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## ARTICLE

## REGULATION FOR THE SAKE OF APPEARANCE

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## REGULATION FOR THE SAKE OF APPEARANCE

Adam M. Samaha\*

*Appearance is often given as a justification for decisions, including government decisions, but the logic of appearance arguments is not well theorized. This Article develops a framework for understanding and evaluating appearance-based justifications for government decisions. First, working definitions are offered to distinguish appearance from reality. Next, certain relationships between appearance and reality are singled out for attention. Sometimes reality is insulated from appearance, sometimes appearance helps drive reality over time, and sometimes appearance and reality collapse from the outset. Finally, sets of normative questions are suggested based on the supposed relationship between appearance and reality for a given situation. The subjects of these normative questions include aesthetics, transparency concerns, and the likelihood of a self-fulfilling prophecy. A closing section applies these ideas to prominent debates over campaign finance regulation and broken windows policing. Leading empirical studies are examined and, throughout, the Article draws from scholarship in philosophy, sociology, psychology, economics, and political science.*

Attention, comrades! . . . We have won the battle for production!<sup>1</sup>

Backed by the full faith and credit of the United States government[.]<sup>2</sup>

At the tone, twenty hours, nine minutes, Coordinated Universal Time.<sup>3</sup>

### INTRODUCTION

Appearance matters, and in more ways than one. Countless decisions are explained and justified by the resulting appearance and not, or not only, by the resulting reality. Most people probably do not leave home before considering how their physical appearance will influence the perceptions of others. Cosmetics and cosmetic surgery are

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<sup>1</sup> GEORGE ORWELL, 1984, at 51 (Signet Classic 1961) (1949).

<sup>2</sup> From the Federal Deposit Insurance Corporation's logo, reproduced at 12 C.F.R. § 328.1 (2011).

<sup>3</sup> From the National Institute of Standards and Technology's radio broadcast, available by telephone at 303-499-7111. See *History of WWV*, NAT'L INST. OF STANDARDS & TECH., <http://www.nist.gov/pml/div688/grp40/wwv-history.cfm> (last visited Mar. 25, 2012).

multibillion dollar industries, after all,<sup>4</sup> to say nothing of commercial advertising and its image focus since before the 1960s.<sup>5</sup> In fact, appearances help determine the health and survival of human institutions. If the importance of appearance was not clear much earlier, the economic catastrophes of the Great Depression and the Great Recession underscored the reality. Confidence is a state of mind, and it influences behavior. Everything from a stable banking system to thriving religious organizations, successful undercover operations, and voter turnout depends on it. It might not be exaggerating to say that the primary goal of human institutions is maintaining various impressions.

Unsurprisingly, then, appearance-based justifications in law and politics are common. Government officials regularly attempt to build public confidence by taking care of appearances. An especially old example is the Bill of Rights. It was promoted partly for the comfort it would give fair-minded critics of the new government, whose supporters professed no interest in crossing these lines. James Madison said that the amendments were offered “to satisfy the public mind that their liberties will be perpetual.”<sup>6</sup> An especially familiar example arises in codes of judicial conduct. They obligate judges to recuse themselves when their impartiality can be reasonably questioned, not only when it is rightly questioned.<sup>7</sup> And especially controversial examples involve order maintenance policing and campaign finance regulation. For decades, academics and policymakers have debated whether the appearance of neighborhood disorder instigates serious crime, and whether policing strategies directed at otherwise minor crimes can change that appearance and stop that dynamic.<sup>8</sup> For an equally long time, supporters of campaign finance regulation have defended against court challenges by arguing that the money/politics relationship can be fashioned to minimize both the appearance and the reality of corruption.<sup>9</sup>

Although the justification is familiar, the special logic of appearance arguments is not well theorized, particularly with respect to legal

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<sup>4</sup> See DEBORAH L. RHODE, *THE BEAUTY BIAS* 34–35 (2010) (stating that people in the United States “spend[] more money on grooming than on reading material”).

<sup>5</sup> See FIRST RESEARCH, *INDUSTRY PROFILE: ADVERTISING & MARKETING SERVICES 2* (2011) (estimating annual revenue for advertising and marketing at \$88 billion in the United States); THOMAS FRANK, *THE CONQUEST OF COOL* 62–67 (1997) (describing Volkswagen’s 1960s advertising campaigns).

<sup>6</sup> 1 ANNALS OF CONG. 450 (1789) (Joseph Gales ed., 1834); see also BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND* 164–65 (1977).

<sup>7</sup> See, e.g., 28 U.S.C. § 455(a) (2006); MODEL CODE OF JUDICIAL CONDUCT Canon 2, r. 2.11(A) (2007); see also *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009) (emphasizing the need for public confidence in the judiciary).

<sup>8</sup> See *infra* section IV.B, pp. 1620–34.

<sup>9</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 25–27, 46–48 (1976) (per curiam) (emphasizing public confidence); see also *infra* section IV.A, pp. 1599–1619.

institutions.<sup>10</sup> Appearance arguments can be slippery and, often enough, troublesome when asserted by those who claim to be working for the public good. Consider campaign finance litigation. Courts have validated a government interest in appearing noncorrupt without much explanation of how or why it should matter. Are we supposed to think that government is entitled to appear noncorrupt even if it is, in fact, riddled with corruption? Are defenders of campaign finance laws claiming to know that the government is basically free of corruption? Is there anything more to the argument?

This Article confronts the potential and problematics of appearance justifications. My principal aspiration is to build a general framework for understanding and evaluating claims that a government decision is justified because it will create a desirable appearance.<sup>11</sup> Decisions within legal institutions are my focus, but the logic of appearance management beyond government will be considered as well. Accordingly, I will offer some conceptual work to distinguish appearance from reality, positive work to identify potential relationships between

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<sup>10</sup> Legal scholarship on appearance-based regulation is thick regarding law's expressive function, see sources cited *infra* note 66, and there is helpful work on law and aesthetics, see, e.g., RHODE, *supra* note 4; SUSAN M. SCHWEIK, *THE UGLY LAWS* (2009); Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CALIF. L. REV. 1 (2000). A broader perspective is mostly missing, although there are important contributions. For an argument for a deontological duty to appear ethical based on relational obligations, see Deborah Hellman, *Judging by Appearances: Professional Ethics, Expressive Government, and the Moral Significance of How Things Seem*, 60 MD. L. REV. 653 (2001). A critical reply is Matthew D. Adler, *Expression and Appearance: A Comment on Hellman*, 60 MD. L. REV. 688 (2001). For an analysis of how government might compete with private parties to reap benefits from manipulating people's misperceptions of risk, see Amitai Aviram, *The Placebo Effect of Law: Law's Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006). Outside the law literature, a consequentialist account to which I am partial is Julia Driver, *Caesar's Wife: On the Moral Significance of Appearing Good*, 89 J. PHIL. 331, 341 (1992), which argues that actions that are not intrinsically immoral can be wrongful when they seem immoral and observers either are offended or copy their misperception of the action. There are, of course, many pockets of appearance-related legal scholarship. See, e.g., Larry D. Barnett, *Law as Symbol: Appearances in the Regulation of Investment Advisers and Attorneys*, 55 CLEV. ST. L. REV. 289 (2007); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914 (2010); cf. Note, *Satisfying the "Appearance of Justice": The Uses of Apparent Impropriety in Constitutional Adjudication*, 117 HARV. L. REV. 2708 (2004) (presenting a taxonomy of statements about appearances in the Supreme Court's constitutional opinions).

<sup>11</sup> I do not include prophylactic rules, which are norms that reach beyond bad conduct in order to help ensure that such conduct does not occur. See, e.g., Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 515-17 (2008); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 200, 204-05 (1988). A leading reason to tolerate such crude regulatory overbreadth is that the feared conduct is too difficult to detect and therefore a (clear) proxy is adequate. This is old news. And although prophylactic rules do tend to target conduct that merely resembles bad conduct, my interest is in decisions that are defended in terms of the appearances that they are supposed to cause, not every decision that takes appearance into account. Prophylactic rules amount to regulation that *applies* to appearances, while I am interested in regulation for the sake of *generating* appearances. The former does not raise the same aesthetic, transparency, or causation questions.

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appearance and reality, and normative work to suggest key evaluative questions that depend on those relationships. To illustrate these ideas, I will apply them to two policies that otherwise have little in common: campaign finance regulation and broken windows policing.

Part I of the Article discusses the concepts of appearance and reality. These ideas have a tangled heritage of many centuries, but a few concise observations should suffice. Part II explores certain relationships between appearance and reality. Often, we think that appearance is a superficial version of reality with no causal impact on it. But looks are not always deceiving. Under certain conditions, an initial appearance will facilitate the emergence of a corresponding reality. These self-fulfilling prophecies happen in banking, dating, democracy, and elsewhere. And, of course, sometimes there is no important difference between an appearance and a reality of interest. Appearance can be important for its own sake.

Part III uses this assortment of relationships to suggest evaluative frameworks for appearance justifications. When there is no relevant reality separate from appearance, normative evaluation is relatively uncomplicated, even if observers disagree. When, instead, appearance and reality might diverge, additional questions arise. With respect to government decisions, appearance justifications often involve boosting public confidence. One stock democratic concern about such efforts is transparency: can officials defend a gap between what they appear to be doing and what they are actually doing? Sometimes they can and sometimes they cannot, and much has been written on that topic already. When a self-fulfilling prophecy is underway, however, the transparency concern is basically eliminated. How things appear will turn into how those things actually are. As such, the key normative question moves from transparency to causation: what is the likelihood of a self-fulfilling prophecy?

Part IV applies these ideas to ongoing debates over campaign finance regulation (especially candidate contribution limits) and broken windows policing (especially to reduce violent crime). Despite taking place in different contexts and on different terms, both of these debates involve appearance justifications, and both can be renovated using the same general framework. The upshot is that the courtroom contest over appearance in campaign finance regulation is both insufficiently concerned about transparency and insufficiently curious about self-fulfilling prophecies involving corruption, while the policy dispute over broken windows policing suffers from something like the opposite problem. Scholarly effort on broken windows theories has thus far yielded evidence of modest or zero impact on serious crime, without adequate recognition of resulting transparency issues — and perhaps without remembering the beneficial aesthetic impact of certain forms of order maintenance. Some of these conclusions are debatable, I freely acknowledge, and serious investigation is still underway. But

whether you agree with my assessment of this or that debate is not particularly important. The core lesson, in my view, is that formulating sound evaluative questions requires understanding different kinds of appearance-based justifications.

Before going further, a caveat: my normative analysis aims to be indifferent to particular moral commitments, but it cannot be entirely agnostic. I do believe that readers with left-wing, right-wing, libertarian, statist, and any number of other ideological loyalties can learn from the analytical framework that I suggest. A variety of people should be able to plug their own values into the general framework before reaching conclusions about specific appearance justifications, and without eliminating insight from the framework. It is “neutral” to this extent. But the general framework is admittedly less useful to those with especially restrictive commitments regarding official management of appearances. For instance, some might flatly oppose intentional official efforts to influence public perception, at least when the influence is misleading. Such commitments might make many cases seem easy and an elaborate analytical framework unnecessary, but only via atypical rigidity of the kind that rules out undercover law enforcement operations.<sup>12</sup> There is, then, moral moderation in what follows. The Article is less about rattling fundamental commitments, and more about uncovering the logic of different sorts of appearance justifications in order to facilitate intelligent normative evaluation — so that we can, in a loose sense of the phrase, start seeing appearance arguments for what they really are.

### I. DISTINGUISHING APPEARANCE FROM REALITY

For an analysis to be worthwhile, the category of appearance-based justifications must be distinctive. One might begin by contrasting appearance and reality, as people commonly do, but is there a meaningful difference? Can the difference be specified in accord with typical usage in legal argument — as in the assertion that “[c]orporate participation in candidate elections creates a substantial risk of corruption *or* the appearance thereof”?<sup>13</sup> These conceptual questions are addressed below. Of course the suggestions here will not end any foundational

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<sup>12</sup> Similarly, people may hold defensible objections to particular processes by which officials influence perceptions, as Professor Jed Rubenfeld has noted to me. Strong forms of these objections cut across all appearance/reality models. One might think that officials should never implant computer chips in people’s heads without their consent, even if solely for the purpose of transmitting standard time whenever a subject wants to know it. These process-related objections are worth article-length treatment, and they are not the subject of my investigation, but they can be easily added to my general framework. They are in the nature of specific side constraints.

<sup>13</sup> Supplemental Brief for the Appellee at 8, *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (No. 08-205), 2009 WL 2219300, at \*8 (emphasis added).

philosophical debates. No article, let alone a law review article, can do that. The more humble goal of this Part is to concisely distinguish appearance from reality in a way that is informed by academic inquiry, consistent with everyday understandings, and useful for the positive and normative analysis that follows.

A. *Pedestrians and Philosophers*

Considerable doubt can be raised about the significance of alleged differences between appearance and reality. Surely it is difficult to show that the former is less valuable than the latter. Aesthetic design choices survived the form-follows-function dictates of high modernism,<sup>14</sup> symbols are taken seriously if not violently,<sup>15</sup> and digitized virtual realities allow second lives to be lived in socially meaningful ways.<sup>16</sup> If these instances count as appearances, they must count for something. One might also think that appearance and reality are points on the same dimension rather than categorically different concepts. References to appearance and reality often arrive together and relate to the same subject, as in the appearance and reality of safety or corruption. Furthermore, many policy debates occur within a fog of uncertainty and error, whether the topic is health, immigration, crime, or terrorism. Being “in touch with reality” might not be very common, and it might not be so vital.

Yet appearance and reality are supposed to be different, and getting the gist of the asserted difference may help illuminate what appearance justifications are all about. Start with ordinary usage. Often the notion of appearance is linked to perception and belief. People regularly discuss the way an event appears to their senses, along with beliefs derived from that perception. Dictionary definitions of “appearance” accordingly refer to an external show or to the outward aspect of something based on sense impression,<sup>17</sup> which can be processed into a belief about the world. (“That rusty bridge appears likely to collapse.”) The idea of reality is perhaps more difficult to pin down in

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<sup>14</sup> See Louis H. Sullivan, *The Tall Office Building Artistically Considered*, LIPPINCOTT'S MAG., Mar. 1896, at 403, 408 (“[F]orm ever follows function, and this is the law.”); cf. ADOLF LOOS, *Ornament and Crime* (1929), reprinted in ORNAMENT AND CRIME 167, 169 (Michael Mitchell trans., 1998) (contending that “in economic respects [ornamentation] is a crime”).

<sup>15</sup> See Luke Harding, *How One of the Biggest Rows of Modern Times Helped Danish Exports to Prosper*, GUARDIAN (London), Sept. 30, 2006, at 24; John Lancaster, *Pakistani Cleric Announces Bounty for Killing of Danish Cartoonists*, WASH. POST, Feb. 18, 2006, at A21.

<sup>16</sup> See F. Gregory Lastowka & Dan Hunter, *Virtual Worlds: A Primer*, in THE STATE OF PLAY 13, 13–16 (Jack M. Balkin & Beth Simone Noveck eds., 2006) (“[V]irtual worlds are real, as well.” *Id.* at 15.); cf. Yochai Benkler, *There Is No Spoon*, in THE STATE OF PLAY, *supra*, at 180, 180–81, 186 (stressing social relationships that are enabled by collaborative software platforms).

