates the public's sense of the meaning of judicial legitimacy.

Finally, Part IV moves beyond diagnosing symptoms of the difficulty of defining judicial legitimacy and offers a partial antidote: discussion of *community values and narratives*, undervalued aspects in the calculus of judicial legitimacy. The specific ways in which different communities, informed by their cultural, religious, economic, racial, ethnic, and other values, function as “the public” in any given judicial controversy significantly affects the shape and quality of judicial legitimacy. Given the increasing diversity of cultural perspectives in American life, the public perception of the judiciary actually is

the sum of innumerable perceptions, each representing a different way of evaluating judicial conduct.

Part IV concludes that focusing on community values and narratives is one concrete way to address the vagueness and indeterminacy that obstruct a clear definition of judicial legitimacy. While focusing on community values and narratives for purposes of interpretation is far from a complete or ideal way to refine public conversation and understanding about judicial legitimacy, such an approach nonetheless enables us to avoid the superficiality that characterizes much of the public conversation about the judiciary.

I

WHY JUDICIAL LEGITIMACY MATTERS AND WHY IT IS DIFFICULT TO DEFINE

Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the *sine qua non* of our common law system.¹⁹

¹⁹ See, e.g., Ronald J. Krotoszynski, Jr., *The New Legal Process: Games People Play and the Quest for Legitimate Judicial Decision Making*, 77 WASH. U. L.Q. 993, 998–1010 (1999); Alain A. Levasseur, *Legitimacy of Judges*, 50 AM. J. COMP. L. 43, 45–50 (2002). To trace the jurisprudential archeology of judicial legitimacy would be a massive undertaking beyond the scope of this Article, requiring sweeping historical discussion of philosophy, politics, and law. Yet the reader may find useful some general direction. For four seminal but diverse voices in the contemporary jurisprudential conversation about legitimacy and its relationship to judges and public reason, see RONALD DWORKIN, *JUSTICE IN ROBES* 198–211 (2006); MARTHA C. NUSSBAUM, *POETIC JUSTICE: THE LITERARY IMAGINATION AND PUBLIC LIFE* 67–70, 79–121 (1995); JOHN RAWLS, *THE LAW OF PEOPLES* 134–138 (1999); and JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 199–204 (1994).

For an insightful philosophical and humanistic exploration of questions of legitimacy, political authority, and justice, see PAUL RICOEUR, *THE JUST*, at VIII–XII, 102–08 (David Pellauer, trans., Univ. of Chi. Press, 2000) (1995). For a careful, postmodern discourse analysis of the rhetorical construction of legal legitimacy, see PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 175–77, 180–81, 187–88, 207 (1987). For an influential and pragmatic postmodern view of the difficulty of constructing and maintaining a stable public understanding of political and cultural legitimacy, see RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 44–69 (1989) [hereinafter RORTY, *CONTINGENCY*]. For a contemporary analysis of the relationship between public moral sentiment and Supreme Court legitimacy, see JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 1–17, 115–50 (2006).

The concept of judicial legitimacy resides at the center of the constitutional doctrine of an independent judiciary and is the primary reason why people respect and obey the law.²⁰ Thus, when the public views the judiciary as legitimate, the legitimacy of the entire legal system is nourished and strengthened. In short, if judicial independence is the lifeblood of the legal body politic, then judicial legitimacy is the immune system.

As suggested above, given the polarized public discourse about the judiciary, defining judicial legitimacy is especially important.²¹ Otherwise, a public war of unexamined, unsubstantiated, and ideologically coercive intuitions about judicial legitimacy results in a polemical situation not unlike the classic epistemological impasse between believers and nonbelievers.²² Even if diverse public notions of judicial

²⁰ See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990) (analyzing how normative factors influence public compliance with the law); Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 *DEPAUL L. REV.* 661 (2007) [hereinafter Tyler, *Does the American Public Accept the Rule of Law?*] (discussing how support for legal authority is contingent on the perceived character of those making legal decisions); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 *CRIME & JUSTICE: A REVIEW OF RESEARCH* 283 (Michael Tonry ed., 2003) (noting the importance of fairness in gaining public trust in the legal system).

²¹ A key aspect of my critique of current views of judicial legitimacy is that people tend to feel satisfied with an intuitive sense that “they know it when they see” good or bad—legitimate or illegitimate—judicial conduct. Here I am paraphrasing Justice Potter Stewart’s famous intuitive standard for identifying pornography. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). One scholarly embrace of this intuitive standard of judicial legitimacy is ROSEN, *supra* note 19, at 7–10 (arguing that “judges throughout American history have tended to maintain their democratic legitimacy . . . when they have deferred to the constitutional views of the country as a whole”). See *infra* Part IV.C.

²² Concerns about, and examples of, the embattled state of the American judiciary, see *supra* notes 14–18, suggest that a kind of cultural-religious fundamentalism has reached a remarkable level in our public discourse. By fundamentalism I mean essentially an ideology or habit of mind that reduces the morality of complex cultural matters to simplistic, binary, us-versus-them terms that directly affect the cultural legitimacy of those whose values, behavior, beliefs, and lifestyles are at issue. For example, in the context of public rhetoric about Mormon polygamy and gay marriage,

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

legitimacy should remain operative in our culture, the concrete implications of such important differences must be understood. Such realism is crucial to the health of our legal system because judicial legitimacy represents our confidence, trust, and belief in the judicial branch of government, which together provide the main reasons for obeying the law.²³

Thus the concern here is not simply whether people generally believe in the legitimacy of judges, but for what reasons and with what reservations.²⁴ What are the actual bases of judicial legitimacy? How do we interpret those basic components, not in the abstract, but in the context of actual judicial situations? As indicated above, an examination of judges' legal compliance, impartiality, and appearance of impropriety yields some of the difficulties inherent in coming to a consensus on the meaning of judicial legitimacy. Such an examination reveals the linguistically indeterminate and culturally diverse meanings that invariably affect the stability of public understanding of the building blocks of judicial legitimacy.

This complexity is compounded by, and reflects, the vague, circular, and overlapping nature of the core components of judicial legitimacy. Such conceptual entanglement is evident in two of the most authoritative sources regarding compliance, impartiality, and appearance of impropriety: the American Bar Association's Model Code of Judicial Conduct ("Model Code"),²⁵ which applies to all judges, and 28 U.S.C. § 455

legitimacy, even if . . . that rhetorical strategy expresses itself in the cloak of highly figurative language.

Gregory C. Pingree, *Rhetorical Holy War: Polygamy, Homosexuality, and the Paradox of Community and Autonomy*, 14 AM. U. J. GENDER SOC. POL'Y & L. 313, 338 (2006). For a well-developed analysis of the categorical, simplifying nature of fundamentalist rhetorical strategies, see ROBERT SCHOLES, *THE CRAFTY READER* 231 (2001) (arguing that "fundamentalist reading is always marked by shifts from the literal to the figurative—as a way of concealing conflicts").

²³ See generally Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 20 (discussing how the public's trust is dependent on rule-based decision making, respect for rights, and respect for people).

²⁴ Effectively I am arguing for enriched public conversation and literacy about the deceptively simple idea of judicial legitimacy. Oliver Wendell Holmes, Jr., is said to have memorably characterized the rewards of genuine intellectual struggle: "I would not give a fig for the simplicity this side of complexity, but I would give my life for the simplicity on the other side of complexity." Pingree, *supra* note 22, at 313 (quoting Oliver Wendell Holmes, Jr.).

²⁵ MODEL CODE OF JUDICIAL CONDUCT (2007). It is worth noting that the 2007 Model Code of Judicial Conduct is the latest version of the Model Code and "a

(“§ 455”),²⁶ which applies to federal judges. These sources define, albeit generically, the three components of judicial legitimacy and reflect the moral logic of their relationships to each other.

Canon 1 of the Model Code states: “A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”²⁷ Rule 1.2 of Canon 1, titled “Promoting Confidence in the Judiciary,” specifies that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”²⁸ Echoing this dictate, § 455 requires that “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”²⁹

In addition, Rule 1.1 of Canon 1, titled “Compliance with the Law,” states: “A judge shall comply with the law, including the Code of Judicial Conduct.”³⁰ The commentary that follows Rule 1.2 makes clear that “[p]ublic confidence in the judiciary is eroded by improper conduct”³¹ and that “[a]ctual improprieties

complete revision to the [1990] Code of Judicial Conduct” approved by the ABA House of Delegates at the February 2007 ABA meeting. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 2007–2008 ABRIDGED EDITION 505 (2007). More to the point, Canon 1 of the 2007 Model Code of Judicial Conduct “combines most of the subject matter of Canons 1 and 2 in the 1990 Code, addressing both the obligation of judges to uphold the independence, integrity, and impartiality of the judiciary and the obligation to avoid impropriety and its appearance.” *Id.* at 517.

²⁶ 28 U.S.C. § 455 (2006).

²⁷ MODEL CODE OF JUDICIAL CONDUCT Canon 1.

²⁸ MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

²⁹ § 455(a).

³⁰ MODEL CODE OF JUDICIAL CONDUCT R. 1.1.

³¹ MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 1. It appears that the drafters of the 2007 version of the Model Code sought to distinguish, at least facially, the concept of impartiality from the concept of compliance. According to the Reporters Explanation of Changes that follows Rule 1.1 of Canon 1, “[t]he former Canon [Canon 2 of the 1990 version] linked the duty to respect and comply with the law to the duty to act at all times in a manner that promoted public confidence in the independence, integrity, and impartiality of the judiciary, which the Commission regarded as distinct and discrete concepts.” Rule 1.1—Reporter’s Explanation of Changes, Explanation of Black Letter, *in* DZIENKOWSKI, *supra* note 25, at 519 n.1. This semantic strategy, whether or not effective, is consonant with

include violations of the law, court rules or provisions of this Code.”³²

Officially, the federal statute is binding and the canons of the Model Code hortatory. Nevertheless, considering these norms collectively makes sense given the special responsibilities and expectations that characterize the judge’s role in our legal system,³³ the Model Code’s status as the primary source of guidance on ethical matters for judges,³⁴ and the shared terminology of the two sources.³⁵ Indeed, the “brooding” notion of judicial legitimacy informs, and is reflected in, all existing canons, standards, rules, and statutes regarding judicial conduct.

One may rephrase these statements to more straightforwardly express their ethics³⁶ logic. First, if the public perceives the behavior of a judge to be proper (i.e., avoiding even “the appearance of impropriety”), then the public will have confidence in the integrity and impartiality of that judge, and hence in the judiciary generally. In short, to the degree enabled by that judge’s act, the public will believe that the judiciary is

my thesis that the basic components of judicial legitimacy are easily and problematically entangled.

³² MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 5.

³³ See, e.g., Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 U. ARK. LITTLE ROCK L. REV. 63, 66 (2005) (arguing that “[t]he code of judicial conduct is not simply a penal provision, threatening judges with the possibility of disciplinary sanction, but an important reminder to them of the ethical foundations of their role in a free society”).

³⁴ State courts also rely on these principles when determining judicial misconduct. *Id.*

³⁵ Of course, the distinction between an official exhortation and a binding rule or statute is significant, and such distinctions are relevant here insofar as they influence how the public perceives judicial conduct and thus judicial legitimacy. Yet that concern is but one of many in the complex calculus of judicial legitimacy; hence my decision to cabin the distinction accordingly. For a fuller discussion of the distinction between binding and aspirational norms, and of the larger problem of the vagueness of both the 1990 Model Code and the language of the 2007 Code’s rule on the appearance of impropriety, see Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1338–44 (2006).