<sup>17</sup> See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 88 (3d ed. 1992); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 56 (10th ed. 1996).



pedestrian talk, but such conversation often distinguishes it from appearance, perception, and belief. Definitions of “reality” refer to things that are not illusory, that occur in fact, or that have an objective existence.<sup>18</sup> (“In reality, there is a negligible chance that the bridge will collapse.”) People thus tend to use the term “appearance” to signify superficial impressions, while “reality” means something like the objective truth.<sup>19</sup>

The ability to distinguish appearance from reality is a sign of maturity in more than one way. It marks cognitive progress in children, most of whom grasp simple appearance/reality distinctions by the time they leave kindergarten. When shown an object behind a tinted transparency, for instance, a typical six-year-old can recognize a difference between what color the object “looks like” and what color the object “really and truly is.”<sup>20</sup> Professional philosophical inquiry also includes appearance/reality distinctions, albeit with more precision and lasting disagreement. The relevant discourse has matured over many centuries and across several subdisciplines. For present purposes, however, it should be enough to briefly note a few fault lines within metaphysical and epistemological investigations into objectivity.

In metaphysics, several positions are distinguishable.<sup>21</sup> Strong objectivists maintain that there is a truth about the existence and properties of some things in the world that is independent of what people believe. Indeed, this objective reality might be inaccessible to anyone even under ideal conditions for judgment.<sup>22</sup> Some metaphysically objective things are concededly dependent on the mind, such as the emotions in your head, but strong objectivists can accommodate psychological facts and proceed to argue about other parts of reality, such as the bridges outside of your head.<sup>23</sup> These sorts of positions leave plen-

<sup>18</sup> See THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 17, at 1505.

<sup>19</sup> Compare, e.g., MAXIMILIAN FOSTER, KEEPING UP APPEARANCES (1914) (telling the tale of a couple who move to the big city and live beyond their means), with, e.g., *The Al Sharpton Show*, SYNDICATION ONE, <http://syndication1.com/al.htm> (last visited Mar. 25, 2012) (displaying the “Keepin’ It Real” catchphrase for Al Sharpton’s radio show).

<sup>20</sup> John H. Flavell, *The Development of Children’s Knowledge About the Appearance-Reality Distinction*, 41 AM. PSYCHOL. 418, 418 (1986) (internal quotation marks omitted).

<sup>21</sup> See generally NICHOLAS BUNNIN & JIYUAN YU, THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 483–84 (2004); Brian Leiter, *Law and Objectivity*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 969 (Jules Coleman & Scott Shapiro eds., 2002); John Wisdom, *Appearance and Reality*, 52 PHIL. 3 (1977).

<sup>22</sup> This position was illustrated in Plato’s *Republic* through the allegory of the cave, see PLATO, THE REPUBLIC bk. VII, 514a–518e, at 273–79 (Benjamin Jowett trans., Charles Scribner’s Sons 1928) (c. 360 B.C.E.), in which even the sunlit world above could provide only a link to the Forms.

<sup>23</sup> See Leiter, *supra* note 21, at 970–71 (explaining “constitutional independence” from the mind (which cannot include psychological facts), “cognitive independence” (which does), and “causal independence” (which is irrelevant to objectivity)).

ty of room for beliefs (perhaps based on something called appearance) that may or may not match objective reality. At another extreme, strong subjectivists maintain that there is no reality or truth other than what is believed by the particular mind or minds in question.<sup>24</sup> This position might eliminate any important appearance/reality distinction. There are also intermediate positions in which what counts as metaphysically objective is partly dependent on the mind. One version uses the conclusions reached by some community of observers to identify objective truth, and another uses the conclusion that would be reached under appropriate or ideal conditions for judgment.<sup>25</sup> Here the space for appearance-based beliefs separate from reality opens up again.

If there is an objective reality of some dimension, epistemological issues follow.<sup>26</sup> The core question is how to conclude that knowledge about the real world has been achieved. A committed skeptic might insist that there is a greater than zero probability that you are under the sway of a computer simulation that is manipulating your every sense impression, and so you cannot really “know” anything, except perhaps conceptual truths.<sup>27</sup> Few people hold themselves to the highest standards of certainty for knowledge in most situations, however. One need not extend those stringent tests beyond “[t]he pastime of epistemology.”<sup>28</sup> Most people would understandably conclude, if pressed, that they *know* that there was in fact green grass on the ground last summer. Perhaps as a matter of principle they should hold residual doubt about this conclusion, but not for any obvious practical

<sup>24</sup> For conflicting interpretations of the dictum “Man is the measure of all things,” compare C.M. Gillespie, *The Truth of Protagoras*, 19 MIND 470, 482–84, 492 (1910), which understands it as relativist and subjectivist, with F.C.S. SCHILLER, PLATO OR PROTAGORAS? 8–10, 15–18, 21 (1908), which understands it as pragmatic.

<sup>25</sup> See Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 192–94 (1993) (book review).

<sup>26</sup> Even if nothing were metaphysically objective, there still would be practically important questions about how beliefs should be formed or defended.

<sup>27</sup> Cf. RENÉ DESCARTES, MEDITATIONS ON FIRST PHILOSOPHY (1641), reprinted in DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 45, 62–63 (Donald A. Cress trans., Hackett Publishing Co. 4th ed. 1998) (introducing the malicious-demon hypothetical in which a person’s sense impressions are manipulated); HILARY PUTNAM, REASON, TRUTH AND HISTORY 5–8, 12–21 (1981) (arguing, however, that the “brain-in-a-vat” supposition has a self-refuting quality). The strong skeptical position is played out in PETER UNGER, IGNORANCE 1 (1975), which also suggests limits to the classical form of the argument, see *id.* at 5–6, 11–12. Cf. IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS 99–100, 109–10 (Lewis W. Beck ed., Liberal Arts Press 1950) (1783) (arguing that people cannot have knowledge of objects in themselves but that they can have important knowledge of objects as they appear).

<sup>28</sup> David Lewis, *Elusive Knowledge*, 74 AUSTRALASIAN J. PHIL. 549, 559 (1996); see also *id.* at 562–67 (suggesting that, in securing knowledge, different possibilities are properly ignored in different contexts); cf. Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFF. 87 (1996) (suggesting that truth claims must be partitioned by discourse); Gerald J. Erion & Barry Smith, *Skepticism, Morality, and The Matrix*, in THE MATRIX AND PHILOSOPHY 16, 22–25 (William Irwin ed., 2002) (similar).

purpose. Even using a compromised test for knowledge, though, reasonable disagreement over the best procedures for identifying truth will persist. Given finite resources and limited cognitive capacity, hard choices must be made. There also is debate over which statements are rightly susceptible to testing for truth and falsity in the first place.<sup>29</sup> But wide agreement on the existence of objective reality and human knowledge is notable, as is the persistent need for tests of justifiable belief.

### B. Working Definitions

These observations point toward a useful working definition of appearance, as contrasted with reality. Fortunately, evaluating appearance justifications does not require a choice among all of the available metaphysical and epistemological positions. Definitions can be formulated that are informed by those positions but that avoid taking sides on the foundational question of whether there is an objective reality in a strong sense. I have in mind the following formulation: for a given proposition about the world, (1) *appearance* can be defined as a source for the perception of information that an observer considers relevant to forming a belief about this proposition — whether or not this source is good for forming a well-justified belief; and (2) *reality* can be defined as either the strongly objective truth about this proposition or the best justified belief about this proposition that any observer holds — whether or not this truth or best belief corresponds with a given appearance.

On these understandings, a person forms at least some of her beliefs about the world based in part on her perceptions of the world's appearances, and these appearances need not help people ascertain the objective truth or the best available belief about the truth. Appearance involves accessible information that might or might not accurately reflect the reality in question, like a potentially imperfect proxy for a variable of interest. But with these definitions, it does not matter whether a mind-independent reality exists or can be known with certainty. Reality is defined broadly enough to persist either way and still provide a convenient contrast to appearance. These unorthodox definitions do mix metaphysical and epistemological concepts. Despite the resulting impurity, they are operable, close enough to common understandings, and applicable to debates over law.

Consider *Baze v. Rees*,<sup>30</sup> which upheld a popular lethal injection protocol.<sup>31</sup> Chief Justice Roberts's plurality opinion concluded that state officials may paralyze a prisoner during the execution to "pre-

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<sup>29</sup> See Leiter, *supra* note 21, at 975–76 (discussing semantic objectivity).

<sup>30</sup> 128 S. Ct. 1520 (2008).

<sup>31</sup> See *id.* at 1525–27 (plurality opinion).

serv[e] the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress.”<sup>32</sup> Perhaps this conclusion is troubling because paralysis conceals relevant information about inmate pain, as Justice Stevens argued.<sup>33</sup> But however the normative question is resolved, we can sensibly use the term “appearance” to refer to the basis for observer perceptions and beliefs (that is, convulsions) regarding some proposition about the world (that is, inmate pain), and those beliefs might or might not correspond to the best-justified or deepest truth of the matter. Whether the reality of pain is truly objective should not affect our ability to distinguish reality from appearance in this setting. A hyper-subjectivist response that “there is no such thing as a ‘reality of pain’” is unproductive, as is the assertion that there is no difference between impressions gleaned by amateurs and the insights of trained experts.

Although the foregoing fits well with propositions about the present or past, an objective reality about the future seems impossible. There would be no such reality with which to contrast appearance regarding an inmate execution that has not occurred. Furthermore, estimated probabilities about the likelihood of pain might not be objective.<sup>34</sup> But recall that our inclusive definition of reality reaches some beliefs. A person can have beliefs about the likelihood of future events even if those propositions are not metaphysically objective. Moreover, an amateur’s impression of, say, a health risk usually will be less justified than, say, a physician’s estimate. Our working definitions therefore can be used to analyze efforts at building expectations about the future, as well as shaping perceptions about the present and the past.

## II. RELATIONSHIPS BETWEEN APPEARANCE AND REALITY

Appearance can be defined to distinguish reality, but understanding connections between the two will become a foundation for normative evaluation later on. There are several potential relationships, at least if we account for the influence of appearance-sensitive behavior over time. The possibilities are similar to familiar statistical associations between two variables — correlated and uncorrelated, positive and negative, causal and noncausal, linear and nonlinear. Not every possibility is worth vetting here, however. This Part concentrates on three relationships that are plainly relevant to government decisions: (1) reality insulated from appearance, (2) appearance driving reality over

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<sup>32</sup> *Id.* at 1535.

<sup>33</sup> *See id.* at 1544 & n.3 (Stevens, J., concurring in the judgment) (rejecting the “aesthetic rationale,” *id.* at 1544 n.3). Justice Stevens concurred in the judgment on grounds of *stare decisis*. *See id.* at 1552.

<sup>34</sup> Alternatively, perhaps “God plays dice” and some aspects of a metaphysically objective reality are irreducibly probabilistic.

time,<sup>35</sup> and (3) reality collapsing into appearance from the outset. Positive causal associations are most intuitive in the following examples, but I will take up potentially negative associations at certain points. The general thought is that relatively accessible appearances sometimes — but only sometimes — help make for a reality of interest.

*A. Bridges — Reality Insulated from Appearance*

Suppose that residents of two towns separated by a river want a bridge to connect them. Recognizing that the bridge will be largely worthless if nobody uses it, and that nobody will use the bridge if it seems unsafe, officials want a bridge that is unlikely to collapse and that appears equally safe to the public. So the bridge is built to meet a chosen level of structural integrity and is decked out to match common perceptions of sturdiness. The adornments include fresh paint, visible rivets, and no architectural frills. The bridge would be a disaster waiting to happen if it were ready to collapse while appearing perfectly safe, but it would be a monumental waste if the bridge were quite safe without looking that way.

Such appearance-based efforts to influence public opinion are widespread in the private and public sectors. The business of advertising is built on demand for these techniques, as is architecture.<sup>36</sup> Professional architects understand that casual observers tend to associate the appearance of certain materials with certain physical properties, regardless of expert risk calculations: opacity is associated with rigidity, for instance, and transparency is associated with fragility. Architects have been known to include visible elements, such as struts, with no effect on the physical integrity of a structure, in the hope of producing a calming effect on untrained observers.<sup>37</sup> Governments have used analogous techniques to improve road safety, sometimes in an attempt to increase public perceptions of danger. Recently, Chicago officials ordered transverse lines painted across a stretch of road that includes a particularly dangerous curve on Lake Shore Drive.<sup>38</sup> The lines

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<sup>35</sup> As the discussion should make clear, appearance on its own does not drive reality, even under my definitions. Sometimes people rely on (their perception of) an appearance to form beliefs or attitudes, which then influence decisions to behave in some way. Over time, these behaviors may influence the pertinent reality, such as the level of corruption or violence. Occasionally I will describe this process using shorthand formulations that I trust will not obscure the sometimes complex causal chains involved.

<sup>36</sup> See JONATHAN E. SCHROEDER, *VISUAL CONSUMPTION* 92 (2002) (“Architecture is a language — a language of metaphor. . . . That is, built form constitutes a system of representation and signifying practices. Buildings mean something.”).

<sup>37</sup> I thank Chris Thompson, a Chicago architect, for these examples.

<sup>38</sup> See Jon Hillekitch, *Lake Shore Drive’s Curve to Get New Stripes*, CHI. TRIB., Sept. 8, 2006, § 2 (Metro), at 3.

become closer together as they approach the curve, giving many drivers a sense of speed greater than they otherwise would experience.<sup>39</sup>

Many government projects are much like the proverbial bridge, some of them extremely successful. Think about the production of economic data such as the unemployment rate and gross domestic product. These numbers would not be relied on if they were not believed to be reliable.<sup>40</sup> Judicial decisions are analogous. Presiding in temple-like structures, wearing standardized robes, sitting on elevated benches, listening to arguments, and publishing explanations for their major decisions, judges in the United States accumulate such respect for their work that others are willing to enforce their judgments and litigants often abide without enforcement efforts.<sup>41</sup> Like judges, the rest of government has an appearance and reality of quality. And, like the bridge, one might say that a corrupt government that appears virtuous is terrible while a virtuous government that appears corrupt is useless.

These examples share a notable feature: the possibility that appearances diverge, perhaps radically, from reality. Whether the proposition is the shakiness of a bridge or the crookedness of a government, that which is easily perceived might not correspond with the truth. At least at the time of those perceptions, appearance will not influence the reality of those propositions. Simply believing that a bridge is safe does not make it safe. An optimist might hope that appearance usually conforms to reality, but in these situations there is no obvious reason to think that appearance dictates reality through effects on behavior. There might be *nonobvious* reasons to believe that appearance will influence reality *over time* in the above examples — positively or perhaps negatively.<sup>42</sup> But it will help to keep in mind a simplified bridge model that stands for situations in which reality is insulated from appearance's effect on beliefs and behavior.

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<sup>39</sup> See *id.* Other tactics for spreading danger perceptions are less subtle. In rural China, off Highway 215, a smashed car is suspended fifteen feet above the ground along with the inscription "Four People Died." PETER HESSLER, COUNTRY DRIVING 121 (2010).

<sup>40</sup> That is, reliable after taking into account known controversies over methodological choices, such as excluding discouraged workers from the "unemployed" when calculating the unemployment rate.

<sup>41</sup> Cf. Benjamin Woodson et al., Judicial Symbols and the Link Between Institutional Legitimacy and Acquiescence 1, 15–27 (2011) (prepared for delivery at the Annual Meeting of the American Political Science Association), available at <http://ssrn.com/abstract=1902275> (reviewing studies and finding that judicial symbols tend to trigger feelings of judicial legitimacy and thus increase acceptance of unwelcome Supreme Court decisions among nonblack college student respondents with relatively low previous exposure to the Court).

<sup>42</sup> Judges might psychologically internalize the norms that they display, see *infra* pp. 1578–79 (discussing self-fulfilling prophecies), and people might crowd a safe-looking bridge in a way that makes the structure less safe during the next time period, see *infra* note 59 and accompanying text (discussing self-defeating prophecies).

### B. Banks — Appearance Driving Reality

Now suppose that town residents want credit. One type of desired financial institution will accept deposits that remain available on demand, while lending most of the take to entrepreneurs willing to pay interest. As long as some critical mass of depositors does not attempt to withdraw funds simultaneously, the banks will have an opportunity to survive and facilitate innovation and economic growth. One of the tricks, then, is to generate the belief among a sufficient number of potential and actual depositors that the banks will not be destabilized by depositors making a run. Various techniques are used to achieve this shared confidence. Bank buildings are designed to match cultural cues of stability, and an insurance scheme is worked out so that depositors are covered in the event of a bank run, which in turn makes a run less likely.

This story is part of the actual history of U.S. banking.<sup>43</sup> Banks became a crucial source of credit, and depositor confidence was addressed by reserve requirements, regulatory oversight, discount windows, insurance, and even architecture. The First Bank of the United States building in Philadelphia had a marble facade and European styling reminiscent of the Bank of England;<sup>44</sup> the Second Bank building, like many government buildings of that era, was fashioned after Greek temples.<sup>45</sup> Pivoting away from the Great Depression, many new banks shifted to a fortress model with an emphasis on steel and granite.<sup>46</sup> The First National Bank of Chicago evoked “qualities of strength, security, and prodigious assets” partly by the display of granite cladding, “which was structurally unnecessary and added significantly to the expense.”<sup>47</sup> Such design choices signal private information about financial stability or otherwise tap perceptions of reliability.

Architecture is hardly the only way to generate confidence, especially in an age of online transactions. Ultimately banks became more heavily scrutinized by regulators for financial soundness, and government-run deposit insurance for many banks was implemented via the Banking Act of 1933.<sup>48</sup> Banks insured by the Federal Deposit Insurance

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<sup>43</sup> See RICHARD SCOTT CARNELL ET AL., *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 2–32 (4th ed. 2009); BENJAMIN J. KLEBANER, *AMERICAN COMMERCIAL BANKING* 138–238, 241, 243–44 (1990).

<sup>44</sup> See Susan Wagg, *A Critical Look at Bank Architecture*, in *MONEY MATTERS* 15, 23–24, 250, 254 (Joel Stein & Caroline Levine eds., 1990).

<sup>45</sup> See *id.* at 26–28, 250; see also Robert Nisbet, *Men and Money: Reflections by a Sociologist*, in *MONEY MATTERS*, *supra* note 44, at 7, 8 (describing banks and churches as relying on the faith and confidence of users).

<sup>46</sup> See Wagg, *supra* note 44, at 228–30, 235–36, 251–52.

<sup>47</sup> *Id.* at 252.

<sup>48</sup> Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.); see 2 JERRY W. MARKHAM, *A FINANCIAL HISTORY OF THE UNITED STATES* 166 (2002).

Corporation (FDIC) are now required to display the assurance of protection in their branch locations and in certain advertising.<sup>49</sup> Deposit insurance and regulatory oversight seem to soothe many people who choose banks with these features, and such measures likely help achieve greater bank longevity in the United States.<sup>50</sup>

The bank-run problem and its confidence-based solution represent two forms of self-fulfilling prophecy — a concept now familiar in several intellectual disciplines. The label refers to situations in which a belief is the basis for behavior that pushes reality toward that belief over time.<sup>51</sup> If many bank depositors believe that there is or will be a run on the bank, they will help cause the run as they scramble to save their savings; if they believe otherwise, a run is less likely. Sociologist Robert K. Merton invented the phrase and extended the idea from bank runs to race relations in 1948.<sup>52</sup> African Americans were viewed as undisciplined strikebreakers by union members in the wake of World War I, Merton asserted, partly because the former group was left with little alternative after having been excluded from unions based on that same view.<sup>53</sup> “[M]en respond not only to the objective features of a situation,” he claimed, “but also, and at times primarily, to the meaning this situation has for them. And once they have assigned some meaning to the situation, their consequent behavior and some of the consequences of that behavior are determined by the ascribed meaning.”<sup>54</sup> The idea is also cognizable in the game theoretic terms of economists. A bank run and bank stability represent multiple equilibria that depend on each participant’s expectations about other participants’ behavior.<sup>55</sup>

<sup>49</sup> See 12 C.F.R. §§ 328.0–.4 (2011).

<sup>50</sup> See CARNELL ET AL., *supra* note 43, at 47, 309–10.

<sup>51</sup> See generally *Self-Fulfilling Prophecy*, in A DICTIONARY OF PSYCHOLOGY 681–82 (Andrew M. Colman ed., 2009); see also Steven N. Durlauf & Lawrence E. Blume, *Stigma*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS, ONLINE EDITION (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); L. Jussim, *Self-Fulfilling Prophecies*, in ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES 13,830, 13,830–31 (2001) (requiring false beliefs); James M. Olson et al., *Expectancies*, in SOCIAL PSYCHOLOGY 211, 222 (E. Tory Higgins & Arie W. Kruglanski eds., 1996) (“[T]he perceiver’s expectancy serves to elicit behavior from the target that confirms the expectancy and that might not have occurred otherwise.”). There are much looser uses of the term on which I will not rely. See, e.g., Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1809, 1843–48 (2010) (involving assertions of crisis that help cause emergency power authorizations, but apparently not the existence of the asserted crisis).

<sup>52</sup> See Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 193–95 (1948).

<sup>53</sup> See *id.* at 196–97.

<sup>54</sup> *Id.* at 194; accord WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA 572 (1928) (“If men define situations as real, they are real in their consequences.”).

<sup>55</sup> See Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 403 (1983).



Under certain conditions, shared expectations become the basis for common strategies.<sup>56</sup>

The notion of a self-fulfilling prophecy is expandable in other ways, too. Merton concentrated on false beliefs and “the perversities of social logic,”<sup>57</sup> yet a similar dynamic applies to beneficial consequences and to beliefs that are not falsifiable at the outset. Widespread depositor confidence in a bank can make the institution justifiably stable, whether or not the expectation against a future bank run can be counted as a false belief. Nor is it necessary that anyone intend to produce the appearance or its consequences; shared beliefs that underwrite reality over time may come about more spontaneously. Furthermore, the key behavioral effects might occur in several places: in those who perceive the appearance, in those who are the subject of perception, or both.<sup>58</sup>

In addition, prophecies can be self-defeating instead of self-fulfilling. A bank run is the classic illustration of the latter, while anticipated crowding illustrates the former.<sup>59</sup> If everyone believes that many people will show up at a particular location at a particular time, it could be that no such crowd materializes. Enough people might avoid the (mis)predicted crowd by not showing up. This outcome depends on touchy variables, of course, including how one person anticipates another person’s response to pessimistic conventional wisdom about the future. In any event, expectations can have quite different influences on reality over time depending on the details of the social environment.

Two seemingly analogous dynamics should be distinguished, however. First, positive-feedback loops overlap with, but are not the same as, self-fulfilling prophecies. These loops encourage path dependence insofar as alternatives become progressively less attractive over time, but they are not necessary to a self-fulfilling prophecy. For instance, bank stability can be a fragile equilibrium in a skittish social environ-

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<sup>56</sup> See DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 39 (1994) (discussing unpredictable outcomes and focal strategies); Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1013 & n.28 (1992) (asserting that bank runs can result from socially costly yet fragile information cascades). The bank confidence situation presents a recursive expectations issue. One person must believe that some number of other persons will not withdraw, which depends on what other persons believe about everyone else’s behavior (and so on). Achieving shared confidence might seem logically complex, but it happens.

<sup>57</sup> Merton, *supra* note 52, at 195; *see id.* at 195–96, 208–10. Merton was more successful at illustrating virulent in-group/out-group dynamics, *see id.* at 197–208, than he was at explaining from where the impetus for “deliberate institutional controls” would come, *id.* at 210 (emphasis omitted).

<sup>58</sup> See Olson et al., *supra* note 51, at 222.

<sup>59</sup> See *Self-Fulfilling Prophecy*, in *DICTIONARY OF THE SOCIAL SCIENCES* 434 (Craig Calhoun ed., 2002).

ment, and path dependence can occur without the complications of appearance/reality gaps. Also distinct is deterrence through expectation of punishment, along with encouragement through expectation of reward. Incentives do operate through expectations that may be based on appearances, but this chain of causation need not take the form of a self-fulfilling prophecy. People's belief that the risk of detection is fifty percent will not always lead to conduct making it more likely that the risk of detection actually is fifty percent; and certainly the risk of detection can be fifty percent even if people do not believe it. Whatever role appearances play in criminal justice, there is no necessary link between the identified beliefs and the corresponding facts.<sup>60</sup>

### C. Clocks — Reality Collapsing into Appearance

Now suppose that town residents, having become more interconnected, wish to coordinate their activities temporally. They need a social convention for keeping time, which need not track any cosmic reality about the progress of time. So town authorities have an ornate clock tower built in the center of town, a structure that is considered beautiful enough to attract public attention and that represents the time of day by reference to a local sundial. It becomes the time benchmark for town residents. Later, townspeople more frequently interact with nonresidents as transportation and communication technologies improve. These interactions generate demand for the coordination of time conventions across more and more jurisdictions, leading to regional standard times and standardized differences between regions.

The foregoing is, once again, a condensed portrayal of two centuries of human effort. Railroads, astronomers, diplomats, and others worked to spread stable conventions regarding time, and their efforts were remarkably successful.<sup>61</sup> Asking Google, "What time is it?" yields a link to a government website that displays "Official U.S. Time" based on a set of atomic clocks here and abroad.<sup>62</sup> This official time is the reference point for countless information systems, including com-

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<sup>60</sup> Again, less straightforward causal links might exist. Widespread belief that law enforcement will quickly apprehend wrongdoers should deter many rational actors from wrongdoing, making it easier for law enforcement to quickly apprehend the remaining contingent of wrongdoers — assuming that this effect is not washed out by potential victims' unexpectedly letting down their guard.

<sup>61</sup> See IAN R. BARTKY, *SELLING THE TRUE TIME* 1–3, 205 (2000) (emphasizing the role of astronomers); Eviatar Zerubavel, *The Standardization of Time: A Sociohistorical Perspective*, 88 AM. J. SOC. 1, 6–8 (1982) (emphasizing the role of railroads); see also Ian R. Bartky & Elizabeth Harrison, *Standard and Daylight-Saving Time*, SCI. AM., May 1979, at 46 (noting, however, both resistance to daylight savings time and certain pressures to redraw time zones).

<sup>62</sup> See Demetrios Matsakis, *Timekeeping at the US Naval Observatory*, IEEE AESS SYS. MAG., June 2003, at 9, 9–12; *USNO Master Clock*, U.S. NAVAL OBSERVATORY, <http://www.usno.navy.mil/USNO/time/master-clock> (last visited Mar. 25, 2012).

puter network timekeepers and the Global Positioning System. Standard time is only one of many solutions to coordination problems that depend on salient benchmarks — several of which were authorized by the embarrassingly underappreciated Weights and Measures Clause of the Constitution.<sup>63</sup>

Clock towers and similar phenomena are reminders that appearance and reality may, roughly speaking, collapse. In the case of standard time used for coordination purposes, the reality in question is constructed from beliefs that follow salient representations of time. There is no deeper truth to be discovered. The widespread belief that it is now 12:00 PM basically *is* the reality of the matter. To complain, as some early critics did,<sup>64</sup> that standard time does not accurately reflect God's version of time is to sidestep the basic point. Standard time does not purport to be anything other than a useful human convention. Of course, standard time is not a matter of individualized subjective belief. It is a reality about which a broken (or rigged) clock can give false appearances and about which people can be mistaken. But the relevant reality is nonetheless constituted by shared beliefs resting on shared perceptions that are connected to salient appearances.

The idea of appearance/reality collapse has even more force as applied to the subjective elements of aesthetics and expression, which can be evaluated without reference to any related reality. The relevant reality is nothing more than the appearance that attracts attention. Thus, a clock tower's form or a person's garb can be assessed for beauty without suggesting that there is any truth of the matter beyond individual subjective valuation. Further, objects and conduct may be taken as conveying a painful message of insult or an uplifting message of validation. A Confederate battle flag or a civil rights statute, whatever its other functions, can be viewed as a symbol of respect or disrespect.<sup>65</sup> Each of these phenomena — architecture, fashion, icons, laws — may be evaluated for aesthetic or expressive quality without invoking another reality.<sup>66</sup> Making those taste-like evaluations can be con-

<sup>63</sup> See U.S. CONST. art. I, § 8, cl. 5.

<sup>64</sup> See MICHAEL O'MALLEY, *KEEPING WATCH: A HISTORY OF AMERICAN TIME* 6–10 (1990).

<sup>65</sup> See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135, 144–56 (observing that symbols not only can have emotional impact, but also may serve a signaling-sorting function).

<sup>66</sup> See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1511–14 (2000) (defining an expressive moral theory in terms of constraints on public meaning); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 2 (2000) (“[S]tate action violates Equal Protection if its meaning conflicts with the government’s obligation to treat each person with equal concern.”); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506–16 (1993). For criticism, see, for example, Simon Blackburn, *Group Minds and Expressive Harm*, 60 MD. L.

troversial, to be sure, just as people sometimes attempt to impress one correct interpretation on certain texts. Even so, people can and do assess the aesthetic, insulting, threatening, and validating qualities of the world for themselves and on those measures alone.

### III. EVALUATING APPEARANCE JUSTIFICATIONS

Although not exhaustive, the discussion above offered three models for the relationship between appearance and reality as I define those terms. For the clock, appearance and reality are essentially the same from the start. For the bridge, appearance does not influence the reality to which it corresponds and the two might be dangerously different at any time. For the bank, an appearance of stability helps push the institution toward that reality over time. Granted, a given decision-maker may have little control over appearance, or how diverse cohorts of observers react thereto, and the applicable model will not always be clear to anyone. Sometimes more than one model will be in play. But with distinct models in mind, we can better understand and assess appearance justifications. These justifications will likely prompt a different set of normative questions depending on the posited relationship between appearance and reality. Without intelligent questions, observers will not get intelligent answers.

These questions, by the way, do not seem hitched to any conventional metric of political ideology. Appearance justifications are both embraced and rejected by leftists, rightists, libertarians, statist, and others. Obviously, people sharing one of these ideologies will support appearance justifications under distinct conditions. But none of the familiar ideological groupings indicate systematically greater acceptance of appearance justifications. In Supreme Court decisions, for example, the evaluation of appearance arguments is sometimes unanimous. All participating Justices condemned a town's attempt to dampen white panic selling by enacting a ban on "For Sale" and "Sold" signs for houses,<sup>67</sup> while there seems to be an equally wide consensus that judges should appear impartial in the hope of boosting public confidence.<sup>68</sup> Furthermore, so-called conservative and so-called

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REV. 467, 488–91 (2001), which questions whether a concept of expressive harm is necessary to explain or justify law's functions, and Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000), which attempts to clarify expressive theories of law and doubts that law's meaning has "foundational moral relevance," *id.* at 1375 (emphasis omitted). For distinct usage of the term, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000), which discusses solutions to coordination problems.