³⁶ Here I use the term “ethics” mindful of the meaning of its classical Greek root, *ethos*. In Aristotle’s paradigm of the “three appeals” (including *logos*, the appeal to reason, and *pathos*, the appeal to emotion) that constitute the structure of a persuasive strategy by rhetorical means, *ethos* generally is understood as the appeal to the audience’s sense of the credibility of the speaker, or, in terms of contemporary principles of judicial ethics, the public’s confidence in the integrity, impartiality, and fairness of the judge. See EDWARD P. J. CORBETT, *CLASSICAL RHETORIC FOR THE MODERN STUDENT* 37–94 (3d ed. 1990).

legitimate. Next, in order for a judge to avoid even the appearance of impropriety, let alone impropriety itself,³⁷ the judge must comply with the law and otherwise act in ways that convince the public of his impartiality. For example, the judge must avoid partisan political or discriminatory affiliations and endorsements, must not maintain personal interests that may conflict with his work as a neutral arbiter of disputes, and so on.³⁸

The discrete and overlapping parts of each component of judicial legitimacy may be seen in a rough syllogism. If a judge obeys the law, and acts impartially, then a judge will have avoided the appearance of impropriety. Each of these three parts gives the public reason to believe in the trustworthiness of the judiciary, although in the language of the Model Code, the compliance and impartiality components seem substantially to add up to the appearance of impropriety. Given the structure of the Model Code, the appearance of impartiality in turn seems to be the primary portal through which a judge reaches that public trust. And maintaining the appearance of impropriety through its constituent parts is how a judge keeps hold of that public trust. This dynamic between the judge and the public could be called the judicial legitimacy process.

Because this entire process is ongoing and changeable, and because each of the parts of the process overlaps significantly with every other part and is difficult to define out of factual context, the metaphor of a dynamic, evolving matrix is useful. The political, social, and cultural dimensions are inherently factual, concrete, and embedded within their defining community contexts. Similarly, a common sense logic characterizes the matrix and underscores a coherent, if general, lesson: if the public perceives that judges behave according to the special standards that make judges worthy of extraordinary respect and trust, then judges will enjoy the benefit of a public that generally chooses to obey the law and to defer to judicial decisions.

³⁷ Often these are one and the same for the public, which generally is not privy to the judge's subjective state of mind.

³⁸ See MODEL CODE OF JUDICIAL CONDUCT R. 2.2, 2.4, 3.1, 3.6, 3.7, 3.11–3.13 (2007).

Yet this basic logic of judicial legitimacy, and the complex matrix that it stands for, require concrete demonstration in order to be accessible and meaningful to the public. In other words, examples of judicial conduct—narratives of judicial legitimacy, so to speak—are necessary to address the vagueness and indeterminacy of compliance, impartiality, and the appearance of impropriety.

One possible step toward making the concrete distinctions that can help clarify the vague and indeterminate terms of judicial legitimacy is implicit in the Commentary to Canon 1 of the Model Code. The Commentary elaborates on the special ethical standards to which judges must conform if they are to maintain public confidence: “A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.”³⁹ The notion that judges must live⁴⁰ by higher ethical standards is a step toward defining specifically what constitutes judicial legitimacy because it circumscribes the conduct of judges and thus provides a focus for comparing the particular actions of judges to general behavior.

Absent such a specific factual context, this comparative ethical perspective would amount to shifting the same indeterminate standards to a different conceptual plane; simply characterizing the obligations of judicial conduct as uniquely demanding provides little if any further understanding of what the components of judicial legitimacy actually *mean* in terms of the experience and understanding of the general public. Thus examining judicial conduct in specific factual context actually helps refine the public’s tendency to simplify or generalize meanings of the components of judicial legitimacy, a phenomenon rooted in the common notion that people “know judicial legitimacy when they see it.”⁴¹ Indeed, what may seem intuitively clear about the meaning of judicial legitimacy is perforce illusory insofar as each of us is informed by a different configuration of background, experience, belief, cultural identity, and so on.

³⁹ MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 2.

⁴⁰ The Commentary to the Model Code makes clear that Canon 1 “applies to both the professional and personal conduct of a judge.” *Id.* cmt. 1.

⁴¹ *See supra* note 21.

II

NARRATIVES OF PROBLEMATIC JUDICIAL CONDUCT

Several brief narratives of judicial misconduct demonstrate the diversity of perspectives on the meaning of judicial legitimacy and its components. These stories, along with the case of Judge Hunter, help show that judicial legitimacy is more accurately understood as a nuanced continuum of factually embedded perspectives than as a fixed categorical concept.

A. Roland Amundson

In 2001, Minnesota Court of Appeals Judge Roland “Rolly” Amundson was convicted of taking \$400,000 over several years from a trust fund he oversaw for a woman with severely limited mental capacity.⁴² This was “money he spent on marble floors and a piano for his house as well as model trains, sculpture and china service for 80, all bought on eBay.”⁴³ For his crime, Amundson received an extended prison sentence of sixty-nine months.⁴⁴ The trial judge imposed the unusually harsh sentence in part because of Amundson’s own judicial record of imposing tougher-than-recommended prison sentences, regardless of any mitigating personal circumstances in the felon’s background.⁴⁵

Amundson has offered various explanations for his crime, including “suffer[ing] from bipolar disorder,” even though as a judge, Amundson “had written an opinion rejecting psychological factors as mitigating.”⁴⁶ Amundson also has suggested that “he wanted to be caught. ‘I was tired of being Rolly Amundson, tired of being at everybody’s beck and call, just tired This was my vehicle to end it all.’”⁴⁷ Amundson’s critics believe that he has not truly changed in prison.⁴⁸ Amundson, however, claims that he has gained transformative insight from his experiences: “Judges can say they have no idea

⁴² Kate Zernike, *A Fallen Judge Rethinks Crime and Punishment*, N.Y. TIMES, Jan. 13, 2006, at A1.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

what's going on in prison But if you know what's going on and you still are callous, God help you.”⁴⁹

B. Sol Wachtler

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

In November 1992, he was New York state's chief judge and a rising star in the Republican party, famed for his monstrous ego, his political ambition, and his jousts with Gov. Mario Cuomo. Then he was arrested for stalking his former mistress, Joy Silverman, and charged with extortion, interstate racketeering, and blackmail, among other crimes. Wachtler had written her harassing letters in the guise of a fictional alter ego, and mailed a condom to her young daughter. The judge claimed mental incapacitation: Jilted by Silverman, he'd succumbed to a manic depression that was exacerbated by an addiction to prescription amphetamines. Wachtler pled guilty to sending threats through the mail. In September 1993—less than a year after he'd presided over New York's Court of Appeals—the 63-year-old first-time⁵⁰ offender began serving an 11-month term in federal prison.

Wachtler has devoted much of his time since his release from prison trying to rehabilitate his image and to atone, on the public stage, for his criminal acts. Also, Wachtler has argued that mental illness substantially caused his behavior and has linked this argument to his hope for forgiveness:

“One would assume that now that my depression, manic behavior, and causal toxicity (caused by the drugs I was taking) have been evaluated and confirmed by the government's own medical experts here at Butner [prison], there would be some understanding by the public—not forgiveness, but some understanding. That will not happen. There will always be those who will refuse to accept the fact that a person can function in what appears to be a normal fashion in his or her job, and still suffer from a mental disorder.”⁵¹

⁴⁹ *Id.*

⁵⁰ David Plotz, *Judicial Restraint: Sol Wachtler's Worthy Sentiments on Prison*, SLATE, Apr. 16, 1997, <http://www.slate.com/toolbar.aspx?action=print&id=2976>.

⁵¹ *Id.* (quoting SOL WACHTLER, *AFTER THE MADNESS* (2003)).

C. *Walter Steed*

Until 2005, Walter Steed had served for roughly twenty-five years as a judge in the town of Hildale in Washington County, Utah.⁵² Appointed by the Hildale City Council in 1980 to the part-time job of municipal court justice, Steed's primary judicial duties consisted of handling class B misdemeanors, such as DUI and marijuana possession cases.⁵³ Unlike state district court judges, Steed did not face retention elections; rather, he was reappointed periodically by the Hildale City Council.⁵⁴

Steed belongs to the Fundamentalist Church of Jesus Christ of Latter-Day Saints, a fringe Mormon sect that, unlike the mainstream L.D.S. church, continues to embrace the nineteenth-century Mormon practice of polygamy.⁵⁵ In 1965, Steed legally married one woman; in 1975 and 1985, he was "sealed in religious ceremonies" to two other women.⁵⁶ "All were adults and entered the situation knowing the subsequent relationships would not be recognized as state-sanctioned marriages."⁵⁷

Notwithstanding Steed's illegal conduct, "neither the Utah attorney general nor the Washington County attorney chose to prosecute" him.⁵⁸ However, in February 2005, the Utah Supreme Court affirmed the Utah Judicial Conduct Commission's recommendation that Steed be removed from the bench.⁵⁹ Steed has never tried to hide his polygamy, arguing that "he has taken three wives as a religious practice and that his lifestyle has no effect on his fairness as a judge."⁶⁰ Further, Steed contends that, unlike the hypocrisy of married people who

⁵² Linda Thomson, *Justice May Be Disbarred*, DESERET MORNING NEWS (Salt Lake City, Utah), Nov. 3, 2005, at B01.

⁵³ *See id.*

⁵⁴ *See id.*; *see also* Pamela Manson, *Court Gets to Rule on Polygamy, Judgeship*, SALT LAKE TRIB., Nov. 3, 2005, at A1.

⁵⁵ *See* RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY*, at vii (2d ed. 1992) (defining "[p]olygamy, or more precisely polygyny, [as] the marriage of two or more women to one man"). As in most states, the Utah statute that Steed violated prohibited bigamy, literally the marriage of one man and two women; however, antibigamy laws generally are used to prosecute all plural marriages.

⁵⁶ Thomson, *supra* note 52.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *In re Inquiry of a Judge, Honorable Walter K. Steed*, 2006 UT 10, ¶ 7, 131 P.3d 231.

⁶⁰ Manson, *supra* note 54.

do not remain faithful to their spouses, he practices plural marriage devotedly: “Which is worse, a monogamist who doesn’t monog or a polygamist who really polygs?”⁶¹ Janet Jessop, one of Steed’s three wives, has “described Steed as a wonderful husband and father and [has] said that ‘everyone likes to live their religion and do what they think is right.’”⁶²

D. Roy Moore

Roy Moore, the former Chief Justice of the Alabama Supreme Court, was removed from office by “Alabama’s judicial ethics panel . . . for defying a federal judge’s order to move a Ten Commandments monument from the state Supreme Court building” in which he presided.⁶³ The panel, consisting of judges, lawyers, and nonlawyers, concluded that “Moore put himself above the law by ‘willfully and publicly’ flouting the [federal court] order.”⁶⁴ Moore was supported by a strong majority of the national public,⁶⁵ and his battle to keep the Ten Commandments in the courthouse and to remain a judge became a rallying point for conservative Christians.⁶⁶

Moore argued that his civil disobedience was justified—even required—because America is a country based on Judeo-Christian values, notwithstanding the First Amendment’s doctrine of separation of church and state. Proclaimed Moore, “The issue is: Can the state acknowledge God?’ . . . ‘If this state can’t acknowledge God, then other states can’t. . . . And eventually, the United States of America . . . will not be able to acknowledge the very source of our rights and liberties and the very source of our law.’”⁶⁷ Unlike Steed, Moore believed his judicial conduct was perfectly legal; he asserted that the federal court ordering him to remove the monument was violating the

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Ten Commandments Judge Removed from Office*, CNN.COM, Nov. 14, 2003, <http://www.cnn.com/2003/LAW/11/13/moore.tencommandments>.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Moore claimed that “‘God has chosen this time and this place so we can save our country and save our courts for our children.’” *Id.*

⁶⁷ *Judge Suspended over Ten Commandments Ethics Complaint*, CNN.COM, Aug. 23, 2003, <http://www.cnn.com/2003/LAW/08/22/ten.commandments> (second and third omissions in original).