<sup>67</sup> See *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 87–88, 95–98 & nn.9–10 (1977) (distinguishing efforts to reduce misleading information, to publicize the number of white residents, and to subsidize residential stability).

<sup>68</sup> For a controversial application of this common position, see *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65 (1988), which listed public confidence among the factors for

liberal judges each use appearance justifications to reach different conclusions. The former faction invoked appearances to support the lethal injection protocol in *Baze v. Rees*,<sup>69</sup> and the latter faction invoked appearances to support limits on contributions to political parties in *McConnell v. FEC*.<sup>70</sup>

The cynical view is that appearance justifications are rhetorical gambits without serious influence on decisions, akin to many claims about federalism, judicial restraint, due process, and other values with fair-weather fan bases. But even if appearance arguments are often tactical, they have logical substance. Conscientious decisionmakers should grapple with them. And the inquiry is complicated because there is no uniform answer for all occasions. Nobody in her right mind should accept or reject appearance justifications in all situations.

How, then, should we react to appearance justifications? This Part suggests general normative considerations with widespread appeal, understanding that they should be processed with attention to individual observer values and particular circumstances. Boiled down, these general lessons are: (1) *regardless of model*, issues of cost, need, efficacy, and institutional competence arise when officials justify decisions based on hoped-for appearances; (2) *under a clock model*, the assessment of an appearance justification will sometimes be deeply contested but often relatively straightforward for each observer; (3) *under a bridge model*, transparency issues will likely emerge insofar as the appearance of government operations might be different from the reality; (4) *under a bank model*, however, transparency issues will fade as attention shifts to causation issues surrounding self-fulfilling prophecies. Together, these considerations form a framework for evaluating an array of appearance arguments. Because cost, need, efficacy, and institutional competence are omnipresent issues, I will not point out their relevance at every juncture. And because clock models are simplest and often applicable, I begin with them.

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vacating a judgment based on the appearance of bias and affirmed vacatur even though the judge was unaware of his conflict of interest during trial.

<sup>69</sup> 128 S. Ct. 1520, 1535 (2008) (plurality opinion); *see also* Crawford v. Marion Cnty. Election Bd., 128 S. Ct. 1610, 1620, 1623 (2008) (opinion of Stevens, J.) (“[P]ublic confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process.” *Id.* at 1620.); *id.* at 1624–27 (Scalia, J., concurring in the judgment); Van Orden v. Perry, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (“The unintelligibility of this Court’s precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.”).

<sup>70</sup> 540 U.S. 93, 150 (2003), *overruled in part* by Citizens United v. FEC, 130 S. Ct. 876 (2010); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865–69 (1992) (retaining a modified abortion right and sourcing the Court’s legitimacy partly in public perception of legally principled decisions and stare decisis).

*A. Appearance/Reality Collapse*

Begin with social constructions, such as standard time, social status, physical beauty, or race (in one sense<sup>71</sup>). They can be used for virtuous or dastardly ends, easing the organization of either deserving liberation movements or destructive subordination campaigns, and there can be disagreement over which is which. The same can be said for attempts to establish favored norms by creating a shared social meaning for certain conduct.<sup>72</sup> In other respects, however, the evaluative task is straightforward. There is no need to worry about a successful construction's failure to match reality. If everyone understands that the construction is meant to be its own mind-dependent reality, questions about deception are inapposite.<sup>73</sup> Coordinated minds are themselves constitutive of the relevant reality. The issue, then, is whether the project of building the social construction is good or bad in other ways.

Similar thoughts govern aesthetics and expressive impact. Yes, observers might perceive an appearance differently, disagree over whether and how it should be assigned meaning, or value the same meaning differently. Some view California's Proposition 8 as a stigmatizing devaluation of gay relationships; others see the law as democratic confirmation of a traditional requirement of marriage.<sup>74</sup> And whether or not there is good reason to disagree about the content of the message, people might still differ over the law's merit. Other challenging issues are, nevertheless, sidelined. Observers looking for meaning and making aesthetic judgments need not confront additional complications associated with appearance/reality gaps. A cap or a city or a constitution can be thought ugly or pretty without any reference to any (other) reality with which it might not correspond. Likewise, a speech or a sign or a statute can be insulting or validating, regardless of whether the audience is missing "the" socially correct meaning and regardless of whether the message influences behavior. People can and do evaluate for themselves the aesthetics and messages of various decisions. If we ignore these individualized reactions, we ignore real-world experiences.

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<sup>71</sup> See PIERRE L. VAN DEN BERGHE, *RACE AND RACISM* 9 (1967) (noting a socially assigned version of "race").

<sup>72</sup> See, e.g., Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 350–51 (1997) (indicating that law expresses shared valuations that might influence the behavior of those who perceive those messages); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 954–55, 957–58 (1995) (recognizing that actions may retain a distribution of meanings across observers and that government may be inept at influencing social meaning).

<sup>73</sup> To reiterate, I refer here to *successful* social conventions, not broken or rigged clocks.

<sup>74</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932–38 (N.D. Cal. 2010) (relating testimony of Proposition 8 opponents and proponents).

So the clock model does not guarantee consensus, and the opportunities for disagreement are reflected in legal disputes. Thus the propriety of paralyzing inmates during their executions was strongly contested, and judges usually will not seriously entertain constitutional challenges to government-hoisted Confederate battle flags<sup>75</sup> even as litigation over government-appropriated religious symbols is commonplace.<sup>76</sup> Nevertheless, clock model debates are streamlined in important respects. They rely on logic and values special to aesthetics and expressivism. These debates do share issues with other models: conscientious evaluators should question whether an appearance-management attempt is needed, how effective it can be, the cost of trying, and the appropriate mix of public and private decisionmakers. Plus a value set is required. But the other models prompt additional questions.

### *B. Appearance/Reality Separation*

If appearance might not match a related reality, new sets of normative questions tend to arise. In the bridge model, the possibility of slippage raises transparency questions about information insiders' manipulating appearances to their advantage. In the bank model, by contrast, the prospect of appearance's facilitating the emergence of a corresponding reality raises causal questions about the true force of appearance. The bridge model is not entirely separate from the bank model, it should be noted: the latter represents a subset of all behavioral effects caused by appearances, albeit an especially curious and useful subset when transparency is prized. Crudely speaking, however, bridge situations present special issues of transparency while bank situations present special issues of causation.

1. *Bridge Models and Transparency.* — If an appearance cannot influence its corresponding reality, even over time, most people will have trepidation about appearance-management efforts. An unsafe bridge designed so that the untrained eye sees safety puts typical bridge users at risk without the ability to accept, reject, or change that risk based on either the objective truth or the best available belief. In this respect, they would be driving blind. Depending on additional details, the situation implicates misrepresentation, negligent failure to warn, or other problematic conduct on the part of those responsible for the struc-

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<sup>75</sup> See, e.g., *NAACP v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990) (stating that Alabama's Confederate flag display, although offensive to many, is a "political matter which is not within [the court's] province to decide").

<sup>76</sup> For now. Cf. *Salazar v. Buono*, 130 S. Ct. 1803, 1819–20 (2010) (opinion of Kennedy, J.) (applying, but injecting criticisms of, the endorsement test for government use of religious symbols); *id.* at 1824 (Alito, J., concurring in part and concurring in the judgment) (assuming that "the so-called 'endorsement test'" should apply).

ture. As such misconduct spreads, society becomes more hierarchical and dysfunctional. At the extreme, citizens are mired in an Oceania-style dystopia in which information is fabricated by the powerful to exploit the powerless.<sup>77</sup> This kind of threat is the downside of institutions' learning how to enhance perceptions of fairness and levels of sociological legitimacy without otherwise reforming their operations.<sup>78</sup>

Today's catchphrase for the problem is "lack of transparency." Although the label is shallow,<sup>79</sup> the notion of transparency is grounded in understandable concerns — concerns about agents failing to serve the interests of their principals, and about strangers depriving others of the power to make informed decisions that affect the well-being of themselves and their political communities. These issues are old.<sup>80</sup> The essential point here is that, while transparency worries are less serious for the clock and bank models, they nag the bridge model. The most anxious libertarian might fear that government secrecy is a constantly expanding problem, as Max Weber's bureaucratic "professional insider" seeks to hoard advantages over outsiders through secrecy.<sup>81</sup> But even tepid democrats start to become concerned when officials may control how their operations appear without similarly influencing their actual conduct.

To be sure, the appropriate extent of government transparency is fairly disputed.<sup>82</sup> Although a bit spooky, official secrecy is, at times, an excellent idea. Indeed, when people disapprove of information access restrictions they decry "secrecy," and when they approve they extol "privacy." Even artifice plays a tragically needed role in an imperfect world.<sup>83</sup> Along with self-preservation in the face of unjustified per-

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<sup>77</sup> See ORWELL, *supra* note 1, at 36–37.

<sup>78</sup> See Robert J. MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 189–93 (2005).

<sup>79</sup> See Adam M. Samaha, *Judicial Transparency in an Age of Prediction*, 53 VILL. L. REV. 829, 829–30 (2008) (explaining that complex institutions cannot be either fully known by any one person or fully unknown to all persons); see also Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 892–95 (2006).

<sup>80</sup> See, e.g., AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 95–101 (1996) (discussing the heritage of the publicity principle as a presumption to promote democratic accountability); FRANCIS E. ROURKE, *SECRECY AND PUBLICITY* 4–5, 39–40 (1961) (presenting government secrecy as a threat to public observation and control); Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 916–22 (2006) (analyzing the issue partly as a principal/agent problem).

<sup>81</sup> 2 MAX WEBER, *Bureaucracy*, in *ECONOMY AND SOCIETY* 956, 992 (Guenther Roth & Claus Wittich eds., 1978).

<sup>82</sup> See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 665–77 (1984); Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 583 (1986) ("[S]ociety is distinctly ambivalent about the benefits of increased knowledge.").

<sup>83</sup> See SISSELA BOK, *LYING* 34–39 (1979) (reviewing commonly accepted positions that justify certain lies, excuse them, or define away the objection to lying). For the extreme position, see



sonal threats to life, plausible examples include covert military operations against wartime enemies and undercover operations against domestic criminal organizations. Much already has been written on the topic and you will have your own opinions. Perhaps the safest synopsis is that deception is usually immoral or unethical and is sometimes unlawful, but that there are exceptions. More important for present purposes is the association of transparency concerns with bridge models of the appearance/reality relationship.

(a) *Combinations and First-Cut Proposals.* — The safe-looking-bridge hypothetical illustrates a serious transparency problem, but it shows only one appearance/reality combination. Table 1 isolates four combinations by supposing that both appearance and reality can be either good or bad, according to a given normative perspective. This scheme simplifies matters by ignoring gradations between good and bad, along with the possibility that uncertainty surrounds the characterization of reality or appearance. Nevertheless, these four combinations allow for some useful normative discussion — beginning with how these cells might be ranked, then moving on to techniques for navigating among the cells under the bridge model and, in the next subsection, the bank model.

Most comforting is a good appearance paired with a good reality (cell 1), as when a bridge looks and is reasonably safe. The least comforting probably is a good appearance joined with a bad reality (cell 4). A sturdy-looking yet rickety bridge is a condemnable situation for mainstream evaluators, in that uninformed observers are made to live with problems that they cannot perceive, much less combat. This is true even if extraordinary situations call for a false sense of security, and even if appearance/reality gaps are sometimes self-correcting. But the combinations are otherwise difficult to rank without entering long-standing moral and ethical disputes. A bad appearance plus a bad reality (cell 3) has the virtue of providing observers an accurate basis on which to demand reform, but bad/bad leaves nothing pleasant to experience and the reality might be impossible to change.<sup>84</sup> In contrast, a bad appearance joined with a good reality (cell 2) is pleasant for anyone with access to the truth and it too might be self-correcting. A downside is that observers might demand “corrective action” that is actually wasteful or dangerous. Public reaction to the perceived risks

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IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives*, in *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346 (Lewis White Beck trans., 1949).

<sup>84</sup> This infeasible change is part of the case for hallucinogens and experience machines. Although drug-induced experiences are “real” on their own terms, I refer, as usual, to situations in which appearance and reality are related to the same proposition of interest (that is, hallucinations designed to take the place of a “real life” without them).

of terrorism in the 2000s and Communism in the 1950s might be examples.<sup>85</sup> Fear is itself a kind of injury, and it will influence behavior whether or not well founded.<sup>86</sup>

TABLE 1: COMBINATIONS, MODELS,  
AND PROVISIONAL RECOMMENDATIONS

		<i>Good Appearance</i>	<i>Bad Appearance</i>
<i>Good Reality</i>	(1)	<i>Bridge:</i> maintain both appearance and reality	<i>Bridge:</i> improve appearance and maintain reality
		<i>Bank:</i> maintain appearance	<i>Bank:</i> <i>unfortunately unstable</i> ; improve appearance
		<i>Clock:</i> same as Bank	<i>Clock:</i> n/a
<i>Bad Reality</i>	(4)	<i>Bridge:</i> improve reality and maintain appearance	<i>Bridge:</i> improve both appearance and reality
		<i>Bank:</i> <i>fortunately unstable</i> ; maintain appearance	<i>Bank:</i> improve appearance
		<i>Clock:</i> n/a	<i>Clock:</i> same as Bank

We can leave further ranking efforts to professional philosophers specializing in experience-machine hypotheticals and the virtues of painful truths. Our street-level focus is on mainstream policy responses, especially techniques for getting to cell 1. As such, the four cells arrive with first-cut policy recommendations under the bridge model, subject to case-specific cost and efficacy considerations. (1) *Good appearance/good reality* is worth preserving or working toward. The issue is how. On a simple bridge model, appearance and reality must be maintained separately. The former cannot be used to influence the latter. (2) *Bad appearance/good reality* ordinarily calls for improvement in the former alone.<sup>87</sup> An unsafe-looking bridge will not

<sup>85</sup> See William J. Burns & Paul Slovic, *The Diffusion of Fear: Modeling Community Response to a Terrorist Strike*, 4 J. DEF. MODELING & SIM. 298, 298–301, 305–07 (2007).

<sup>86</sup> Institutional responses to such misconceived demands might be best, if the reality cannot be credibly communicated. For indications that federal prosecution of suspected subversives during World War I was partly an effort to moderate populist demand for persecution, see PAUL L. MURPHY, *WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES* 125–26, 165 (1979), which notes that federal officials denounced mob violence while attempting to harness patriotic fervor to build the war effort.

<sup>87</sup> Similar logic applies to situations in which appearances are worse than reality, regardless of whether appearance or reality should be characterized as “bad.” I use the good/bad dichotomy for clarity in exposition, understanding that the analysis could be complicated by introducing gradations.

necessarily make the fact of the matter worse but it can have other negative effects, hedonic or behavioral. Sometimes advertising the good news will be sufficient but, often enough, more than cheap talk will be needed. Insiders might engage in signaling<sup>88</sup> or otherwise conform to the picture of safety held by outsiders, without hope that reality will improve as a result. Indeed, if appearance cannot feasibly be improved, degrading reality might be preferable to transparency problems. (3) *Bad appearance/bad reality* situations are different. Making the bridge appear safer will not make it safer, so the real risk of bridge collapse should be reduced. We might defend appearance manipulation to make the risk appear even worse and thus create pressure for improvements, but of course this tactic is morally controversial. Equally controversial is improving appearance without improving reality. Reality might be too difficult to move and appearance too awful to tolerate; but this “blue pill”<sup>89</sup> situation is, hopefully, a rare dilemma. (4) *Good appearance/bad reality* also prompts a noncontroversial first-cut recommendation: ordinarily, improve reality. There are other possibilities that depend on the details; bridge users might be warned of risk at the same time that the bridge’s structural integrity is modestly improved. But a pleasant appearance, whatever its benefits, will not change the bridge’s structural integrity.

Finally, what about the complicating case of *uncertainty*? Thorough consideration can leave the most capable observer with doubts about the relevant facts, not to mention the appropriate value set or the correct application thereof to a specific issue. Whether or not uncertainty and other forms of indeterminacy are part of objective reality, they are part of the human experience and they can constitute the best-justified belief. When uncertainty is the “reality,” what should be the appearance?<sup>90</sup> Intuitions might loosen here. But as an opening presumption, when reality is uncertain, appearance probably should display uncertainty as well. If the risk of a bridge collapse cannot rationally be pinned down between 0.01% and 10%, perhaps no one should be given the impression that the risk is any clearer. This recommendation fits the usual desire to align appearance with reality in order to energize informed popular judgment. Moreover, intellectuals lack a consensus prescription for dealing with fundamental doubt. There is a list of academic decision protocols for conditions of uncer-

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<sup>88</sup> See ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–27 (2000) (discussing costly conduct, or “signaling,” that may help separate good from bad types). A signal is an appearance as I define the term.

<sup>89</sup> See *THE MATRIX* (Warner Bros. Pictures 1999).

<sup>90</sup> I assume that appearance cannot be uncertain with respect to any given observer, although there can be disagreement across observers regarding how something appears.

tainty as opposed to mere risk,<sup>91</sup> including maximin, maximax, and randomization.<sup>92</sup> Given the controversy, perhaps the protocol choice should be decentralized to the individual level when possible. Even if uncommon today, officials can alert others to uncertainty through explicit messages of doubt. They can confess uncertainty within bounds about the actual level of, say, quid pro quo political corruption as well as they can allege that it happens occasionally, or rarely, or never.

Again, exceptions may be justified. Uncertainty might be difficult for nonexperts to understand even if easy for experts to express. Moreover, beneficial action might be possible only if most people are under the impression that uncertainty has been eliminated. A morally acceptable course for experts conceivably could be to convince the rest of us that the residual uncertainty is nonexistent, if such convincing is necessary to carry out the socially best course of action. One account of the global climate change debate has this complexion, which is not far from the Supreme Court's rationale for allowing voter identification demands at polling places.<sup>93</sup> Following this route is itself fraught with risk, of course. The authoritarian dangers are familiar while the likely gains are unclear, almost by definition. Still, the justifications can be analyzed along the lines of deception tactics applicable to the good appearance/bad reality combination. A similar remark applies to efforts at manufacturing uncertainty when the reality is known to be good or bad.<sup>94</sup>

(b) *Necessity and Efficacy.* — There is more to consider, of course, even apart from the cost of successfully engineering appearance or reality. Here I want to note two other factors with widespread relevance.

First, attention to appearance is sometimes unnecessary, even under the bridge model. Appearance/reality gaps can be unstable without anyone's trying to close them, as with large-scale conspiracies in which secrecy is difficult to maintain. Strong optimism faces challenges after

<sup>91</sup> See FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 19–20, 231–34 (1921).

<sup>92</sup> See, e.g., SIMON FRENCH, *DECISION THEORY* 32–60 (1986); David Kelsey & John Quiggin, *Theories of Choice Under Ignorance and Uncertainty*, 6 J. ECON. SURVS. 133, 133–42 (1992); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 18–21 (2009).

<sup>93</sup> See *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610, 1619–20, 1623 (2008) (opinion of Stevens, J.); *id.* at 1624, 1627 (Scalia, J., concurring) (referring to the state interests discussed in the lead opinion, but rejecting the challenge on broader grounds). The Court upheld Indiana's identification requirement against a facial challenge based on the interests in preventing an unknown level of fraud, as well as reducing the appearance of fraud to maintain voter confidence. *Id.* at 1624 (opinion of Stevens, J.).

<sup>94</sup> For indications that uncertainty maintenance is an accepted tactic in law enforcement, consider the confidential protocols for selecting subway stops for bag searches in New York City, see *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006), and federal income tax returns for audit, see INTERNAL REVENUE MANUAL §§ 4.19.11.1.5.1.8–10 (2007), available at [http://www.irs.gov/irm/part4/irm\\_04-019-011.html](http://www.irs.gov/irm/part4/irm_04-019-011.html).

such episodes as Bernard Madoff's Ponzi scheme and the Johnson Administration's lasting spin on the Vietnam War, but even modest pessimists will admit that reality often has a gravitational pull on appearance. Conspirators may have incentives to break ranks, and covert behavior may be uncovered through carelessness or alert monitors. At least episodically, "life in a world of myth must collide with fact in the world of reality."<sup>95</sup> The old, superficial markers of underlying truths may come to lose their impact on belief.

Second, even when it seems necessary or worthwhile, manipulating appearances can be difficult. Some people pay no attention to image advertising, which can do only so much to control the beliefs of product users.<sup>96</sup> They have better information than sellers' talk. And different people perceive and interpret events differently, sometimes unpredictably. The causes of such disparate impressions include differential access to information, differential resources for processing information, and differential sensitivity to influences such as cognitive bias,<sup>97</sup> emotional state,<sup>98</sup> cultural identity,<sup>99</sup> and normative bias.<sup>100</sup> Thus appearance regulation might not have much effect, or it might not have the intended effect on the key audience. Indeed, appearance management efforts can backfire. Denying that you beat your spouse draws attention to a possibility that listeners might not have entertained.

Take voter fraud. One theory is that a person's perception of widespread fraud is demoralizing, making her less likely to vote, and that requiring photo identification at polling places will moderate this perception. The Supreme Court relied on this logic in *Crawford v. Marion County Election Board*.<sup>101</sup> But there are competing theories — after all, it is not as if we have a consensus theory of why people vote in the first place. Perhaps perceptions of fraud prompt outraged citizens to vote in greater numbers. Perhaps demoralized voters will simply ignore a statutory response. Or perhaps the response will vary with ideology. Voter identification requirements like Indiana's — which was debated along partisan lines<sup>102</sup> — could prompt some people to be-

<sup>95</sup> Merton, *supra* note 52, at 204.

<sup>96</sup> See, e.g., GEORGE A. FLANAGAN, *MODERN INSTITUTIONAL ADVERTISING* 63–69 (1967).

<sup>97</sup> See, e.g., Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121, 121–22 (2003).

<sup>98</sup> See, e.g., Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES* 397, 397, 420 (Thomas Gilovich et al. eds., 2002).

<sup>99</sup> See, e.g., MARY DOUGLAS & AARON WILDAVSKY, *RISK AND CULTURE* 72–73, 194–95 (1982); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 149–50 (2006).

<sup>100</sup> See, e.g., Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1111–12, 1118–19 (2006).

<sup>101</sup> 128 S. Ct. 1610, 1620 (2008) (opinion of Stevens, J.).

<sup>102</sup> *Id.* at 1623–24.

lieve that the system is getting better, others to believe the opposite, and still others to perceive a risk that they had not thought about until the legislation. Voter identification could be akin to airport security efforts that some call necessary inconveniences and others call “security theater.”<sup>103</sup>

Existing empirical research also leaves doubt. Studying cross-sectional polling data and voting records, Professors Stephen Ansolabehere and Nathaniel Persily found no correlation between beliefs about voter fraud prevalence and turnout, or between the strength of voter identification requirements and beliefs about voter fraud.<sup>104</sup> The devastating suggestion is that neither causal element of the appearance justification is demonstrable. But the study raises questions, too. Perhaps antifraud efforts are more likely in places with concerns about voter fraud, and these measures do reduce those concerns — but only enough to wash out differences between high and low regulation jurisdictions. The study cannot rule out this possibility, which is better tested with time-series data.<sup>105</sup> All of this recommends a cautious interest in, not total disregard for, appearance-management efforts.

2. *Bank Models and Causation.* — Although questions of cost, need, and efficacy are inescapable, the possibility of appearance positively influencing reality changes the picture. The normatively plausible options suddenly shift if a self-fulfilling prophecy is at work.

First of all, appearance manipulation can now move us from the lower right quadrant (cell 3) to the upper left (cell 1). Society could elevate out of the bad appearance/bad reality combination by engineering a better appearance. Similarly, society might retain the good appearance/good reality combination by sustaining the appearance alone. For example, unstable banks might become and remain stable through confidence-building measures such as deposit insurance. This recommendation assumes that propping up the bank is a good goal, of course, but the present observation is about techniques. Conversely, attempting to change the underlying reality alone will be ineffective. Unlike a simple bridge model in which reality and appearance must be maintained separately, a bank model shifts attention to appearance by itself.

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<sup>103</sup> Jeffrey Goldberg, *The Things He Carried*, ATLANTIC MONTHLY, Nov. 2008, at 100, 100; see also Thomas E. Baldwin et al., *Understanding Public Confidence in Government to Prevent Terrorist Attacks*, 5 J. HOMELAND SEC. & EMERGENCY MGMT., iss. 1, 2008, art. 4, at 16 (identifying response patterns among a small group of subjects who watched mock news broadcasts regarding terrorist attacks).

<sup>104</sup> See Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1750–60 (2008).

<sup>105</sup> Cf. *id.* at 1755 n.43 (recognizing that fraud perceptions may drive fraud regulation).

In addition, the upper right quadrant (cell 2) and the lower left quadrant (cell 4) become unstable, and for reasons different from those that produce instability under the bridge model. Especially potent appearances will eliminate those combinations as self-fulfilling prophecies pull reality into alignment. Well-functioning banks cannot always survive rumors of insolvency or a widespread financial panic, while poorly functioning banks can survive awhile if access to such facts is restricted. Under the bank model, therefore, a good appearance/bad reality situation (cell 4) becomes less urgent compared to a bad appearance/good reality situation (cell 2); the former is self-correcting while the latter threatens a downward spiral. Something like the opposite is true under the bridge model, to the extent that reality has any positive causal effect on appearance. For a similar reason, the bank model makes uncertain realities less significant. If a self-fulfilling prophecy is in place, we may rely on appearance as a proxy for unobservable reality.

(a) *New Causation Questions.* — But these differences depend on the likelihood of a self-fulfilling prophecy — a potentially challenging causation question. Sometimes the suggestion will seem ridiculous, at least to intellectuals. *The Secret* is a self-help outfit that promotes positive visualization techniques. Among them is daily concentration on statements such as, “I am receiving unexpected checks in the mail.”<sup>106</sup> On par would be a claim that inmate pain depends on the appearance of pain. At other times, however, a self-fulfilling prophecy will be perfectly plausible. Consider negative expectations and dating. It might not be surprising, given the degree of personal influence, if those who anxiously expect relationships to end are more likely to help prompt the quick end of a relationship. And evidence exists for this proposition. In a leading study involving Columbia University student couples who were asked to maintain journals about their relationships, preexisting anxious expectations of rejection led the subjects to perceive ambiguous cues negatively and to behave differently during conflicts in ways that decreased the probability of a prolonged relationship.<sup>107</sup>

Seeing a correspondence between belief and result is not the same as understanding the undergirding mechanism, however. To fully comprehend self-fulfilling prophecies, you must know the environments in which appearance, perception, and belief form in ways that

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<sup>106</sup> *The Secret to Riches* at 1:03, THE SECRET, <http://thesecret.tv/secret-to-riches> (last visited Mar. 25, 2012).

<sup>107</sup> See Geraldine Downey et al., *The Self-Fulfilling Prophecy in Close Relationships: Rejection Sensitivity and Rejection by Romantic Partners*, 75 J. PERSONALITY & SOC. PSYCHOL. 545, 545–53, 556–59 (1998).

encourage reality to align with them.<sup>108</sup> The fundamentals of the bank confidence example are perhaps most confidently known. A period of remarkable stability for covered banks followed the advent of FDIC insurance and greater federal oversight. Many factors contributed to greater stability, to be sure, and the results have not been perfect: the country experienced interest rate spikes and savings and loan failures during the 1980s and 1990s.<sup>109</sup> Part of the latter problem seems to have been troubled thrifts taking riskier gambles with insured money as the government looked on, hoping in vain for a turnaround.<sup>110</sup> Nevertheless, there is good reason to think that post-1933 insurance and regulation increased bank stability through depositor confidence.<sup>111</sup>

Elsewhere, the statistically reliable effect of self-fulfilling prophecies is limited. Among the most studied is the impact of teacher expectations on student performance. The classic study is Professor Robert Rosenthal and Lenore Jacobsen's *Pygmalion in the Classroom*.<sup>112</sup> Elementary school teachers were told which of their students were likely to show significant intellectual growth based on a new test. But the teachers were misled. Their students had taken a standard IQ test, and the students supposedly marked for an intellectual spurt instead had been marked at random. At the end of the school year, another IQ test was administered. The randomly marked students nevertheless outpaced the IQ score increases of their classmates in a statistically significant way.<sup>113</sup> The control group for all grade levels gained about eight points between the two tests, while the treatment group gained about twelve; the gap for first and second graders was about fifteen points and nine points, respectively.<sup>114</sup>

Yet it was always unclear precisely which mechanisms drove *Pygmalion's* impressive results — how exactly teachers might have acted differently toward the marked students, and how marked students experiencing special treatment reacted. The authors warned that their results might be sensitive to the particular student population and sur-

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<sup>108</sup> See *id.* at 557–58; see also William E. Wilkins, *The Concept of a Self-Fulfilling Prophecy*, 49 SOC. EDUC. 175, 179–80 (1976) (pointing out that self-fulfilling prophecies might be a function of misperceptions, ignorance, values, or the environment).

<sup>109</sup> See CARNELL ET AL., *supra* note 43, at 24–25, 29–30.

<sup>110</sup> See Richard Scott Carnell, *A Partial Antidote to Perverse Incentives: The FDIC Improvement Act of 1991*, 12 ANN. REV. BANKING L. 317, 322–24 (1993) (arguing that regulators of banks and thrifts had incentives to favor forbearance excessively); Jonathan R. Macey, *Commercial Banking and Democracy: The Illusive Quest for Deregulation*, 23 YALE J. ON REG. 1, 15 (2006) (describing the moral hazard problem).

<sup>111</sup> See, e.g., CARNELL ET AL., *supra* note 43, at 47, 309–10; Diamond & Dybvig, *supra* note 55, at 401.

<sup>112</sup> ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM* 61–97 (1968).

<sup>113</sup> See *id.* at 74–82.