law. “‘When a court order departs from the law and tells you what you can think and who you can believe in,’ [Moore] said, the judge issuing that order is ‘telling you to violate your oath. And he can’t do that. Judges simply don’t have that power.’”⁶⁸

E. Antonin Scalia

Supreme Court Justice Antonin Scalia has created controversy in recent years for a number of actions and statements that have characterized his growing stridency as a member of the Court. For example, when asked at a Boston church whether his religion affects his judicial decisions, he “‘placed his fingertips under his chin and flicked them outward,” a gesture many consider undignified, if not obscene.⁶⁹ Speaking to a meeting of the Federalist Society, Justice Scalia “‘dismissed those who believe that the Constitution is a living document that evolves over time. ‘You would have to be an idiot to believe that.’”⁷⁰

Justice Scalia has defended his controversial decision not to recuse himself from a case involving Vice President Dick Cheney after he and Cheney went on a hunting trip.⁷¹ During a visit to the University of Connecticut, Justice Scalia remarked that “‘I think the proudest thing I have done on the bench is not allow myself to be chased off that case.’”⁷² He has made seemingly partisan statements about the result in *Bush v. Gore*.⁷³ During a speech in Switzerland, Justice Scalia remarked that if all the votes the Democrats wanted counted in the 2000 presidential election “‘were indeed counted, ‘[t]hey would have lost anyway.’”⁷⁴ Responding in the same speech to a question about the legitimacy of the Court’s ruling that gave George W. Bush the presidency, Scalia retorted, “‘Oh God. Get over it.’”⁷⁵

⁶⁸ *Id.*

⁶⁹ Adam Cohen, Op-Ed., *Reining In Justice Scalia*, N.Y. TIMES, Apr. 26, 2006, http://select.nytimes.com/2006/04/26/opinion/26talkingpoints.html?_r=1&oref=slogin. Peter Smith, who took the now-famous photo of the gesture, observed that “‘when Justice Scalia made the gesture he also uttered an obscenity in Italian.” *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

III

THE PROBLEM OF INTERPRETING COMPONENTS OF JUDICIAL
LEGITIMACY

We can highlight important vagueness and indeterminacy problems by drawing on the examples of judicial conduct described above, as well as by raising a classic argument about neutrality and a current argument about the appearance of impropriety. Each component presents the interpretive challenges of vagueness and indeterminacy in unique ways, making the sum of those components—the meaning of judicial legitimacy—vulnerable to significant instability.

A. Compliance with the Law

In terms of judicial legitimacy, compliance is the notion that judges themselves must obey the law in order to credibly adjudicate allegedly unlawful conduct within the general population. The compliance component of judicial legitimacy would seem to be the least susceptible to vagueness and indeterminacy: either a judge complies with the law or she does not. Indeed, compliance is arguably the most basic and broadly agreed upon component of judicial legitimacy. Compliance seems intuitively obvious, as conveyed in clichés like “practice what you preach.” Moreover, as the Model Code makes clear, judges are held strictly to this standard of conduct.⁷⁶ We justifiably may expect more of judges than of members of the executive and legislative branches of government,⁷⁷ who frequently and with impunity declare: “Do as I say, not as I do.”⁷⁸

⁷⁶ MODEL CODE OF JUDICIAL CONDUCT R. 1.1 (2007); MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 2 (“A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.”).

⁷⁷ See, e.g., ROSEN, *supra* note 19, at 13–14. Insofar as this anecdotal impression is accurate, to expect judges to comply strictly and fully with the law as written—whether the Constitution, federal and state laws, or model rules of judicial conduct—is implicitly to affirm the transcendent role of the judiciary in our democracy. Yet even so straightforward a component of judicial legitimacy as legal compliance is not immune from the problems of vagueness and indeterminacy.

⁷⁸ For purposes of this discussion, I take as a given that all judges and elected officials take an oath to uphold the law. Were this not a universal requirement of members of all three branches of government, analyzing that distinction would make sense.

In many situations, the judge's violation of the law is patent and undeniable. For example, Amundson, Wachtler, and Steed indisputably violated the laws of fraud, harassment, and polygamy, respectively. Yet in more complex situations, reasonable questions arise from both sides of the compliance standard. For example, Moore was removed from the bench for violating a federal court order, a violation of the law distinct from the straightforward illegality of Amundson or Wachtler. In assessing Moore's legitimacy as a judge, the public might consider his violation of a court order and removal by an ethics panel less problematic than if he had broken a legislatively enacted statute, since ostensibly the latter more directly reflects public values.

Conversely, although Steed clearly violated Utah's antibigamy statute, local prosecutors chose not to bring criminal charges against him, deciding instead to rely on the state supreme court to affirm the state Judicial Conduct Commission's recommendation that Steed be removed from the bench.⁷⁹ Public feeling about Steed's departure from the bench would depend on several factors, including the perceived gravity of the judge's clear violation of a law and the more relative, negotiable legitimacy of an ethics panel's disciplinary action versus a criminal prosecution.

Moreover, Judge Hunter appears to have violated no specific positive law regarding the handling of criminal defendants in New Orleans. Thus, one must assess Hunter's compliance in light of more ambiguous, open-ended laws, such as the Fourth and Fifth Amendments of the Constitution and the "appearance

⁷⁹ See Thomson, *supra* note 52 (noting that "laws against bigamy and, by extension, polygamy, have rarely been enforced [in Utah] for the past 50 years"). That "neither the Utah attorney general nor the Washington County attorney chose to prosecute Steed," *id.*, reflects the cultural dilemma faced by prosecutors in a state dominated by one religion, Mormonism, with a rich and controversial history of polygamy. See, e.g., SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA* 147–81 (2002); JON KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 12 (2003); JOHN R. LLEWELLYN, *POLYGAMY UNDER ATTACK: FROM TOM GREEN TO BRIAN DAVID MITCHELL* 109–43 (2004); JAN SHIPPS, *MORMONISM: THE STORY OF A NEW RELIGIOUS TRADITION* 145 (1987); VAN WAGONER, *supra* note 55, at 284–99; Armand L. Mauss, *Assimilation and Ambivalence: The Mormon Reaction to Americanization*, *DIALOGUE: J. MORMON THOUGHT*, Spring 1989, at 30, 33–35; see also *infra* Part IV.

of impropriety” standard expressed in 28 U.S.C. § 455.⁸⁰ Except in settled areas of clear precedent, these laws are more difficult to interpret and apply than, say, a law against shoplifting. Much of this ambiguity stems from the greater factual complexity of both constitutional conflicts and accusations of the appearance of judicial impropriety.

Hence, analyzing even judicial compliance is not always straightforward. Probing the relationship between judicial compliance and judicial legitimacy is more complex still, because legitimacy depends on more than mere compliance; legality and legitimacy are not coterminous. Beyond this threshold ambiguity, other factors further complicate any assessment of judicial compliance as a building block of judicial legitimacy.

First, one must distinguish between a judge’s professional conduct that violates the law, such as when a judge refuses to adhere to congressionally mandated federal sentencing guidelines, and a judge’s personal conduct that violates the law, such as when a judge exceeds the speed limit while driving. For example, Amundson’s abuse of his judicial position in misappropriating a trustee’s funds differs from Wachtler’s personal (and ultimately criminal) vendetta against his former lover. More precisely, Moore’s refusal to remove the Ten Commandments monument, an act of noncompliance made in his capacity as Chief Justice of the Alabama Supreme Court, is distinct from Steed’s violation of Utah’s antibigamy statute, an ongoing crime committed outside of his judicial role.⁸¹

Both kinds of noncompliance present challenges to the judge’s legitimacy, but in importantly different ways. If a judge refuses

⁸⁰ 28 U.S.C. § 455 (2006).

⁸¹ Again, Rule 1.2 makes clear that judges are to maintain all standards of judicial conduct, including compliance, in both their personal and professional lives. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 1 (2007). But because the purpose of this Article is to probe components and factors that collectively substantiate the Model Code’s broader provisions, I emphasize this and other distinctions. These distinctions are integral to my argument that the Model Code’s broad standards are not nearly specific enough to provide sufficient interpretive traction for purposes of assessing judicial legitimacy. See Rotunda, *supra* note 35, at 1340–44; Alex Kozinski, *The Appearance of Propriety*, LEGAL AFFAIRS, Jan.–Feb. 2005, at 19, 19. *But see* Gray, *supra* note 33, 65–66 (arguing that “the [appearance of impropriety] standard is not too vague to follow and . . . given their power and prestige, requiring judges to consider the implications of their conduct for public confidence in the judiciary is not too much to ask and, indeed, is a responsibility most judges readily assume”).

to adhere to federal sentencing guidelines, then the public may rightfully conclude that the judge is unwilling to uphold her oath to faithfully *administer* the laws of the land. If a judge refuses to drive within the established speed limit, then the public may perceive that the judge is unwilling to uphold her oath to faithfully *obey* the laws of the land. Notwithstanding inevitable differences in how various communities may interpret these two actions to be judicially illegitimate, the first situation exemplifies a kind of professional misconduct; the second, a personal exercise of illegal behavior.

Next, *why* a judge chooses illegal behavior may affect public perception of a judge's noncompliance. For instance, when a judge refuses to impose a congressionally mandated prison sentence because the judge finds the sentence disproportionate to the crime and thus not in the interests of justice, then the public may perceive that the judge is engaging in a kind of civil disobedience on moral grounds. This is noncompliance of the sort that many people may tolerate or even respect, especially given the moral legitimacy that history has conferred on lawbreakers such as Thoreau, Gandhi, and Martin Luther King, Jr. Steed violated criminal law, and both Steed and Moore defied judicial ethics standards in order to serve their own religious principles. Some parts of the public (the small fundamentalist polygamist part in Steed's case; a majority of Americans in Moore's⁸²) would consider the two judges' civil disobedience admirable.

Still, engaging in civil disobedience, however noble the cause, is arguably more problematic for a judge than for a social or religious activist. Social and religious activists ostensibly serve a cause higher than the law of the state. In contrast, the judge, while privately entitled to her personal, nonlegal ideals and convictions, professionally must make compliance with the law her primary loyalty.⁸³

⁸² See *supra* notes 65–66 and accompanying text.

⁸³ In affirming the Utah Judicial Conduct Commission's recommendation that Judge Steed be removed from the bench, the Utah Supreme Court stated:

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

Thus judicial legitimacy is not necessarily identical to moral legitimacy. If a judge, who must exemplify and evaluate the legality of human conduct, behaves morally but illegally, the judge's legitimacy *as a judge* will be undermined in the eyes of many people, notwithstanding that the behavior may be morally laudable. This divide between a judge's legal and moral legitimacy further complicates the notion of compliance. Moreover, for those who believe that moral conduct trumps legal conduct on particular issues (e.g., abortion), Judge Moore's or Judge Steed's defiance of the law actually may *enhance* those judges' judicial legitimacy.⁸⁴

Notwithstanding these complicating factors, as a general matter a judge's noncompliance with the law will be perceived as an illegitimate act, whereas compliance with the law will enhance the judge's judicial legitimacy. But as illustrated above, even this most straightforward basis for judicial legitimacy suffers from the dual problems of vagueness and indeterminacy, the dimensions of which are especially challenging in a morally pluralistic society.

As already mentioned, two kinds of judicial noncompliance are administrative disobedience (e.g., a judge not following mandated federal sentencing guidelines) and general legal disobedience (e.g., a judge exceeding the speed limit while driving). These may be characterized, respectively, as explicitly abusing judicial power or authority—*judicially* not complying

In re Inquiry of a Judge, Honorable Walter K. Steed, 2006 UT 10, ¶ 6, 131 P.3d 232.

⁸⁴ Such conflation reflects the underlying debate about the relationship between law and morality that always have been central to Western jurisprudence. A salient modern example is the debate between natural law theorists and positive law advocates over the "separation thesis" asserted in different ways by positivists such as H.L.A. Hart. *See, e.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 79–88 (1961).

Ironically, the deontological conflation of judicial and moral legitimacy (i.e., a natural law perspective) embraced by supporters of Judge Moore or Judge Steed is somewhat analogous to a utilitarian argument commonly put forth in discussions of legal ethics. According to that argument, attorneys who represent their clients aggressively but within the rules of professional conduct are acting morally, because our adversarial system yields the greatest justice for the most people when every attorney plays her role as a zealous advocate. In this "role morality" view, the morality of the individual attorney is based on the morality of the larger system in which the attorney properly plays her part, despite public distaste for the idea that attorneys act as hired guns, and even though other moral considerations may have to be sacrificed. *See, e.g.*, Alan Donagan, *Justifying Legal Practice in the Adversary System*, in *THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS* 123, 130 (David Luban ed., 1984).

with the law—and simply failing to live by standards required of the general public. Additionally, in the eyes of the public, there may be important moral differences between a judge breaking the law for selfish or malicious reasons and a judge breaking the law because of personal conscience.

Thus there are at least two axes of evaluation of the morality of a judge's illegal conduct. One axis determines whether the illegal conduct is judicial or personal conduct; the other axis determines whether the illegal conduct is morally indefensible or justifiable.⁸⁵ Again, a matrix is a useful metaphor for identifying and organizing different aspects of judicial legitimacy. Consider how several of the judicial narratives detailed above are situated on the matrix of noncompliance mapped in Table 1.

⁸⁵ This analysis applies only to noncompliance defined as *illegal* conduct. Obviously there are many instances of judicial conduct that arguably violate nonlegal (or at least nonbinding) norms and standards of ethical behavior. One of the difficulties in evaluating Judge Hunter's conduct is that it seems to fall on this border; one could characterize his conduct in three ways: (1) the conduct is strictly illegal because it violates the "appearance of impropriety" standard of 28 U.S.C. § 455; (2) the conduct is possibly illegal because it violates Canon 2 of the Model Code, which, while not binding law, is a source of legal authority; or (3) the conduct is legal, but unethical generally under the standards of the Model Code or the norms of public sentiment.

TABLE 1
MATRIX OF JUDICIAL NONCOMPLIANCE

	Noncompliance Without Moral Justification	Noncompliance with Moral Justification
Judicial Noncompliance	<i>Judge Roland Amundson:</i> Abusing judicial power by stealing funds from a vulnerable person's trust fund and spending the money on personal goods	<i>Judge Roy Moore:</i> Refusing to remove a stone replica of the Ten Commandments from his courthouse because of religious convictions about America's Christian foundations
Personal Noncompliance	<i>Judge Sol Wachtler:</i> Harassing a former lover	<i>Judge Walter Steed:</i> Refusing to stop practicing polygamy because of personal religious convictions

Of these four categories of judicial noncompliance, Judge Hunter's contested approach to releasing criminal defendants belongs under "Judicial Noncompliance with Moral Justification;" Hunter's conduct was judicial rather than personal and was driven by his moral convictions about the representation and treatment of prisoners.

As prosecutors correctly gambled, the public condemned Amundson's and Wachtler's noncompliance as the abuse of judicial power, which unequivocally undermines judicial legitimacy. Driven by lust, revenge, and greed, the misconduct of Amundson and Wachtler could be considered a kind of

“external” noncompliance. Their actions were external to arguably acceptable public values or beliefs and thus not viable in any sense as bases for judicial legitimacy. Such cases of external noncompliance are two-dimensional in the sense that they are morally binary and easily evaluated for their essential wrongness. Thus they unequivocally detract from judicial legitimacy.

By comparison, Moore’s and Steed’s species of noncompliance is more complex relative to public sentiment. Both Moore’s Christian militancy and Steed’s open practice of polygamy are strongly if not overwhelmingly supported locally, as the judges’ communities share their religious values and thus admire them for their civil disobedience. In at least this local sense,⁸⁶ the judges’ illegal conduct probably did not undermine, and possibly enriched, their judicial legitimacy within their geographic and culturally interpretive communities.⁸⁷

Here we see a kind of “internal” noncompliance. A legal transgression is motivated by personal religious conviction, a quality that many people admire.⁸⁸ Such noncompliance is internal in that it reflects basic personal values that are enmeshed within the larger moral matrix of most Americans, however differently each person’s matrix may be configured. Extending my spatial metaphor for various kinds of noncompliance, internal noncompliance is morally three-dimensional: complex and ambiguous regarding both personal and communal values and loyalties.

⁸⁶ Moore’s support is more expansive since devout Christian America extends well beyond Alabama’s state lines.

⁸⁷ Of course, even some fervent moral or religious supporters of Moore and Steed probably feel some ambivalence about the judges’ injudicious actions. Such supporters’ loyalty to personal religious values may conflict with their general loyalty to the rule of law, whether constitutionally enshrined or legislatively enacted. As both Rosen and Tyler remind us, this reverence for legality runs deep in the American character. See ROSEN, *supra* note 19, at 7 (arguing that “successful judicial decisions must be accepted by the country as being rooted in constitutional principles rather than political expediency”); Tyler, *Does the American Public Accept the Rule of Law?*, *supra* note 20, at 692 (concluding that “Americans are strongly committed to the ideas enshrined in the concept of the rule of law”). This seeming paradox underscores my point that indeterminacy (here in the form of moral ambiguity within and between interpretive communities) infuses all aspects of judicial legitimacy, in this instance the rule of law.

⁸⁸ This general assumption, however, is limited by any number of exceptions that run counter to mainstream American values, such as the personal convictions of Satanists, atheists, and so on.

Justice Scalia's acts of noncompliance, to the extent that they qualify as such, represent a kind of middle ground on the spectrum of judicial noncompliance. His alleged violations of federal statutory and judicial ethics rules relate to the highly ambiguous, contested notion of "the appearance of impropriety." This concept lies at the heart of judicial ethics and is especially susceptible to diverse linguistic and cultural community interpretations. However, one might argue that this particular ethical parameter is the most directly concerned with public perception of the character of judges, and thus is most relevant to the idea of judicial legitimacy.

The foregoing exploration of the conceptual contours and interpretive complexities of compliance demonstrates the difficulty of defining satisfactorily even the most straightforward of the three components of judicial legitimacy under discussion in this Article. The other components, impartiality and appearance of impropriety, are even more difficult to interpret, our intuitions about them notwithstanding. Thus, rather than anatomize these components as I have with compliance, I will explore them in the more nuanced context of important past and present debates about their meaning and value.

B. Impartiality

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

Wechsler initiated a debate about the promise and possibility of judicial neutrality in his provocative 1959 article, *Toward Neutral Principles of Constitutional Law*.⁸⁹ The ensuing scholarly debate over Wechsler's argument for neutral principles was driven by the critique that neutrality was simply too vague to provide meaningful traction for judges attempting to find stable principles of constitutional interpretation. Consider, for example, Arthur Miller's and Ronald Howell's early critique of Wechsler's argument:

Neutrality, if it means anything, can only refer to the thought processes of identifiable human beings. Principles cannot be neutral or biased or prejudiced or impersonal—obviously. The choices that are made by judges in constitutional cases always involve value consequences, thus making value choice unavoidable. The principles which judges employ in projecting their choices to the future, or in explaining them, must also refer to such value alternatives, if given empirical reference.⁹⁰

Wechsler himself largely had avoided the formidable task of defining neutral principles.⁹¹

In one instance, however, he responded to his critics with a caveat “that he had no intention of denying that constitutional provisions protected certain values.”⁹² Indeed, Wechsler emphasized that those values should

“be determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim. So too, when there is conflict among values having constitutional protection . . . I argue that the principle of resolution must be neutral in a comparable sense. . . . Issues of federalism, for example, such as those involved in the interpretation of the commerce clause, may not be made to turn on the material interest that is affected, be it that of labor or of management, producers or consumers, or whatever other faction is at bar.”⁹³

⁸⁹ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16–20 (1959) [hereinafter Wechsler, *Toward Neutral Principles*].

⁹⁰ Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664 (1960).

⁹¹ See WALTER F. MURPHY & C. HERMAN PRITCHETT, *COURTS, JUDGES, AND POLITICS: AN INTRODUCTION TO THE JUDICIAL PROCESS* 606 (4th ed. 1986).

⁹² *Id.*

⁹³ *Id.* at 606–07 (quoting HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* xiii–xiv (1961) [hereinafter WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW*] (omissions in original)).

Wechsler's response reflects a kind of amorphous truism of judicial interpretation, his labor-management example notwithstanding.

Few if any judges would deny that they hew to the ideal of neutrality generally, but neither would most deny that, for better or worse, values play an indisputable role in adjudication. As Murphy and Pritchett point out,

Wechsler's formula finds heady support in the rhetoric of judicial opinions. All judges like to think themselves neutral between the parties to a case, though few would be so naïve as to claim neutrality between those values they see the law as protecting and those they think it condemns. Yet . . . there is no doubt that judges, while speaking Wechsler's script, have often acted according to Miller and Howell's scenario. To seek is not always to find.⁹⁴

It is difficult, if not impossible, to know exactly where a particular judge resides on the continuum running from the "romantic appeal"⁹⁵ of absolute judicial neutrality to the conviction that courts are utterly political⁹⁶ ("naked power organ[s]," in Wechsler's phrase⁹⁷).

But in the end, precisely because of the romantic appeal of judging—and being seen to judge—neutrally, many judges tend to evade "facing how determinations of this kind [political and value-driven] can be asserted to have any legal quality."⁹⁸ And Wechsler's famous answer, for all its debated limitations, is useful in returning us to the problem of indeterminacy in deciding what a principle is or means: "The answer, I suggest, inheres primarily in that [judges] are—or are obliged to be—entirely *principled*."⁹⁹

This brief discussion of the Wechslerian neutrality debate illustrates several points endemic to the difficulty of interpreting

⁹⁴ *Id.* at 607.

⁹⁵ *Id.* at 606.

⁹⁶ The idea that judges and courts, and more generally the law, are to some degree political is arguably the primary theme that has characterized Legal Realism and its progeny, such as critical legal studies, critical race theory, feminist legal theory, and postmodern legal theory. See generally *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., rev. ed. 1990) (collecting essays using progressive theories to critique the law).

⁹⁷ Wechsler, *Toward Neutral Principles*, *supra* note 89, at 12.

⁹⁸ *Id.* at 19.

⁹⁹ *Id.* (emphasis added).

the ideal of impartiality in the context of judicial ethics. First, Wechsler's claim for the possibility of neutral principles immediately met charges of vagueness and indeterminacy. As Murphy and Pritchett observed, all judges embrace the vague ideal of being neutral, a great virtue generally articulated in abstract form.¹⁰⁰ Yet as with impartiality, neutrality, notwithstanding its tremendous appeal as an ideal, remains *in fact* in the eye of the beholder. It behooves us to accept this reality and move to the more useful task of trying to refine and situate the meaning(s) of the impartiality ideal in the contexts of specific community and cultural situations. This approach does not take away from the value of the ideal; rather, it more genuinely respects that ideal by attempting to give it real meaning rather than lofty but relatively unusable appeal.¹⁰¹

Second, and especially relevant to the factual grounding and context-sensitivity of community standards, Wechsler's argument lacks factual context, remaining a seductive abstraction. To be fair, Wechsler acknowledges that "when there is conflict among values having constitutional protection . . . I argue the principle of resolution must be neutral in a comparable sense."¹⁰² But Wechsler, much like the Model Code, at best offers generic hypotheticals, not actual conflicts within actual cultural communities, to buttress his standard.¹⁰³

Third, Wechsler formulated a proxy for judicial legitimacy—"principledness"—that, for all of its intuitive appeal and jurisprudential longevity, defers the hard question of what exactly judicial legitimacy means to the public. What is it to be principled? Does not this term, both grammatically and conceptually, require an object—i.e., principled about *what*?