<sup>114</sup> See *id.* at 74–76.



rounding community.<sup>115</sup> That warning turned out to be sound, if not always heeded during the ensuing excitement. What we can say with some confidence now is that “self-fulfilling prophecies in the classroom do exist, but they are generally small, fragile, and fleeting.”<sup>116</sup>

No simple restatement of how to prompt self-fulfilling prophecies seems possible at this date. Researchers indicate that several factors might be relevant, including the novelty of the situation and the incentives for observers to acquire accurate information.<sup>117</sup> But these are hypotheses. A more powerful message from this literature is that context matters. While we have reason to believe that self-fulfilling prophecies occur in a variety of situations,<sup>118</sup> we do not always have a comfortable grip on when and how they happen.

(b) *Necessity and Efficacy.* — As with the bridge model, issues of need and efficacy deserve acknowledgement. When a self-fulfilling prophecy is in play, there remains the question of whether to instigate or inhibit the dynamic. Were it possible to increase student intelligence significantly by merely increasing teacher expectations, broad support for that strategy might follow — bracketing objections to the questionable tactic of systematically deceiving teachers. Other efforts to control appearances are at least equally debatable. Government deposit insurance paired with regulation is one method of reducing bank runs without the inconveniences of bank holidays, but there are downsides, apart from attendant taxation. A deposit insurance program can backfire. If the program is not coupled with accurate risk-based premiums or effective regulation of bank reserves and investments, depositors might monitor their banks less seriously and banks

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<sup>115</sup> See *id.* at 96 n.4.

<sup>116</sup> Lee Jussim & Kent D. Harber, *Teacher Expectations and Self-Fulfilling Prophecies: Knowns and Unknowns, Resolved and Unresolved Controversies*, 9 PERSONALITY & SOC. PSYCHOL. REV. 131, 142 (2005) (surveying studies and finding coefficients for treatment to be around 0.1 or 0.2); see also *id.* at 152 (“Although typically weak, some large self-fulfilling prophecies have been found especially regarding members of some at-risk groups; although self-fulfilling prophecies dissipate, they may endure in diluted form for years.”).

<sup>117</sup> See *id.* at 142, 147 (discussing theory and evidence for the notions that self-fulfilling prophecies are more likely in circumstances that are new to the participants, while stereotype effects weaken as observational information accumulates).

<sup>118</sup> See, e.g., T. Alexander Aleinikoff & Rubén G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 2 (1998) (examining self-fulfilling prophecies in immigration decisions); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1640 (1991) (discussing a vicious circle of statistical discrimination and employee decisions not to invest in human capital); see also Mayer G. Freed & Daniel D. Polsby, *Privacy, Efficiency, and the Equality of Men and Women: A Revisionist View of Sex Discrimination in Employment*, 1981 AM. B. FOUND. RES. J. 583, 633–36 (similar); cf. Stewart Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 233 (1986) (noting the difficulty of identifying the effects of statistical discrimination).

might become too happy to make low-probability/high-return loans.<sup>119</sup> The savings and loan crisis has been associated with this moral hazard.<sup>120</sup> There also is evidence from a range of countries that government insurance can actually undercut financial sector stability, depending on how the program is designed.<sup>121</sup>

Cynicism about regulation in the post-Camelot era comes easily — too easily, in my view. Dark theories should not overwhelm convincing experience, and many decades of reliable banking provide that kind of experience-based evidence.<sup>122</sup> Regardless, the financial sector, like others, is subject to politics that generates its own imperatives. Popular demand for increased reliability cannot be ignored in the real world. But nor should we forget the usual complexity of engineering self-fulfilling prophecies. Their possibility makes the analysis more exciting and more taxing. This examination should consider the chance of appearance effectively swaying reality based on theory and evidence, the need for aligning the two, and the costs of proceeding in this way. Everything depends on this kind of analysis, however challenging it may be.

### C. Institutional Choice and Design Problems

Finally, crosscutting issues of institutional choice and design call for recognition. The familiar idea is that a decision's character and quality depend on the structure of the decision process.<sup>123</sup> Societies face trade-offs when designing each institution and even more trade-offs when allocating decisions among institutions. The standard advice from theorists is to compare decision costs along with error costs across different institutional designs and institutional options. Some institutions will be frugal in churning out decisions, others expensive;

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<sup>119</sup> See Jonathan R. Macey & Elizabeth H. Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 YALE J. ON REG. 215, 220 (1988). The FDIC now attempts to vary assessments according to each bank's risk. See generally Assessments, Large Bank Pricing, 76 Fed. Reg. 10672 (Feb. 25, 2011).

<sup>120</sup> See John C. Coffee, Jr., *What Caused Enron? A Capsule Social and Economic History of the 1990s*, 89 CORNELL L. REV. 269, 278 (2004).

<sup>121</sup> Asli Demirgüç-Kunt & Enrica Detragiache, *Does Deposit Insurance Increase Banking System Stability? An Empirical Investigation*, 49 J. MONETARY ECON. 1373, 1402 (2002) (studying explicit, government-run deposit insurance programs between 1980 and 1997).

<sup>122</sup> Also worth noting are near-substitutes for banks, such as deposit facilities that are subject to less regulation, which makes regulation more like an option that people select into. See Jonathan R. Macey & Geoffrey P. Miller, *Nondeposit Deposits and the Future of Bank Regulation*, 91 MICH. L. REV. 237, 267–68, 271–73 (1992). There remains the issue of systemic risk from a shadow banking system. See generally GARY B. GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007 (2010).

<sup>123</sup> See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 5 (1994); David L. Weimer, *Institutional Design: Overview*, in INSTITUTIONAL DESIGN 1, 12 (David L. Weimer ed., 1995).

some will be reliably correct, others more error-prone. Such differences are partly a function of healthy incentives and relevant expertise, which are often, and sadly, inversely related.<sup>124</sup> Furthermore, designers should account for longer-term dynamic effects of institutional settings, where predictable.<sup>125</sup> There also is the possibility that a decision is best left *un*institutionalized. Decision costs plus error costs plus problematic dynamic effects could mean that a supposedly social decision should be individualized.<sup>126</sup>

The number of appearance justifications precludes specific advice about the allocation of power. Their variety affects the proper basis for aesthetic choices, the importance of public confidence, the magnitude of transparency problems, the mechanics of self-fulfilling prophecies, and so on. However, two features of appearance justifications do make them seem special for institutional analysis. They cut in different directions.

On the one hand, appearance justifications may come with a high risk of self-serving motivation, facilitated by a lack of transparency. Whether the appearance managers are politicians, corporate executives, union leaders, or anyone else, outsiders may worry that false impressions are being generated for the purpose of hoarding power. Concerns escalate when decisionmakers control their images without checks to ensure correspondence with their actual performance. True, outsiders suffer from expertise shortages that diminish the trustworthiness of their second-guesses. But expertise deficits pervade institutional choice problems, and they do not seem systematically different for appearance justifications. A relatively high risk of officials carrying out selfish designs flows from information asymmetries. This risk distinguishes many appearance arguments, insofar as outsider incompetence is less troubling than insider motivation problems. Wariness is therefore in order when decisionmakers defend themselves based on pleasant appearances.

On the other hand, only a subset of appearance justifications is susceptible to this risk of bad motives. Aside from occasions when information asymmetries are minor, the risk is particularly great for bridge models but not for bank models and even less so for clock models. Concern about selfishness peaks when appearance managers create images of their performance that cannot influence the reality of their conduct backstage. When reality will be pulled toward appearance over time, however, the transparency problem fades — and so

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<sup>124</sup> See Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 661 (2006).

<sup>125</sup> See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 78–79 (2006) (suggesting testable hypotheses regarding cross-institutional interaction).

<sup>126</sup> See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 5–7 (1962).

does the concern about motivations. Outsiders need not be so worried whether decisionmakers are truly motivated by good or ill as long as the appearance is consistent with a normatively attractive outcome. There is then more ground for deference favoring expert decisionmakers.

None of the above avoids the task of identifying the most likely appearance/reality relationships. Even if bank models indicate less deference while bridge models indicate the opposite, evaluators must choose a model. At times this will be uncontroversial, as in the lethal injection case. Situations like those are better suited to oversight by outsiders, being as well-educated as they reasonably can be. But the true relationship among appearance, perception, belief, and behavior is at least occasionally foggy. How these considerations net out will depend on additional detail.

#### IV. TWO APPLICATIONS

As we have seen, references to appearance and reality often refer to the same proposition. When they do, several relationships are possible. I have emphasized three: reality might be insulated from appearance (the bridge model), appearance might help pull reality into alignment over time (the bank model), or reality might collapse into appearance (the clock model). Each model requires a value set to be normatively useful, and each presents issues of cost, need, and efficacy within an institutional setting. But each suggests a different set of evaluative questions for appearance justifications. In simple terms, the bridge model often triggers transparency concerns, the bank model tends to eliminate them, and the clock model is often applicable regardless. What people call an appearance is usually significant for its own sake, but sometimes official manipulation of appearance away from an associated reality also causes concern, and at other times those worries should wane amid the aligning force of a self-fulfilling prophecy.

These general impressions are now ready for more concrete application. The possibilities are countless, even considering only contemporary government decisions. In addition to disparate examples referenced above — such as deposit insurance, voter identification, and lethal injections — the list includes ongoing debates over stimulus policies to build consumer and investor confidence, religious symbols placed on government property to reflect mainstream culture,<sup>127</sup> anti-discrimination law as a tool to increase investment in human capital,<sup>128</sup>

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<sup>127</sup> See, e.g., *Samaha*, *supra* note 65, at 143–44 (discussing possible objections to such practices); see also *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005).

<sup>128</sup> See, e.g., *Freed & Polsby*, *supra* note 118, at 633–36; *Strauss*, *supra* note 118, at 1626–27; see also *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 730 (1982) (“[The university’s] admissions policy . . . makes the assumption that nursing is a field for women a self-fulfilling prophecy.”).

legislative districts apparently drawn according to racial lines,<sup>129</sup> appearance-based ethics rules for legislators and bureaucrats,<sup>130</sup> and the proper standard for judicial recusal.<sup>131</sup> This is only a start.

All of these debates can be compared under the models for appearance/reality relationships emphasized above. But each has special nuances. Instead of canvassing a large number of applications in speculative fashion, this Part reexamines two modern debates. The discussion can then be fairly in-depth, though not conclusive. It will illuminate the more general analytic framework and how the parts fit together. For these purposes, I have chosen courtroom debates over campaign finance regulation and policy debates over broken windows policing. Within these debates, moreover, I will concentrate on candidate contribution limits and policing strategies designed to reduce violent crime. These two applications make for a constructive discussion: they have lasting prominence in legal scholarship, they are the subject of intriguing recent study by empiricists, and, when compared using the same general framework, their discussion manifests sharply different gaps.

#### A. Campaign Finance Regulation

1. *Litigation Under the Bridge Model.* — The Supreme Court and the advocates before it treat the appearance justification for campaign finance regulation as if government were the proverbial bridge. Justices show varying levels of sympathy toward elected officials' worries about public confidence,<sup>132</sup> but this worry consistently follows a causal path from perceived official misconduct to citizen demoralization and loss of confidence in government. The ultimate dangers are not fully specified but they seem to be much like those of a bridge made useless by its risk-ridden reputation. And low confidence, low participation

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<sup>129</sup> See, e.g., Pildes & Niemi, *supra* note 66, at 506–16; see also *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[R]eapportionment is one area in which appearances do matter.”).

<sup>130</sup> See, e.g., PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY* 2–5 (1997) (criticizing overused charges of apparently unethical behavior); see also *United States v. Nat’l Treasury Emps. Union*, 513 U.S. 454, 473 (1995) (“Congress reasonably could assume that payments of honoraria to judges or high-ranking officials . . . might generate a similar appearance of improper influence.”).

<sup>131</sup> See, e.g., Fredrick Schumann, “*The Appearance of Justice*”: *Public Justification in the Legal Relation*, 66 U. TORONTO FAC. L. REV. 189, 196–97 (2008); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 817–18 (2002) (Ginsburg, J., dissenting) (“Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe.”).

<sup>132</sup> For expression of such worries by elected officials, see, for example, KURT HOHENSTEIN, *COINING CORRUPTION* 225–26 (2007), which recounts Senator Howard Baker’s concerns about public confidence during debates over post-Watergate campaign finance legislation, and JOHN MCCAIN WITH MARK SALTER, *WORTH THE FIGHTING FOR* 337 (2002), which declares that “[q]uestions of honor are raised as much by appearances as by reality in politics, and because they incite public distrust, they need to be addressed.”

levels, and low respect for official decisions undoubtedly undermine effective government.

Courtroom attention to this public relations problem developed between World War II and Watergate. Consider Hatch Act<sup>133</sup> cases. In 1947, the Court rejected an as-applied free speech challenge to the Act asserted by a U.S. Mint employee who wanted to serve as a party ward boss.<sup>134</sup> The majority opinion relied on a sizable catalog of factors without clearly invoking public perception.<sup>135</sup> By 1973, the arguments had shifted. *United States Civil Service Commission v. National Ass'n of Letter Carriers*<sup>136</sup> again vindicated the Hatch Act, but this time the Court relied on the appearance problem explicitly: “[I]t is not only important that the Government and its employees in fact avoid practicing political justice,” the majority reasoned, “but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.”<sup>137</sup>

We cannot be certain why the Court turned to appearances. The government’s lawyers did not press the idea in briefing or oral argument. Worth noting, however, is that *Letter Carriers* was decided during an era with waves of social unrest and a crisis of confidence in major institutions — government included. The Watergate break-in had finally escalated into a premier scandal,<sup>138</sup> while the Vietnam War had not done the federal government’s reputation any favors. “[F]rom 1964 to 1970, there was a virtual explosion of anti-government feeling”<sup>139</sup> that was “sustained by the Watergate experience.”<sup>140</sup> True, showcasing official perfidy is awkward for government attorneys defending regulation. It amounts to a claim that one’s superiors are so corrupt that they require license to restrain themselves and perhaps

<sup>133</sup> 5 U.S.C. §§ 7321–7326 (2006).

<sup>134</sup> See *United Pub. Workers v. Mitchell*, 330 U.S. 75, 91–92 & nn.23–24, 103–04 (1947).

<sup>135</sup> See *id.* at 96–104 (citing tradition, deference to Congress, threats to efficiency, threats to government “integrity” when citizens might not receive service without political connections, and support for the law in “informed public opinion,” *id.* at 103).

<sup>136</sup> 413 U.S. 548 (1973).

<sup>137</sup> *Id.* at 565 (listing other regulatory interests as well).

<sup>138</sup> H.R. Haldeman and John D. Ehrlichman were purged after oral argument in *Letter Carriers* but before the decision issued. See Laurence Stern & Haynes Johnson, *3 Top Nixon Aides, Kleindienst Out; President Accepts Full Responsibility; Richardson Will Conduct New Probe*, WASH. POST, May 1, 1973, at A1.

<sup>139</sup> SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, *THE CONFIDENCE GAP* 16 (1983).

<sup>140</sup> *Id.* at 18; see also ROBERT E. MUTCH, *CAMPAIGNS, CONGRESS AND COURTS* 42–43 (1988); John R. Alford, *We’re All in This Together: The Decline of Trust in Government, 1958–1996*, in *WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?* 28, 29–31 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001) (noting that few people expressed full or no trust in “the government in Washington” and that the shift was mostly from trust “most of the time” to “some of the time”).

innocent parties as well. But the appearance justification goes down easier. A practical problem of corrupt appearance can exist even if corrupt bargains are rare in fact. This problem must have seemed all too real in 1973.