¹⁰⁰ See MURPHY & PRITCHETT, *supra* note 91, at 606.

¹⁰¹ See Gregory C. Pingree, *Afterword: Toward Stable Principles and Useful Hegemonies*, 78 CHI.-KENT L. REV. 807, 808 n.3 ("To view skeptically the dogma of pure legal neutrality is crucially different from recognizing, relying on, even embracing the *ideal* of neutrality (along with other jurisprudential ideals such as objectivity, truth finding, etc.) as a necessary fiction for purposes of achieving a social order that is as just, fair, and democratic as possible. Vital to consequential legal analysis, it seems to me, is the *quality* of one's self-consciousness about this difference . . .").

¹⁰² MURPHY & PRITCHETT, *supra* note 91, at 606–07 (quoting WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW, *supra* note 93, at xiii–xiv) (omission in original).

¹⁰³ See *id.* This point is expanded upon in the discussion of the promise of community standards. See *infra* Part IV.

Similarly, in implicitly defining judicial legitimacy, the Model Code offers only general, even tautological,¹⁰⁴ ideals, exhorting judges to act in ways that promote “public confidence in the independence, integrity, and impartiality of the judiciary.”¹⁰⁵

Hence, Wechsler’s primary achievement was to reframe and thus defer his question—whether neutral principles are possible and identifiable—in so sophisticated and engaging a way that a sense of interpretive perspective, if not grounding, seemed to emerge. But as many legal scholars have since wondered, what grounding did Wechsler really offer?¹⁰⁶ As Part IV of the Article argues, developing a more concrete approach to community standards is one step toward making good on the promise of interpretive traction that Wechsler offers.

C. *Avoiding the Appearance of Impropriety*

As suggested above, the appearance of impropriety standard is the great catch-all standard among many catch-all standards in the regime of legal ethics. This makes sense in light of the centrality of judicial legitimacy within the judicial ethics system, for the appearance of impropriety standard concerns entirely the public’s perception of judges. Thus it is not surprising that this component of judicial legitimacy suffers more than any other

¹⁰⁴ For example, the Model Code offers the following guidance for determining whether a judge’s conduct promotes confidence in the judiciary: “Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. *Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.*” MODEL CODE OF JUDICIAL CONDUCT R. 1.2 cmt. 3 (2007) (emphasis added). The drafters of Rule 1.2 seem to believe that providing *any* concrete touchstone for imagining the judicial conduct in question will only distort, rather than clarify, the intended meaning of the Rule. Further, consider how the commentary to Rule 1.2 literally recycles key terms and phrases in its attempt to articulate a meaningful definition of the appearance of impropriety: “The test for appearance of impropriety is 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, temperament, or fitness to serve as a judge.” *Id.* cmt. 5. To the extent that the terms deployed in this definition are combined in varying ways throughout the Model Code to define each other, the reader will have difficulty gaining interpretive traction and thus meaningful illumination about what role the notion of “avoiding the appearance of impropriety” plays in defining judicial legitimacy.

¹⁰⁵ MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

¹⁰⁶ See, e.g., Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217, 219 (2003).

from problems of vagueness, indeterminacy, and the public's temptation simply to trust general intuitions about what it means for a judge to behave properly.¹⁰⁷

Legal scholars have highlighted the difficulty of interpreting this component of judicial legitimacy. One current example is the legal ethicist Ronald Rotunda. Although Rotunda does not focus expressly on the issue of judicial legitimacy, his concern about how vagueness and indeterminacy lead to the abuse of the appearance of impropriety standard implies a deep interest in how the public perceives judges. Thus his perspective helps clarify my argument by friendly comparison.

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

We sometimes think, loosely, that ethics is good and that therefore more is better than less. But more is not better than less, if the "more" exacts higher costs, measured in terms of vague rules that impose unnecessary and excessive burdens. Overly-vague ethics rules impose costs on the judicial system and the litigants,¹⁰⁸ which we should consider when determining whether to impose ill-defined and indefinite ethics prohibitions on judges.¹⁰⁹

Rotunda urges vigilance about the dangers of vagueness in the language of the Model Code, especially in the Code's open-ended articulation of the appearance of impropriety standard.¹¹⁰ In Rotunda's view, such a generically expressed but central standard invites excessive, unfair accusations against judges.¹¹¹ Such accusations damage judges' reputations and open judges to all manner of charges that carry the feel of legitimacy for having invoked the general phrase "appearance of impropriety."¹¹² In linking the vagueness of the appearance of impropriety standard to the broad phenomenon of attacks on judges' character (from

¹⁰⁷ The special challenge of making the appearance of impropriety standard more manageable than in the past is illustrated by the ABA's extensive debate over whether and how to revise the standard. *See infra* notes 118–26 and accompanying text.

¹⁰⁸ Here the author cited two cases, including *Simonson v. General Motors Corp.*, 425 F. Supp. 574, 578 (E.D. Pa. 1976) (discussing a judicial obligation not to recuse without valid reason because of the burden such recusal places on fellow judges).

¹⁰⁹ Rotunda, *supra* note 35, at 1338.

¹¹⁰ *See id.* at 1339.

¹¹¹ *See id.*

¹¹² *Id.*

the bar, litigants, the media, and political factions of the public), Rotunda's argument is consonant with the thesis of this Article.

Rotunda especially is concerned with the dynamics of public perception of judges. He rightly identifies the appearance of impropriety standard as susceptible to great abuse and thus potentially dangerous to judicial legitimacy; he argues that vague, imprecise standards of judicial conduct enable disgruntled political voices to attack judges in ways that undermine judicial legitimacy:

Today, any lawyer or member of the media can flippantly accuse a judge of violating "the appearance of impropriety" in either his or her private or official capacity because the title of Canon 2 of the ABA Model Code of Judicial Conduct boldly tells us that the judge must avoid such appearances.¹¹³

Rotunda illustrates his point by distinguishing the amorphous appearance of impropriety standard from the equal protection doctrine. He observes that "[w]hat is true of equal protection is not true of judicial ethics" in that the equal protection doctrine legitimately can be applied broadly because, even though "[a]ll laws make distinctions and so the lawyer can always allege that the distinction violated equal protection," "[t]he Court responded to the problem by defining equal protection with care, and creating types of equal protection."¹¹⁴ Thus Rotunda argues that the appearance of impropriety standard ought to be a doctrine made up of specific rules and categories of conduct, which would give the judicial ethics system the concreteness necessary to deal fairly and precisely with diverse questions of judicial misconduct.¹¹⁵ Under the current regime, such questions fit indiscriminately under the floppy umbrella of "appearance of impropriety."¹¹⁶

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.* at 1375–77.

¹¹⁶ *See id.* at 1344–51. Rotunda offers a useful metaphor to characterize the current situation:

Hurling the charge of "appearance of impropriety" . . . is like using a blunderbuss. Nowadays, we might describe a blunderbuss as a weapon of terror. It was not a very precise weapon, and marksmen never used it. Instead, it was good for crowd control, when the goal was to shoot multiple balls simultaneously in the hope of hitting something. The ABA has chosen to arm any lawyer or any pundit with the equivalent of a blunderbuss to attack a judge by giving its imprimatur to a charge of

Although Rotunda's critique of the broad manipulability of the Model Code's impropriety standard focuses on the 1990 version, his jeremiad portends the American Bar Association's recent struggle over whether and how to make the 2007 impropriety standard more specific, especially given the American bar's concern about the increasingly embattled status of the judiciary.¹¹⁷ The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, appointed in 2003, labored to create "explicit rules as benchmarks for conduct, in place of general statements either admonishing against forms of misconduct or exhorting judges to behave in certain ways."¹¹⁸

Indeed, the Commission's proposals, presented for consideration in February 2007 to the ABA House of Delegates, were "intended to provide clear guidance for judges regarding their professional and personal conduct and to assure the public that effective standards exist to regulate that conduct."¹¹⁹

However, the proposals met with "[a] flurry of controversy over the appearance-of-impropriety standard," which "threatened to derail the project just one week before the delegates met."¹²⁰

According to the commentary to Canon 1 of the 2007 Model Code,

At the center of the Commission's deliberations . . . was the "appearance of impropriety." The discussions reflected two competing tensions. On the one hand, a primary purpose of the Code is to advise and inspire judges to adhere to the highest standards of ethical conduct. To preserve public confidence in the courts, it is not enough that judges avoid actual improprieties; they must avoid the appearance of impropriety as well. On the other hand, another purpose of the Rules is to serve as a basis for discipline. To discipline

violating the "appearances of impropriety." The attack on the judge's ethics seldom results in discipline or disqualification, but it does serve to besmirch and tarnish a judge's reputation.

Id. at 1341.

¹¹⁷ See *supra* notes 14–18.

¹¹⁸ Press Release, Am. Bar Ass'n, ABA Commission Releases Proposals to Revise Model Judicial Code to Guide Judges' Conduct, Assure Public Accountability (Oct. 31, 2006), http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid=43.

¹¹⁹ *Id.*

¹²⁰ Elizabeth J. Cohen, *ABA Revamps Its Model Judicial Code After Amendment Satisfies Most Critics*, 23 LAW. MANUAL PROF. CONDUCT 93 (2007).

judges for appearing to act improperly—even if they did not act improperly in fact—was considered by some commentators to raise due process issues because of the potential vagueness of the term “impropriety.”¹²¹

As the commentary indicates, the Commission’s primary concern was to preserve general guidance about the appearance of impropriety while enacting change sufficient to provide a clearer standard for disciplining judges who in fact *act* improperly.

The Commission’s extensive efforts notwithstanding, approval of the entire revised Model Code “appeared in doubt . . . until proponents agreed to a last-minute amendment preserving from the previous [1990] code an *enforceable* standard directing judges to avoid conduct that has the appearance of impropriety.”¹²² Indeed, over the arguments of several proponents of the new, more specific standard,¹²³ on February 6, 2007, “the National Conference of Chief Justices . . . voted to oppose the commission’s report unless the appearance-of-impropriety language was returned to its *enforceable* status.”¹²⁴

Ultimately, the Commission’s solution was something of a Solomonic compromise: to conflate the first two canons of the 1990 version¹²⁵ to form a new Canon 1 that preserves the traditional, “enforceable” standard governing impropriety while presumably establishing a more specific disciplinary standard in

¹²¹ Canon 1—Reporters Explanation of Changes, Explanation of Black Letter, in DZIENKOWSKI, *supra* note 25, at 518 n.3.

¹²² Cohen, *supra* note 120 (emphasis added).

¹²³ Representing the Association of Professional Responsibility Lawyers, Ronald Minkoff of New York

argued that eventually the appearance-of-impropriety standard would be eliminated from the code so that judges will be protected against vague standards. “A well-defined set of rules will be the wave of the future,” he said.

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

Id.

¹²⁴ *Id.* (emphasis added).

¹²⁵ Canon 1—Reporters Explanation of Changes, Explanation of Black Letter, in DZIENKOWSKI, *supra* note 25, at 517 n.1.

Rule 1.2 of Canon 1 in order to address actually improper judicial behavior.¹²⁶

In the end, then, the “enforceability” concern was invoked to justify both the new Canon’s general appearance of impropriety language and the corresponding disciplinary language of the Canon’s Rule 1.2, which addresses actual improper conduct. As the commentary to Canon 1 of the 2007 version of the Model Code summarizes:

Urgings from legal organizations and the judiciary led the Commission to accept an amendment . . . that reinstated the obligation of a judge to avoid impropriety and the appearance of impropriety as black letter Rule 1.2. With an *enforceable rule* thus ‘on the books,’ any objections to the non-enforceability of the Canons were withdrawn¹²⁷

Yet this new configuration of the crucial impropriety concept, a broad canon containing an exhortation to avoid the appearance of impropriety followed by an ostensibly more narrow rule to enforce the idea of proper judicial conduct, is mere (and minimal) rearrangement of the same vague, indeterminate words and phrases as contained in the 1990 Model Code.¹²⁸ The portions of the new Canon and the new Rule relevant to impropriety are *literally identical*: “A judge . . . shall avoid impropriety and the appearance of impropriety.”¹²⁹ The language qualifying these identical exhortations differs slightly¹³⁰ with the Canon urging judges to “uphold and promote the independence, integrity, and impartiality of the judiciary”¹³¹ and the Rule requiring that a judge “shall act at all times in a manner

¹²⁶ *Id.* at 518 n.3.

¹²⁷ *Id.* (emphasis added).

¹²⁸ See MODEL CODE OF JUDICIAL CONDUCT, Canon 1, 2 (1990).

¹²⁹ MODEL CODE OF JUDICIAL CONDUCT, Canon 1 (2007); MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

¹³⁰ Canon 1 states in full: “A judge shall *uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.*” MODEL CODE OF JUDICIAL CONDUCT Canon 1 (emphasis added). Rule 1.2 states in full: “A judge shall *act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.*” MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (emphasis added).

¹³¹ MODEL CODE OF JUDICIAL CONDUCT Canon 1.

that promotes public confidence in the independence, integrity, and impartiality of the judiciary.”¹³²

There may be a useful difference between the Canon’s exhortation to “uphold and promote” and the Rule’s requirement to “act at all times in a manner that promotes public confidence in” the values of “independence, integrity, and impartiality.”¹³³ But that difference is remarkably slight, and it effectively disappears upon close reading: the Canon merely *implies* that judges act in ways that enhance public confidence in the judiciary, while the Rule explicitly states that such desirable judicial conduct be pursued “at all times in a manner that promotes public confidence.”¹³⁴

Indeed, this distinction at best identifies desirable judicial conduct in general versus slightly-less-general terms. It does nothing to clarify the meaning of “the appearance of impropriety,” the underlying concern that gave rise to the revision of the Model Code in the first place. And it is difficult to imagine how either Canon 1 or Rule 1.2 of the 2007 Model Code is any more “enforceable” than the same language, differently configured, in Canons 1 and 2 of the 1990 Model Code. Rotunda’s “blunderbuss”¹³⁵ of imprecision remains, devoid of specific rules and categories of conduct, which would give the judicial ethics system the concreteness necessary to deal fairly and precisely with diverse questions of judicial misconduct.

Moreover, the protracted ABA debate leading to the relatively useless semantic compromise discussed above reflects the profound difficulty of fashioning a satisfactorily meaningful impropriety standard. Further, the debate—and the worn, flabby standards that it produced—only underscore the continuing problem of defining the relationship between the appearance of impropriety and the notion of judicial legitimacy, let alone the attendant difficulty of understanding how judges and the general public conceive of that relationship.

Former ABA president Michael S. Greco’s tradition-bound perspective on this problem typifies the epistemological inertia

¹³² MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

¹³³ MODEL CODE OF JUDICIAL CONDUCT Canon 1; MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

¹³⁴ MODEL CODE OF JUDICIAL CONDUCT R. 1.2.

¹³⁵ Rotunda, *supra* note 35, at 1341.

that thwarts meaningful change of the kind this Article suggests. Argued Greco near the end of the Commission's deliberations:

[T]o delete the [old] provision—over the clear objection of the Conference of Chief Justices—would send the wrong signal to the public. Many groups work under standards of conduct that are similarly imprecise, he said, mentioning prohibitions against conduct “prejudicial to the administration of justice” or “unbecoming an officer.”¹³⁶

What exactly the “wrong” message would be is unclear from Greco's statement, although he seems to suggest that a shift from general exhortation to specific requirements would imply that somehow judges' usual conduct needs to be reined in.

The fear of facing realistically the limits and virtues of general ideals is likely only to further entrench the problems of vagueness and indeterminacy, problems replicated in the 2007 version of the Model Code.¹³⁷ Why not adopt a more affirmative, practical approach to interpreting judicial ethics standards, rather than the reactionary, defensive posture that seems to prevail among both judges and the ABA?

As the ABA Commission's experience makes clear, judges themselves may be the biggest obstacle to meaningful change.¹³⁸ Invoking what seems a condescending comparison of judicial knowledge to the public's understanding of the appearance of impropriety, Laurie D. Zelon,

a California court of appeal justice as well as a member of the ABA Board of Governors, has argued that judges understand what appearance of impropriety means. “Lawyers judge by outcomes;¹³⁹ the public by whether they were treated fairly,” she stated.

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

¹³⁶ Cohen, *supra* note 120.

¹³⁷ Rotunda makes the same argument. *See* Rotunda, *supra* note 35, at 1356, 1375–77.

¹³⁸ Canon 1—Reporters Explanation of Changes, Explanation of Black Letter, in DZIENKOWSKI, *supra* note 25, at 518 n.3.

¹³⁹ Cohen, *supra* note 120. This seems yet another “I know it when I see it” position on a component of judicial legitimacy.

I know there's a growing tendency to distrust judges—to craft more elaborate ethical rules and restrictions, to expand the scope of what is encompassed within the appearance of impropriety standard, to adopt better methods of intruding into judges' private lives—all in a misguided effort to promote ethical judicial behavior. But the hard truth is that few of those things really matter. Judicial ethics, where it counts, is often hidden from view, and no rule can possibly ensure ethical judicial conduct. Ultimately, there is no choice but to trust the judges. To my mind, we'd all be better off in a world with fewer rules and a more clear-cut understanding that impartiality and diligence are obligations that permeate every aspect of judicial life—obligations that each judge has the unflagging responsibility to police for himself.¹⁴⁰

Kozinski's candor is admirable, and clearly he shares Rotunda's concern that general rules governing judicial ethics pose risks of abuse, such as intrusion into judges' privacy.

Yet more relevant to this Article is Kozinski's implication that "a more clear-cut understanding" of standards such as impartiality is preferable to more rules. Kozinski seems to be gesturing (perhaps unwittingly) toward the notion that the vague intuitive standards to which we hold judges would be more meaningful were they more "clear-cut," a state of affairs that would be enabled by a better understanding of the values and circumstances of the particular community in which a judge serves. Developing more concrete standards would, Kozinski seems to imply, at least give judges more to stand on than, "you'll have to trust us," when questions of judicial legitimacy arise.

IV

THE PROMISE OF COMMUNITY VALUES AND NARRATIVES IN DEFINING JUDICIAL LEGITIMACY

Thus far, this Article has focused on the difficulty of defining and understanding judicial legitimacy, which in large part turns on the difficulty of interpreting three key components of judicial legitimacy: compliance, impartiality, and the appearance of impropriety. As explained above, the vagueness and indeterminacy that characterize attempts to achieve interpretive traction contribute significantly to the cultural symptoms of these interpretive difficulties. Such symptoms include both the

¹⁴⁰ Kozinski, *supra* note 81, at 21.

public's reliance on unexamined, intuitive notions of judicial legitimacy and the related phenomenon of the acute politicization of the judiciary.

I have emphasized the slippery circularity (and the consequent vulnerability to facile political manipulation) of central judicial ethics concepts such as impartiality and the appearance of impropriety. While there is no way to reliably "fix" the indeterminacy inherent in public discourse generally, it *is* possible to give some greater degree of determinate substance and grounding to these standards by which we judge our judges. The better we understand and account for the cultural values specific to the particular interpretive communities in which judges serve, the greater is our capacity to achieve some kind of provisional, working consensus about the meaning of the simultaneously eminent and diffuse concept of judicial legitimacy. To put it perhaps more provocatively, by thinking relatively, we can achieve at least a provisional kind of universality.

One important step toward a coherent public sense of judicial legitimacy is a coherent understanding of the particular values and concerns of each community. This is especially so in our increasingly pluralistic democracy, in which there is no coherence of values sufficient to produce reliable consensus on what makes a particular judge, under particular circumstances, legitimate. Indeed, the further one moves beyond any particular cultural community—defined by some combination of geography, religion, race, ethnicity, socioeconomic status, and so on—the more diffuse one's vision of judicial legitimacy becomes.

Therefore, before concluding whether a judge has complied with the law, acted impartially, or avoided the appearance of impropriety, and hence before determining whether the judge is legitimate to the public, we must (1) scrutinize the facts of the cultural context of each act of alleged judicial misconduct, (2) consider carefully the difficulties inherent in interpretation as a necessary but culturally mediated process, and (3) develop some useful, realistic sense of the notion of community. Each of these challenges is discussed below, and then applied to the case of Judge Hunter.

A. Facts

As with the discussion of Wechsler and neutrality-impartiality, here I resuscitate a relevant classic analysis, and a deceptively simple exercise, of the relationship between facts and law. In 1930, Arthur Goodhart wrote an influential essay about how to ascertain the principle of a case for purposes of following judicial precedent, an exercise foundational to both judicial decision making and legal education.¹⁴¹ Especially germane here is Goodhart's deductive validation of the essential role of facts in the judicial process and the implication that certain facts matter more than others.¹⁴² Goodhart's insightful analysis illuminates some of the interpretive difficulties that prevent deep understanding of the importance of facts¹⁴³ in understanding how people assess judicial legitimacy.

Many jurists and scholars have tried to elucidate compact, universal principles for deriving from a judicial opinion the singular principle of that case for purposes of guiding judges in future cases. Codifying the basis of this interpretive enterprise, sometimes called the *ratio decidendi*, has proved difficult. In attempting to anatomize precisely the best steps for discerning the principle of a case, Goodhart set forth five rules:

- (1) The principle of a case is not found in the reasons given in the opinion.
- (2) The principle is not found in the rule of law set forth in the opinion.
- (3) The principle is not necessarily found by a consideration of all the ascertainable facts of the case and the judge's decision.
- (4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them.
- (5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the

¹⁴¹ Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 169–81 (1930).

¹⁴² See *id.* at 169–73.

¹⁴³ See *id.* Given the context and purpose of his analysis, Goodhart properly focuses on *material* facts, while I argue for a greater sensitivity to *cultural* facts. But the difference is not a problematic one, and is actually useful to my argument, because my concern, like Goodhart's, is that we attend to the facts that matter in any given situation, such as the facts of certain racial and socioeconomic communities in New Orleans in the wake of a devastating storm and an inadequate system of criminal representation.

principle may depend as much on exclusion as it does on inclusion.¹⁴⁴

Strikingly, at least from the perspective of the average reader, Goodhart's first two interpretive rules exclude the two most obvious sources of that principle. Accordingly, Goodhart must have thought the language of a judge's opinion a somewhat unreliable indicator of the judge's intended meaning. Indeed, one might consider Goodhart a prescient advocate of two tenets of postmodern literary and legal theory: the assumption that language is inherently indeterminate, and the belief that meaning is constructed by and within specific interpretive communities.¹⁴⁵ These two notions effectively represent vagueness and indeterminacy, the two major challenges to defining judicial legitimacy.

Moreover, Goodhart's first two interpretive rules imply that what he sees as abstract formulations—a judge's given reasons for her decision and a legal rule that the judge believes is most relevant to resolving the dispute therein—cannot alone yield the principle of the case. Goodhart's logic suggests that the facts of the case are the critical ingredient for understanding the case's principle. Yet Goodhart's third step limits this inference, because "all of the ascertainable facts of the case," even when read in light of the judge's final decision, will not reveal¹⁴⁶ the principle of the case, which seems to become more mysterious with each step.¹⁴⁷

¹⁴⁴ *Id.* at 182.

¹⁴⁵ See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980) (establishing the notion of interpretive communities and the "Reader-Response" school of literary criticism).