The landmark Federal Election Campaign Act Amendments of 1974<sup>141</sup> followed,<sup>142</sup> and the Supreme Court imported the appearance justification in *Buckley v. Valeo*.<sup>143</sup> “Here, as [with the Hatch Act], Congress could legitimately conclude that the avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’”<sup>144</sup> This argument was not enough to preserve every element of the legislation; the Court invalidated caps on independent expenditures.<sup>145</sup> In addition to supposedly greater constitutional value for spending uncoordinated with candidate campaigns, the majority thought that these expenditures presented less risk of corrupt bargains between spenders and candidates.<sup>146</sup> Yet the Court did rely on the appearance of corruption in upholding dollar limits on contributions to candidates.<sup>147</sup> Here the risks of actual corruption were considered higher and thus the problem of corrupt appearance seemed worse.

The appearance justification thus played a modest supporting role in *Buckley*, as it has in cases since. Knowing exactly how modest is difficult. But consider this: there seems to be no campaign finance decision holding that the regulatory interest in fighting corruption was insufficient but that the interest in combating corrupt appearance was strong enough.<sup>148</sup> Equally notable, the appearance justification has always been theoretically stunted. Judges may worry about public confidence in government, but they do not assert that the appearance of

<sup>141</sup> Pub. L. No. 93-443, 88 Stat. 1263.

<sup>142</sup> For helpful background, see MUTCH, *supra* note 140, at 1–82, and Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in *FIRST AMENDMENT STORIES* 345 (Richard W. Garnett & Andrew Koppelman eds., 2012).

<sup>143</sup> 424 U.S. 1 (1976) (per curiam).

<sup>144</sup> *Id.* at 27 (omission in original) (quoting *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 565 (1973)).

<sup>145</sup> *Id.* at 51.

<sup>146</sup> *See id.* at 47.

<sup>147</sup> *See id.* at 27 (“Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.”). As this quotation suggests, the appearance justification has been intertwined with arguments for prophylactic regulation. Corrupt bargains can be difficult to detect, and broad rules might assure the public that corruption is not widespread. But the argument for prophylaxis, *see supra* note 11, can stand on its own without making the reduction of corrupt appearance a significant independent goal.

<sup>148</sup> The closest counterexample I have seen is *Jacobus v. Alaska*, 338 F.3d 1095 (9th Cir. 2003), which indicated that soft-money contributions to political parties create corrupt appearances regardless of how the money is actually spent, *id.* at 1113 n.24, though the court also relied on an undue-influence rationale, *id.*

corruption also helps cause actual corruption. “Leave the perception of impropriety unanswered,” Justice Souter once wrote, “and the cynical assumption that large donors call the tune could jeopardize *the willingness of voters to take part in democratic governance.*”<sup>149</sup> Government lawyers have argued in similar terms. In *Buckley*, for instance, the Justice Department relied on *Letter Carriers* and its worry about public demoralization,<sup>150</sup> not on the risk of a downward spiral into widespread corruption in fact. On this score, legal scholarship is not more exotic. Appearance justifications for campaign finance regulation are not much different in character from courtroom arguments.<sup>151</sup>

Despite newsworthy deregulatory themes, the liberation of corporate and union treasuries for independent expenditures in *Citizens United v. FEC*<sup>152</sup> did not mark a major change in the processing of appearance justifications.<sup>153</sup> In this respect, the Court took the orthodox approach. Again, the feared consequence was sagging public confidence,<sup>154</sup> not more actual corruption.<sup>155</sup> And, as usual, the Justices did not ask whether the political system might falsely appear less corrupt with regulation in place. Finally, the case is consistent with a judicial tradition of unflinching empirical claims. Ten years earlier, in *Nixon v. Shrink Missouri Government PAC*,<sup>156</sup> a majority relied on its own sense of plausibility to uphold contribution limits as an effective

<sup>149</sup> *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 390 (2000) (emphasis added).

<sup>150</sup> See Brief for the Attorney General & the FEC at 22, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437) (indicating that “legislating to restore public confidence in elected government” is important “in times of deep public suspicion and apathy”). Popular demand might be an additional reason for regulation, but these public-pacification arguments still fall under the bridge model.

<sup>151</sup> The mountain of legal scholarship on campaign finance regulation touches on appearance arguments, but sustained treatment is rare. See, e.g., MORGAN & REYNOLDS, *supra* note 130, at 2, 5 (asserting that focus on appearance of ethical behavior has been counterproductive); D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About “Big Money” and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 713-14 (2000) (presenting a practitioner’s argument for stronger evidence of efficacy); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 394-95, 397 (2009) (arguing for a broadly defined anticorruption norm and downplaying the significance of appearance). See generally Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest in Preventing the Appearance of Voting Fraud*, 83 N.Y.U. L. REV. 847 (2008) (analogizing from campaign finance to voter identification). Perhaps the most important law journal article on the subject is empirical. See Nathaniel Persily & Kelli Lammie, *Perceptions of Corruption and Campaign Finance: When Public Opinion Determines Constitutional Law*, 153 U. PA. L. REV. 119 (2004).

<sup>152</sup> 130 S. Ct. 876 (2010).

<sup>153</sup> See *id.* at 901-03, 908-11 (relying on *Buckley* for the contribution/expenditure distinction).

<sup>154</sup> See *id.* at 910.

<sup>155</sup> Perhaps the most important doctrinal turn of events was a narrowing of the regulatory interest in preventing “corruption” to quid pro quo deals along with the dismissive treatment of “undue influence,” see *infra* note 197 and accompanying text, a concept that, as Professor Heather Gerken has suggested to me, is more clearly related to political equality commitments. My criticism of the Court’s approach to appearance arguments, I should stress, does not depend on a broader understanding of “corruption.” I am unsatisfied either way.

<sup>156</sup> 528 U.S. 377 (2000).



method of reducing real and perceived corruption.<sup>157</sup> “The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised,” Justice Souter told us.<sup>158</sup> The reasoning in *Citizens United* is not so different. Justice Kennedy asserted that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of [quid pro quo] corruption”<sup>159</sup> and that “[t]he appearance of influence or access . . . will not cause the electorate to lose faith in our democracy.”<sup>160</sup> Justices supporting and opposing regulation seem equally comfortable estimating the effect on public opinion.

Perhaps this fact is unsurprising. Judges are hardly the most careful empiricists. And they are understandably sympathetic, at some level, to public relations problems in the rest of government. Aside from the crass observation that the threat is faced by the same system that provided their commissions, judges have for centuries relied on public confidence to maintain a role in social life.<sup>161</sup> This experience must make the bridge model seem natural for campaign finance cases. Judges wearing the same kind of robe or using a broad recusal standard might influence observers’ impressions, but one can scarcely think that those impressions will seriously affect actual levels of judicial propriety. Believing in dispassionate judges — something Justice Jackson suggested was “mystical”<sup>162</sup> — does not convert the optimistic view into reality. Familiar logic, no doubt, for judges hearing campaign finance cases.

2. *Unvetted Transparency and Efficacy Problems.* — The question is whether this particular logic has been all too familiar. In my view, the answer is yes: judges have been insufficiently demanding of appearance justifications under the bridge model and insufficiently creative in ignoring the bank model.

(a) *Transparency.* — Criticizing courts for permissiveness on the appearance justification might seem counterintuitive. The argument

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<sup>157</sup> See *id.* at 393–95 (pointing to mass media accounts of shady political dealings, public support for contribution limits, and divided scholarship investigating the relationship between contributions and voting behavior).

<sup>158</sup> *Id.* at 391; see also *McConnell v. FEC*, 540 U.S. 93, 144 (2003) (repeating Justice Souter’s admonition).

<sup>159</sup> *Citizens United*, 130 S. Ct. at 909. The majority did later observe that the record in *McConnell* had not identified instances of independent-expenditure quids exchanged for vote quos. See *id.* at 910.

<sup>160</sup> *Id.*

<sup>161</sup> Cf. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009) (relying partly on public-confidence problems in requiring recusal of a state judge based on large independent expenditures in a judicial election).

<sup>162</sup> *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

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has, at best, questionable adjudicative potency. But in operating under the bridge model, judges have been disturbingly timid. My objection is not that the government's confidence problem is insignificant; it might be more serious than any government lawyer is willing to allege. The basic problem is that judges entertain appearance justifications without assuring others that the *actual* incidence and likelihood of corruption is *at least as low* as the appearance that regulators hope to create. Judges provide little reason to believe that a good reality accompanies any good appearance attributable to regulation. The advertising might be false.

And this possibility is a major problem under the bridge model. Any presumption of transparency in democracy has special force when it comes to campaign regulation. The targets for appearance manipulation are voters or citizens or some other cohort in good standing. They are considered principals in democratic theory — the opposite of “enemies of the state.” Although it might be overcome by other considerations, the standard presumption must be that this cohort is entitled to some assurance that the engineered appearance of campaign finance regulation roughly aligns with the actual effect on corruption. This position leans on more than merely abstract commitments to democracy. In this situation, officials are doing more than communicating their claims to freedom from corruption through talk or self-regulation. They are attempting to reprogram the paths of third-party political resources. Even if observers should disregard restrictions on contributor choices, there remains the risk of overconfidence (or, as one might put it today, insufficient lack of confidence). If political outsiders underestimate corruption levels because of regulation that only looks effective, those outsiders might not monitor the political system as closely as they otherwise would, and they might not demand reform as strongly as they should.

From this view, even Justice Kennedy is too soft. Critics in his camp complain that much campaign finance law is ham-handed overkill against legitimate spending on political speech that also protects incumbents or preferred speakers.<sup>163</sup> But this critique does not question the law's ability to cut quid pro quo corruption in proportion to alleged gains in good-looking appearances. In fact, there seems to be tacit agreement among the Justices that contribution caps reduce actual corruption, maybe a lot. Certainly the defenders of contribution limits hold that the caps will reduce the frequency of corruption;<sup>164</sup>

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<sup>163</sup> See, e.g., *McConnell*, 540 U.S. at 248–49 (Scalia, J., concurring in part and dissenting in part); *id.* at 286–88, 306 (Kennedy, J., concurring in part and dissenting in part); *Nixon*, 528 U.S. at 411–30 (Thomas, J., dissenting).

<sup>164</sup> For example, see Supplemental Brief for the Appellee, *supra* note 13, among other arguments, of course.

they do not confess that corruption is widespread and then ask for authority to convince the public otherwise. True, today's limits might well deter the exchange of campaign contributions for official favors from presidents and federal legislators. The powers of these officials are worth more than a few thousand dollars, one would think.<sup>165</sup> But nothing close to a guarantee has been given that public appearance attributable to contribution limits will reflect the actual prevalence of such deals. The public should want evidence, which is difficult to obtain: participants in unlawful bargains ordinarily prefer to keep their dealings private. If, however, the best-justified belief is that the real level of corruption is uncertain within wide bounds, then this understanding should form the logical footing for evaluating appearance-based justifications — not an optimistic assumption.<sup>166</sup> Officials are free to defend contribution caps based on other consequences, such as asserted increases in political participation. But they are not entitled to a quick and quiet conversion of uncertainty into permission.

Finally, contribution limits risk information losses in the form of candidate signals.<sup>167</sup> Candidate choices about how to finance their campaigns might help voters distinguish good types from bad types. A candidate who refuses large contributions might be more credible when she warrants that her official judgment will depend on the best interests of her constituents or her campaign platform, not the whim of the highest bidder. But across-the-board regulation is unlikely to create a separating equilibrium. If the same rule binds all competing politicians, they are indistinguishable within the domain of prohibited conduct. Granted, politicians may constrain themselves further than the law requires, as when candidates refuse or return contributions from unpopular donors. But additional distinguishing behavior should be expected in the absence of regulation.<sup>168</sup> Election law could instead authorize candidates to choose their own limits on contributions, if any, and then advertise and enforce those promises.<sup>169</sup> Potential in-

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<sup>165</sup> See 2 U.S.C. § 441a(a)(1), (c) (2006); FED. ELECTION COMM'N, CONTRIBUTION LIMITS FOR 2011–2012 (2011) (showing inflation-adjusted limits for 2011–2012, including a \$2500 cap on individual contributions to federal candidates per election, and a \$30,800 cap on individual contributions to national party committees per year). These limits do not account for bundling.

<sup>166</sup> See *supra* pp. 1589–90 (addressing uncertainty).

<sup>167</sup> See generally POSNER, *supra* note 88.

<sup>168</sup> Recorded votes on campaign finance legislation might provide useful signals, but officials do not seem to support, say, biennial reauthorization of these laws.

<sup>169</sup> If there is a signaling justification for statutory contribution limits, it must be institution-wide. Congress, for instance, might be competing with other government institutions and the private sector for the confidence of people concerned with social problems. But that story is more complicated — in part, evaluators would need to know the extent to which the competitor institutions impose campaign finance-like restrictions on behavior — and it would not recover the value of lost information about individual candidates, anyway.

formation loss under current law only deepens the transparency problem associated with today's contribution limits.

(b) *Efficacy*. — The appearance justification for contribution limits also presents an important efficacy question. If such regulation does not positively influence how outsiders perceive the political system, there will be only costs, without an effective response to the potentially demoralizing perceptions of corruption. It is hard to believe that contribution limits have zero effect on anyone's corruption perceptions compared to legalizing contributions of all sizes, but the extent and character of the effect is worth questioning.

The issue has been investigated recently, although expert empirical study remains scarce.<sup>170</sup> Most notably, Professors Nathaniel Persily and Kelli Lammie attacked the claim that corruption perceptions follow campaign finance regulation.<sup>171</sup> They reviewed polls asking respondents, for example, whether they believe that there are many "crooked" people running the government and whether a few big interests run government.<sup>172</sup> These numbers have changed, but not obviously in response to law. Actually, the study's data showed perceptions improving after Watergate and the 1974 legislation, but the authors emphasized that perceptions deteriorated after the Bipartisan Campaign Reform Act of 2002<sup>173</sup> (BCRA). Several causes might explain the trends. Indeed, Persily and Lammie found statistically significant correlations between answers to the corruption questions and variables such as approval of the President's job performance, favorable views of the economy, and relatively high levels of trust in general.<sup>174</sup>

The study asked an essential question, but the answer is unfortunately only suggestive. Regulation was not an independent variable in the study.<sup>175</sup> Although the raw numbers are enough to indicate that past legal change has not dramatically affected public opinion, that impression does not indicate the magnitude of the effect, if any, from various regulatory regimes. More radical legal change — such as robust public financing or elimination of contribution limits — might move the numbers further. In addition, the sensitivity of public opinion might change. Rising pessimism could help explain improved perceptions after the 1974 amendments yet worsening perceptions after BCRA, without assurance that *deregulation* would not threaten gov-

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<sup>170</sup> See David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 23 (2006) ("[N]o study has directly examined the connection between existing campaign finance laws and how citizens view their government.").

<sup>171</sup> See Persily & Lammie, *supra* note 151, at 119.

<sup>172</sup> See *id.* at 145–46 (drawing on the National Election Study).

<sup>173</sup> Pub. L. No. 107-115, 116 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.); see also Persily & Lammie, *supra* note 151, at 147–49 & fig.1.

<sup>174</sup> See Persily & Lammie, *supra* note 151, at 150, 156–57, 160, 167 n.119, 168.