¹⁴⁶ Here I use the term "reveal" to suggest that, notwithstanding his arguably postmodern reading assumptions, Goodhart seems to hold the view that the principle of a case is a buried treasure waiting to be discovered through correct, precise digging, rather than a creation of the reader's interpretive apparatus. I conclude this because of Goodhart's search-for-the-holy-grail style of characterizing the problem of finding the principle of a case.

¹⁴⁷ The contemporary playwright David Mamet refers to the "through-line" of a play: the real message, the truly intended subtext beneath the highly mediated written text, what we *mean* rather than what we *say*. DAVID SAVRAN, *IN THEIR OWN WORDS: CONTEMPORARY AMERICAN PLAYWRIGHTS* 137 (1988). Responding to an interviewer's observation that in Mamet's plays "the through-line is so strong that the characters can be saying things that are very, very different from what is really being communicated in the subtext," Mamet observed, "That's why theatre's like life, don't you think? No one really says what they mean, but they always mean what they mean." *Id.*

In his fourth rule, however, Goodhart finally states his key point: that only by scrutinizing the relationship between the judge's decision and the *material* facts of the case (ironically, perhaps, facts deemed material by the judge) can the reader find the principle of the case.¹⁴⁸ This precisely narrowed interpretive relationship—i.e., a carefully circumscribed set of facts tied in a taut, direct line to a singular resolution of the case's conflict—suggests that the reader's interpretive task in determining the overarching principle of a case consists of examining, with exquisite care, the judge's rendering of the material facts. In other words, the reader must interpret the *judge's* interpretation of what facts are material, and then must gauge exactly how the judge frames those facts in order to construct the decision.

Because several interpretive operations are at work here, the reader's provisional understanding of the judge's intended principle of the case is, at best, a significantly refracted notion. Again, it is hard not to notice the postmodern feel of Goodhart's protocols of reading judicial opinions, for Goodhart directs us to pry open the reading process to get a sense of the multiple kinds and levels of mediation at work in a judicial decision.

Goodhart's fifth rule seems to foreshadow one of postmodernism's most salient concepts, Derrida's notion of *difference*.¹⁴⁹ In this last rule Goodhart provides that "the

¹⁴⁸ Goodhart, *supra* note 141, at 182.

¹⁴⁹ See generally JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 278 (Alan Bass trans., Univ. of Chi. Press 1978) (1967) (demonstrating the process of "difference" by critiquing "logocentrism," the conventional view that written language operates in relation to some absolute, transcendent point of reference that enables specific meanings to attach reliably to specific words). For a brief but lucid explication of Derrida's critique of language, see TERRY EAGLETON, LITERARY THEORY: AN INTRODUCTION, 127–34 (1983). Eagleton observes that Derrida's views on language are in large part a response to the linguistic analyses of Ferdinand de Saussure, who posited that "meaning in language is just a matter of difference. 'Cat' is 'cat' because it is not 'cap' or 'bat.'" *Id.* at 127. Derrida sophisticates this notion of difference to an extraordinary degree. *Id.* at 132. Eagleton helpfully summarizes Derrida's probing critique of Western thought, which

has been . . . "logocentric," committed to a belief in some ultimate "word," presence, essence, truth or reality which will act as the foundation of all our thought, language and experience. It [Western thought] has yearned for the sign which will give meaning to all others—the "transcendental signifier"—and for the anchoring, unquestionable meaning to which all our signs can be seen to point (the "transcendental signified"). A great number of candidates for this role—God, the Idea, the World Spirit, the Self, substance, matter and so on—have thrust themselves forward from time to

principle [of the case] may depend as much on exclusion as it does on inclusion.”¹⁵⁰ In rules four and five, then, Goodhart emphasizes the preeminence of the relational nature of meaning, the influential postmodern notion of the “play of signification”: that nothing *means* except by reference to, and differentiation from, something else.¹⁵¹ In rule four, Goodhart embodies this notion in the requirement that the reader scrutinize the judge’s interpretation of the relationship between those carefully selected material facts and the final decision in the case; in rule five, Goodhart applies this notion to the judge’s specific sifting of material facts from nonmaterial facts.

In all of this, the rich rhetorical analysis that Goodhart compresses into five rules is resonant of Roland Barthes’ pithy postmodern characterization of the act of reading as the quintessential human cognitive activity: “And no doubt that is what reading is: rewriting the text of the work within the text of

time. Since each of these concepts hopes to *found* our whole system of thought and language, it must itself be beyond that system, untainted by its play of linguistic differences. It cannot be implicated in the very languages which it attempts to order and anchor: it must be somehow anterior to these discourses, must have existed before they did. It must be a meaning, but not like any other meaning just a product of a play of difference.

Id. at 131.

¹⁵⁰ Goodhart, *supra* note 141, at 182.

¹⁵¹ See DERRIDA, *supra* note 149, at 278–93. Elaborating on the problem of logocentrism, Derrida argues that written language cannot provide a closed system of meaning (“signification”) and thus no ultimate stability of definition. *See id.* at 280. Derrida characterizes humankind’s “finite language” as a “field [that] is in effect that of *play*, that is to say, a field of infinite substitutions only because it is finite, that is to say, because instead of being an inexhaustible field, . . . there is something missing from it: a center which arrests and grounds the play of substitutions.” *Id.* at 289. Joseph Childers and Gary Hentzi explain how “play” and “difference” operate in Derrida’s critique of language:

[T]extual meaning is not ultimately determinate or decidable, but rather always subject to the ‘play’ of *differance* within the signifying chain of language. We can see how these two senses of the word [difference] work when we look up a definition in a dictionary. On one hand words are defined according to what they are *not*, that is, how they differ from one another, which helps to delimit the possibilities of meaning. Yet that possibility of meaning is always deferred, since words are only defined by other words, which may also need definitions, ad infinitum. Even the term *differance* is itself unstable, at least in Derrida’s usage, for to fix it as a determinant concept would be to remove its force and its emphasis on indeterminacy.

THE COLUMBIA DICTIONARY OF MODERN LITERARY AND CULTURAL CRITICISM 83 (Joseph Childers & Gary Hentzi eds., 1995).

our lives.’”¹⁵² To move from Arthur Goodhart’s Legal Realist analysis of the fact-law relationship in determining the principle of a case to postmodern concepts of meaning and textuality¹⁵³ is not the conceptual stretch it may seem, for both perspectives¹⁵⁴ privilege, in their own way, the inductive process of close reading of facts as a prerequisite to the formulation of broader meanings.

To those skeptical of postmodern perspectives on the indeterminacy of language and the instability of meaning outside specific cultural contexts, the prescription presented here may seem no different from a “totality of the circumstances” standard or a “case by case” basis for evaluating judicial conduct. This is certainly true in the sense that both of these conventional legal tests share with a postmodern narrative approach an emphasis on facts over abstractions, on contextual interpretation over deductive imposition of universal rules.

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

Thus both reasonableness and legitimacy are, in law and the world it serves and regulates, necessary fictions. But whether one seeks a workable definition of reasonableness or of legitimacy, the “necessary”—i.e., pragmatic—part of these concepts requires consideration of concrete facts, individual narratives, and community values and standards in order to construct their definitions. It is not that a judge and jury cannot simply apply universal abstractions in a specific case without

¹⁵² ROBERT SCHOLES, *PROTOCOLS OF READING* 10 (1989) (quoting Roland Barthes, *Day by Day with Roland Barthes*, in *ON SIGNS* 98, 101 (Marshall Blonsky ed., 1985)).

¹⁵³ See *id.* at 1–49.

¹⁵⁴ It is with hesitation that I refer to a cluster of postmodern voices as “a perspective.”

regard to the cultural connotations of the facts of that case; surely this happens all the time, and that is largely the problem this Article addresses.

Rather, the *meaning* of the outcome of a case will carry greater legitimacy to the relevant “public” when a judge and jury carefully have considered cultural context and the community standards that reside there. Indeed, the comparison between reasonableness and legitimacy is a particularly useful one, because both seem intuitively clear, impossible to define out of specific context, yet crucial to the practical operation of the law. Moreover, reasonableness is something of a token of legitimacy, since parties in, say, a negligence action are more likely to honor the outcome (i.e., believe the disposition of the case is legitimate) if they feel confident that the judge and jury thoughtfully have attempted to assess the behavior in question against a standard of reasonableness. In this way, reasonableness, like compliance, impartiality, and the appearance of propriety, is a proxy for legitimacy.

As this discussion suggests, the axiom of the relationship between facts and principles—such as compliance, impartiality, and avoiding the appearance of impropriety—inexorably raises questions about the interpretation of those facts and principles.

B. Interpretation

A crucial but somewhat implicit component of the rhetorical production of judicial legitimacy is interpretation. Given that the components discussed above are functions of public perception, we must consider *how* public perceptions work. What are the interpretive conditions under which the public perceives and evaluates judicial conduct for purposes of determining legitimacy? To address this broad question, we must acknowledge that diverse interpretive communities constitute the larger public upon whose collective belief the general legitimacy of the judiciary rests.¹⁵⁵

These various interpretive communities are, just like individual people, fluid in their identities. Indeed, communities distinguish themselves in some respects but overlap in others,

¹⁵⁵ See generally FISH, *supra* note 145 (discussing how the shared values of a given community enable its readers to create (i.e., interpret) accessible, relatively fixed meanings in the reading of texts).

depending on complex factors such as cultural values, religious beliefs, political ideologies, social status, race, ethnicity, gender, sexual orientation, life experience, and so on. Thus, in attempting to identify or develop precise meanings of judicial legitimacy, we must take into account the increasingly diverse plurality of interpretive perspectives from which people view law and justice generally, and courts and judges in particular.

For example, Judge Steed likely would be viewed by most of the American public as illegitimate for both his noncompliance (violating antibigamy laws) and his morally troubling personal lifestyle (having multiple wives), although probably there would be more diversity of opinion on this second point. Libertarians or same-sex marriage advocates might sympathize with Steed's desire to construct his family as he sees fit.¹⁵⁶ Within Utah, the fact that many citizens' ancestors sacrificed liberty in order to practice polygamy in nineteenth-century America as part of the then mainstream Mormon religion certainly would create some sympathy for Steed, if not acceptance of his lifestyle.¹⁵⁷ Finally, the citizens of Hildale, a small, entirely fundamentalist polygamist community in southern Utah, surely would embrace Steed's polygamous conduct. Possibly they would consider him *especially* legitimate as a judge because of his courage and religious devotion in the face of legal punishment redolent of the punishments faced by their ancestors a century ago.

As this brief example shows, interpretation, which could be called the "procedural" component of judicial legitimacy, is especially important because the key terms of the components of judicial legitimacy are vague and indeterminate, and thus context sensitive. For example, given the diversity of interpretive communities regarding Steed's polygamy, what (and

¹⁵⁶ See, e.g., Steven Chapman, *Two's Company; Three's a Marriage*, SLATE, June 5, 2001, <http://slate.msn.com/toolbar.aspx?action+print&id=109334> ("With divorce rates high, out-of-wedlock births rampant, and most kids fated to spend at least some of their childhood in single-parent homes, the American family obviously has some serious problems. [Polygamist] Tom Green is not one of them."); see also STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 129 (1993) (observing that "the dominant culture" always has "rid itself" of "marginalized and violent dissenters").

¹⁵⁷ Of course, this could go the other way as well, since the hugely successful mainstream Mormon Church has publicly rejected polygamy and has excommunicated polygamists since the early twentieth century. See VAN WAGONER, *supra* note 55, at vii.

where) exactly is “the appearance of impropriety”? By whose notion of propriety? Is what it means to “comply” with the law always clear? Does it matter if compliance is different from, or in conflict with, one’s moral or ethical perspective? What is “impartiality,” what kinds of judicial behavior give the public confidence in that impartiality, and under what circumstances might that impartiality reasonably be questioned? The difficulty of answering these fundamental questions with meaningful precision represents, in the aggregate, the difficulty of precisely articulating the central idea of judicial legitimacy.

The interpretation component of judicial legitimacy, then, is actually a problem that mediates our understanding and treatment of the other components. Indeed, while it is challenge enough to define in principled, accessible ways the other components of judicial legitimacy, the component of interpretation amounts to the *process* by which we address that challenge. While the other components of judicial legitimacy are explicit in the language of the Model Code and § 455, the implicit component of public interpretation of judicial conduct is essential to the equation of judicial legitimacy articulated in Canon 2 of the Model Code.

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

C. Community

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

In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument, one way of looking at the world and at its own authority—or another. Whether or not the process is conscious, the judge seeks to persuade her reader not only of the rightness of the result reached and the propriety of the analysis used, but to her understanding of what the judge—and the law, the lawyer, and the citizen—are and should be, in short, to her conception of the kind of conversation that does and should *constitute* us. In rhetorical terms, the court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses—the lawyers, the public, and the other agencies in government. It creates by performance its own character and role and establishes a community with others. I think this is in fact the most important part of the meaning of what a court does: what it actually becomes, independently and in relation to others.¹⁵⁸

White's thoughtful vision of the normative community that judges create through their opinions is appealing in the abstract.

Yet that vision is also problematic, in its rather sweeping, essentialist premises about what constitutes a community. Indeed, various legal scholars, particularly feminist and critical race theorists, have criticized White's analysis, primarily for his tendency to generalize about a phenomenon that, by definition, requires attention to difference and nuance in terms of culture, race, gender, ethnicity, and so on. For example, Angela Harris has objected to the essentialist nature of White's claim that the "voice" of the Declaration of Independence is "not a person's voice, . . . but the "unanimous" voice of "thirteen united States" and of their "people.""¹⁵⁹ In Harris's words, "Despite its claims, however, this voice does not speak for everyone, but for a political faction trying to constitute itself as a unit of many disparate voices; its power lasts only as long as the contradictory voices remain silenced."¹⁶⁰

Another thoughtful but problematic example of the difficulty of interpreting components of judicial legitimacy is Jeffrey

¹⁵⁸ JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 101–02 (1990) (emphasis added).

¹⁵⁹ Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 582 (1990) (quoting JAMES BOYD WHITE, *WHEN WORDS LOSE THEIR MEANING* 232 (1984)).

¹⁶⁰ *Id.* at 583.

Rosen's popular recent book *The Most Democratic Branch*.¹⁶¹ Rosen argues that people's confidence in the Supreme Court rests primarily on the Court's reflection of popular moral sentiment, which itself invariably includes the idea that the justices should make their decisions in a constitutionally principled way.¹⁶² Rosen's analysis is singularly coherent and highly engaging, but his analysis of the dynamics of judicial legitimacy, like Wechsler's argument for neutral principles, lacks clear, concrete definition. Indeed, Rosen embodies the theme that this Article critiques: the notion that the public knows judicial legitimacy when it sees it.¹⁶³ Rosen's argument rests on the assumption that the reader can interpret clearly what he means when he offers his prescription for judicial legitimacy:

[J]udges throughout American history have tended to maintain their democratic legitimacy in practice when they practiced what might be called democratic constitutionalism; in other words, when they have deferred to the constitutional views of the country as a whole.¹⁶⁴

What Wechsler did with "principled neutrality," Rosen does with "democratic constitutionalism": he leans upon it heavily as a proxy for what enables judicial legitimacy. While one may argue that the notion of democratic constitutionalism is the way to better understand judicial legitimacy,¹⁶⁵ using this (or any) particular formulation without digging into its meaning in specific factual contexts does not solve the problems of

¹⁶¹ See ROSEN, *supra* note 19, at 7–10.

¹⁶² See *id.*

¹⁶³ See *supra* note 21.

¹⁶⁴ ROSEN, *supra* note 19, at 8.

¹⁶⁵ Indeed, Rosen's thorough discussion of democratic constitutionalism is engaging and persuasive as far as it goes. But in my view, Rosen ends up championing a circular argument: "My point is that judges should identify the constitutional views of the people by using whatever combination of the usual methodologies they find most reliable and then enforce those views as consistently as possible." *Id.* at 13. Thus, in order to answer the question, "What does the public find judicially legitimate?"; Rosen answers, "Just ask them." This presumption that there exists some clear national consensus on what counts as principled in the context of democratic constitutionalism—on what counts as judicial legitimacy—suffers from the same weakness as does White's otherwise appealing concept of community. Both fail to take on the Herculean but utterly necessary task of accounting for the diversity of cultural values within the many interpretive communities that constitute the larger public, a public that both White and Rosen presume, quite confidently, to speak for.

vagueness and indeterminacy, but instead simply defers them, albeit in impressively erudite fashion.

The late postmodern pragmatist philosopher Richard Rorty articulated the concept of community in ways that address the problems inherent in both White's essentialist and Rosen's vague paradigms.¹⁶⁶ Rorty's articulations are helpful in formulating more useful and meaningful definitions of judicial legitimacy, because Rorty is the rare philosopher who judges abstract principles by the concrete fruits of their application, not vice versa.¹⁶⁷

Rorty seems an ally of White in that he argues for the practical, community-forming consequences of a writer's discursive decisions, much as White argues for a judge's rhetorical, public-oriented ones.¹⁶⁸ Indeed, Rorty suggests that all who seek an ultimate or absolute truth should qualify (though not diminish) their teleological ambitions, focusing instead on the relative truth that inheres in the linguistic process of interpreting and expressing—and thereby becoming—who we are.¹⁶⁹

In this way, American judges, seekers of legal "truth" and interpreters of institutional language, operate, as White and other legal scholars have suggested, as *poets*.¹⁷⁰ In other words, the institutional, social, and cultural power of judges to "interpret" specific persons, their actions, and their legal conflicts makes judges uniquely able to help people know better who they are: contingent beings, actual people living in a particular society at a specific time and place, with idiosyncratic values, stories, and identities.¹⁷¹

Accordingly, true to his project of justifying a coherent postmodern vision of who we are, Rorty ultimately rejects the kind of essentialist view of shared knowledge and understanding

¹⁶⁶ See, e.g., RORTY, *CONTINGENCY*, *supra* note 19, at 27–28; 44–61.

¹⁶⁷ See, e.g., Richard Rorty, *First Projects, Then Principles*, *NATION*, Dec. 22, 1997, at 18, 18 [hereinafter Rorty, *First Projects, Then Principles*] (arguing that to work deductively from "first principles" toward concrete political actions is far less effective in addressing social problems than to invest in specific political "projects" and work inductively from there toward establishing good principles).

¹⁶⁸ See RORTY, *CONTINGENCY*, *supra* note 19, at 44–61.

¹⁶⁹ See *id.* at 26–28.

¹⁷⁰ See NUSSBAUM, *supra* note 19, at 79–121; WHITE, *supra* note 158, at 101–02.

¹⁷¹ Cf. RORTY, *CONTINGENCY*, *supra* note 19, at 26–28.

upon which White's paradigm of judicial ethics rests.¹⁷² For Rorty, what is most important for the writer or speaker—the judge, the poet, the politician—to consider in her judgments and representations of the human world is *not* some universal set of values or qualities.¹⁷³ Indeed, Rorty eschews “the pre-Nietzschean [essentialist] philosopher's story,” in which “the particular contingencies of individual lives are unimportant.”¹⁷⁴ Rather, Rorty argues for a view of language and interpretation that not only accounts for individual human differences of circumstance and experience, but embraces those contingencies as the stuff of genuine, authentic representation, the closest thing to any meaningful truth that we are going to achieve.¹⁷⁵ The remarkably practical message of Rorty's dense theoretical view of human language and community is that social and political change comes about through the concrete “projects” of community, rather than through the abstract “principles” of government.¹⁷⁶

D. Judge Hunter Revisited

To return to the initial inquiry of this Article, how does one assess Judge Hunter's conduct in seeking to release incarcerated criminal defendants in response to the inadequate public defense system in post-Hurricane Katrina New Orleans? Stated in a way more suited to the discussion above, how does one gain interpretive traction in discussing both the components of judicial legitimacy and the question of whether Judge Hunter satisfies those components?

First, we should consider carefully the specific facts that shaped the context of this possible judicial misconduct. These facts are not just physical, such as whether a courthouse was damaged by the hurricane, but more importantly cultural and political. They are *material* in the largest sense: *who* ended up in jail, *why* they did not receive timely legal representation, and *what* a judge should do in such a situation. Such normatively mediated facts are more difficult to interpret than merely

¹⁷² See *supra* notes 165–67 and accompanying text.

¹⁷³ See RORTY, CONTINGENCY, *supra* note 19, at 26–28.

¹⁷⁴ *Id.* at 26.

¹⁷⁵ See *id.* at 27–28.

¹⁷⁶ See Rorty, *First Projects, Then Principles*, *supra* note 167, at 18.

physical ones, but these are the facts that actually matter to the public perception of the judge and thus to the legitimacy of the judiciary. Moreover, such facts are not isolated and discrete, but rather embedded parts of larger narratives, shared by judge and public, that give context and perspective to every decision a judge makes.

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

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

Rather, we will see him, as Rorty suggested, on the one hand as constrained by the contingencies of his background and experience, and on the other hand as a relatively autonomous actor who must take responsibility for his actions. Moreover, whether the judge appeared to behave properly, as vague as that standard otherwise tends to be, is a question one can answer

with greater precision by taking the time to interpret circumspectly the facts of the entire situation.

Finally, one should be mindful of both the homogeneity and heterogeneity of individual and overlapping communities, and the virtues and dangers of each. For example, it may be easier to take an essentialist view of the situation and argue that, regardless of differences in life experience and opportunity, everyone must bear the same level of responsibility for his or her actions in the community of law-valuing people. Or one might apply Harris' critique of essentialist community ideology to Judge Hunter's situation in New Orleans. One kind of voice, primarily of the poor, black, and dispossessed, argues that Judge Hunter's judicial legitimacy rests on his taking bold steps to protect those incarcerated without adequate legal representation.¹⁷⁷ Another kind of voice, primarily of the middle and upper classes, those either least affected by Katrina or better able to recover from it, criticizes Judge Hunter for putting the dubious legal rights of incarcerated criminal defendants above the public safety.¹⁷⁸

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

There is no view from nowhere. We can never leave all our prejudices behind and operate from a wholly disinterested standpoint, but our prejudices become dangerous only when they are dogmatic, kept hidden from view and not open to discussion.¹⁷⁹

¹⁷⁷ See Duplessis, *supra* note 13.

¹⁷⁸ See Simmons, *supra* note 11.

¹⁷⁹ HONI FERN HABER, BEYOND POSTMODERN POLITICS: LYOTARD, RORTY, FOUCAULT 1 (1994). For an excellent discussion of related issues, see generally Katherine R. Kruse, *Lawyers, Justice, and the Challenge of Moral Pluralism*, 90 MINN. L. REV. 389 (2005) (discussing the legal ethics of a lawyer's duty to act within the law while seeking justice).

CONCLUSION

My general goal in exploring the hermeneutically unstable state of affairs within three core components of judicial legitimacy is to encourage renewed examination of these basic elements. In so doing, we might better come to terms with the interpretive diffuseness of our national concept of judicial legitimacy. Further, we might look anew at the special, albeit complex, place of the judiciary in our democracy.

My particular argument points concretely in that direction. Although in easy cases certainly there are universal rights and wrongs for judges, unique difficulties arise when judges behave in ways that the general public, in reality a diversity of publics, finds debatable. In those situations, specific community values, narratives, and standards may be the best tools available for cultivating useful understandings of the otherwise vague and indeterminate components of judicial legitimacy and for arriving at a meaningful sense of judicial legitimacy itself.