<sup>175</sup> See *id.* at 145.

ernment's image. Deregulation is a change about which one can be pessimistic, too. Further, there is an identification problem here: respondents' perceptions of corruption might be influencing some of the independent variables, such as presidential approval. Perceptions of corruption during the latter part of the Nixon Administration surely affected that President's numbers. To the extent that such perceptions negatively impact approval ratings, forces that influence corruption perceptions, including law, might become more important.

Another step forward came from Professors James E. Alt and David Dreyer Lassen. Their dependent variable was the corruption perceptions of journalists covering state legislatures, who were surveyed in 1998 as a clever proxy for actual corruption levels.<sup>176</sup> Journalists are, of course, freakishly well informed. Still, Alt and Lassen were interested in the effects of regulation. It turned out that four factors explained fifty-seven percent of the variation in journalists' corruption estimates: statewide education levels (negatively correlated), per capita government revenue (positively correlated), metropolitan population share (positively correlated), and income level (negatively correlated).<sup>177</sup> These findings left room for other factors, including law.<sup>178</sup> "Campaign expenditures restrictions, by and on behalf of a candidate, are associated significantly with lower corruption,"<sup>179</sup> the authors concluded, speculating that such regulation might counteract the fundraising advantages of incumbents.<sup>180</sup> This correlation persisted after the authors added a host of control variables, including measures of government size and regulatory burden.<sup>181</sup> Alt and Lassen did not better specify their campaign finance regulation variable,<sup>182</sup> so the signifi-

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<sup>176</sup> See James E. Alt & David Dreyer Lassen, *The Political Economy of Institutions and Corruption in American States*, 15 J. THEORETICAL POL. 341, 350 (2003). Another proxy is corruption prosecutions or convictions, see, e.g., Rajeev K. Goel & Michael A. Nelson, *Corruption and Government Size: A Disaggregated Analysis*, 97 PUB. CHOICE 107, 114 (1998), which is partly a function of law enforcement priorities. In a hideously dysfunctional regime, however, there would not be a positive correlation between corruption prosecutions and high corruption levels. A third proxy involves surveys of people's experiences with corruption. See *infra* section IV.A.3, pp. 1609-18.

<sup>177</sup> See Alt & Lassen, *supra* note 176, at 352-53 & tbl.1.

<sup>178</sup> See *id.* at 354-55 & tbl.2 (finding that states with direct initiative opportunities without legislative vetoes were associated with lower journalist corruption perceptions). The theory is that initiatives allow citizens to unbundle the package of policies otherwise offered by political agents. See also *id.* at 354 tbl.2, 356 (same for states with higher relative government salaries). The theory is that a lucrative government job makes engaging in corruption less attractive.

<sup>179</sup> *Id.* at 355.

<sup>180</sup> *Id.* at 354 tbl.2, 355.

<sup>181</sup> See *id.* at 357-59 & tbl.3.

<sup>182</sup> Limits on the total amount spent by candidates would presumably be held unconstitutional, except as a condition on receiving public financing. See *Buckley v. Valeo*, 424 U.S. 1, 52-54 (1976) (per curiam). Correspondence with the authors indicates that they used 1996 data from the *Book of the States* on whether states imposed restrictions on candidate expenditures or expendi-

cance of their finding is cloudy. Nonetheless, their study offers some support for the notion that law can affect the appearance of corruption among professional observers.

Using an analogous approach, Professors David Primo and Jeffrey Milyo broke down state-level campaign finance law into five categories, including candidate contribution limits.<sup>183</sup> The authors then studied the relationship of these regulatory categories to perceived political efficacy, such as whether respondents agreed that “[p]eople like me don’t have any say about what the government does.”<sup>184</sup> This measure is not exactly perception of corruption, nor does it target perceptions about state government.<sup>185</sup> And the study tested the influence of any kind of candidate contribution limit, regardless of how high or how loosely enforced.<sup>186</sup> In other respects, though, the study is useful. The time frame was long; the authors investigated whether regulation tended to lag behind efficacy perceptions as a way of getting at the reverse-causation problem; and the authors controlled for several other plausible influences, including partisan affiliation and identification with the party in power.<sup>187</sup> The results were mixed. Public financing was associated with lower levels of perceived efficacy, while disclosure laws and contribution limits on organizations (corporations, unions, and political action committees) correlated with marginally higher levels.<sup>188</sup> Interestingly, Primo and Milyo found no statistically significant relationship between efficacy perceptions and contribution limits that cover both organizations and individuals.<sup>189</sup> A cautious inference is that law can modestly influence efficacy perceptions but that this effect should not be assumed.

The most provocative study is the most recent. Professor Beth Ann Rosenson found that an index of campaign finance laws is *positively*

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tures on behalf of a candidate. The latter might be a form of contribution under First Amendment doctrine. *See, e.g., id.* at 24.

<sup>183</sup> Primo & Milyo, *supra* note 170, at 31.

<sup>184</sup> *Id.* at 30; *see id.* at 29–30 (relying on National Election Studies surveys from 1948 through 2000). On average, sixty percent disagreed with the statement quoted in the text above. *Id.* at 30.

<sup>185</sup> *See id.* at 30 n.16 (recognizing the problem).

<sup>186</sup> *See id.* at 29. Few states imposed any limit on individual contributions before 1976, but about two-thirds had them by 2000; a majority of states imposed limits on organizational contributions before 1976, and this number drifted upward to over forty states by 2000. *See id.* at 28–29 & fig.1. Also worth noting are changes in the number of state-level expenditure limits — which plunged from about half the states to zero after *Buckley* — and disclosure laws — which surged from over half the states to every state during the same time frame. *See id.* at 29 & fig.1.

<sup>187</sup> *See id.* at 31–32.

<sup>188</sup> *See id.* at 33–34 & tbl.3 (finding a three percent increase in likelihood of reported efficacy in states with a disclosure law, a four percent increase in states with an organizational contribution limit, and a five percent decrease in states with a public financing system). These effects were extremely modest compared to people in the jurisdiction having a college degree or a high school diploma. *See id.* at 33 tbl.2.

<sup>189</sup> *See id.* at 34 tbl.3.

correlated with journalists' perception of corruption.<sup>190</sup> Controlling for several variables,<sup>191</sup> journalists covering state legislatures tend to report somewhat higher levels of corruption when this index of regulation is higher. As with the Alt and Lassen study, the use of journalist perceptions is not the best stand-in for public perceptions.<sup>192</sup> Moreover, both studies are cross-sectional snapshots; they do not investigate variation in legal regimes and perceptions over time, which provides better insight into causation. It would not be shocking to learn that political systems plagued by widespread perceptions of corruption respond with formal legal changes that mildly dampen those perceptions without eliminating them. That said, Rosenson does employ an instrumental-variables technique to help with the reverse-causation problem of (reporters') corruption perceptions possibly driving the adoption of campaign finance laws.<sup>193</sup> And her findings are a proper warning that reform efforts in low-confidence environments can backfire.

These studies are not all directly on point, and they are bounded by the variation in state law. Moving from restrictive contribution limits to none is an uncommon experience. Nor can researchers be sure that the relationship of regulation to public perception at the state and federal levels is the same. Different audiences might pay different kinds of attention to system changes depending on their locus. But the limits of existing empirical study provide grounds for healthy skepticism, not disregard. The power of campaign regulation to influence public perceptions greatly, especially in an era of low background confidence levels, is open to serious question. And serious investigation into such questions is, in some respects, only beginning to accelerate. So far, the judicial debate has been left behind.

3. *Potential for the Bank Model.* — What are the alternatives to the bridge model? The clock model is not terribly compelling. The appearance and reality of quid pro quo corruption are hardly conceptual equivalents, the latter's social meaning might well be quite negative regardless of formal law, and 2 U.S.C. § 441a(a)(1)<sup>194</sup> is not pretty enough to be defended on aesthetics alone. Regardless, there is an intriguing bank model for campaign finance regulation. Unlike the bridge model, the bank model reduces transparency concerns, as appearance becomes a resource for gauging reality instead of a tool for deception. Furthermore, the chance of a beneficial self-fulfilling prophecy counterbalances concerns about regulatory efficacy. If per-

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<sup>190</sup> See Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 34, 40 (2009).

<sup>191</sup> *Id.* at 37–38.

<sup>192</sup> See *id.* at 34.

<sup>193</sup> See *id.* at 35–36.

<sup>194</sup> See sources cited *supra* note 165.

ceptions change, the expected benefit is larger: whatever its other effects, a favorable appearance would pull reality toward lower actual corruption levels. A bank model for campaign finance law, including contribution limits, is theoretically appealing and thankfully subject to increasing empirical inquiry.

(a) *Theoretical Sketches.* — The theory for a self-fulfilling prophecy here is fairly straightforward, although the contemplated prophecy makes a difference. One possibility is that appearance of undue influence yields greater likelihood of such influence, and another is that appearance of quid pro quo corruption yields greater likelihood of such corruption.<sup>195</sup>

The first possibility is simpler: widespread perception of undue political influence (somehow defined) logically begets actual undue influence (similarly defined). People choose whether to participate in the political system, such as by voting, and participation is costly. If many people believe that the system is rigged in the sense that other people have much greater influence on outcomes, the first set of people might not participate in the first place. Their subjectively expected impact on outcomes would fall without the cost of participation falling in tandem. A sophisticated understanding of political participation is admittedly necessary here; a crude rational actor model might predict zero turnout on election day, regardless. But it is not difficult to believe that those who participate for expressive purposes or to comply with social norms can end up disaffected from the political system when subsets of the population appear to be pulling the strings. These self-perceived outsiders might unplug completely, which only reduces the likelihood that any given person's values will be taken into account. More people dropping out might make it socially comfortable for still others to do the same.

This undue-influence prophecy is not free from doubt, obviously. Outrage can take many forms, including plugging into a system to change it. Occupy Wall Street might not have a clear policy platform, but it counts as something other than political inaction. Nor is campaign finance reform a surefire mechanism for adjusting perceptions of undue influence;<sup>196</sup> it might be insignificant compared to, for instance, lowering the costs of voting or controlling gerrymanders. And different cohorts of people will feel differently about what influence is “due”

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<sup>195</sup> There are other forms of corruption and other objectives for campaign finance regulation. I choose the two in the text because they are prevalent in contemporary legal debates.

<sup>196</sup> See David M. Primo & Jeffrey Milyo, *The Effects of Campaign Finance Laws on Turnout, 1950–2000*, at 2 (Feb. 2006) (unpublished manuscript) (on file with the Harvard Law School Library) (finding no positive impact on turnout from state campaign finance laws post-*Buckley*, and finding a negative effect from public financing post-*Buckley*, but finding a positive effect from contribution limits on organizational donors pre-*Buckley*).



other cohorts. In any event, the interest in correcting something called “undue influence” has been under assault at the Supreme Court. This interest has not clearly survived *Citizens United*, certainly not regarding access to public officials prompted by independent expenditures.<sup>197</sup> Consider it retired.

The quid pro quo—corruption prophecy is more complicated, and it has not been a factor in litigation. Indeed, this particular dynamic does not necessarily have anything to do with citizen demoralization, which is the phenomenon typically singled out in court decisions. Yet it has an enticing logic, and the theory seems perfectly admissible without doctrinal change.

The idea is that the occasions for quid pro quo corruption will expand, and the political consequences of such corruption may recede, if the general perception is that illicit bargains are commonplace. Imagine that a vast majority is convinced that unlawful quid pro quo deals between citizens and officials are the norm. People believe that such bargains are standard operating procedure and they expect the practice to persist. Admittedly, people might have overestimated the incidence of such corruption, but that is not our core concern any longer. The question is how this society — with a bad appearance and an existing reality that is good, bad, or uncertain — might operate over time given these beliefs and expectations. One strong possibility is that corrupt offers and acceptances will spike upward compared to a situation in which such corruption is thought rare.

First, people often are more likely to adopt than to repudiate what seems to be normal behavior.<sup>198</sup> Acting consistently with a perceived social norm of illicit bargaining must be psychologically more comfortable than entering corrupt bargains absent such perceptions. The perceived normalization of “corrupt” bargains might well undo the negative label. Quid pro quo deals contrary to the formal law ultimately might be considered “gift-giving” compatible with necessity, common

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<sup>197</sup> See *Citizens United v. FEC*, 130 S. Ct. 876, 909–10 (2010) (Kennedy, J.) (claiming that the regulatory interest vindicated in *Buckley* “was limited to *quid pro quo* corruption,” *id.* at 909); accord *McConnell v. FEC*, 540 U.S. 93, 298 (2003) (Kennedy, J., concurring in part and dissenting in part).

<sup>198</sup> See, e.g., Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 380–81 (1997) (discussing shame, esteem, internalization, and guilt). You might think of the Minnesota tax compliance experiment at this point, although the results are not as strong as some suggest. Compare STEPHEN COLEMAN, MINN. DEP’T OF REVENUE, *THE MINNESOTA INCOME TAX COMPLIANCE EXPERIMENT: STATE TAX RESULTS* 5–6, 17–19 & tbl.2, 25 (1996) (finding increased income reported and taxes paid by randomly selected taxpayers who were told that tax compliance is actually the norm, at least at the  $p = .10$  confidence level), with Marsha Blumenthal et al., *Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota*, 54 NAT’L TAX J. 125, 130–35 (2001) (assessing the same experiment but reporting no statistically significant effect for included tax filers as a whole, with some subgroups reacting positively and others negatively).

sense, or tradition.<sup>199</sup> Regardless, people can more easily discount the prospect of social sanctions, such as shaming, if they believe that most others are already engaged in the supposedly shameful behavior. More people perceiving the norm can lead to more people following the norm, which can lead to more people perceiving the norm (and so on).

Second, a perceived norm of corrupt bargaining will generate perceived competitive pressure to follow it. Citizens who deny themselves corrupt bargains are at a disadvantage compared to those who ante up. Self-denial amounts to unilateral disarmament in a battle for scarce public resources and favors. Even if such resources are in fact abundant, an apparently corrupt system can push otherwise law-abiding citizens toward bribery out of felt necessity. “If officials are generally untrustworthy, ordinary people and businesses may believe that the only way to get what they need is through a payoff,” Professor Susan Rose-Ackerman has observed.<sup>200</sup> The decision to employ this strategy depends on an estimate of its necessity, which is a matter of appearance. More people perceiving the usefulness of such payoffs can lead to an equilibrium in which there are more people offering such payoffs. “[O]ur expected gain from corruption depends crucially on the number of other people we expect to be corrupt.”<sup>201</sup>

A third corruption-escalating force comes from the officials’ side of the equation. In addition to other psychological comforts, officials might become less fearful of punishment for entering corrupt bargains when most people consider it normal. Part of the reason could be societal shifts in ethical standards that exclude such deals from the definitions of bad behavior. But another factor is the difficulty in credibly distinguishing oneself as a law-abiding official. Once the political system is tarnished by a reputation for corruption, it is not clear how a participant can escape that reputation.<sup>202</sup> Attestations of ethical behavior, almost by definition, will ring hollow when perceptions of corruption are running high. Most observers of politics tend to be casual observers, and even careful observers have difficulty distinguishing politicians on questions of ethics.<sup>203</sup> That these perceptions are influ-

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<sup>199</sup> *But cf.* BO ROTHSTEIN, *THE QUALITY OF GOVERNMENT* 15, 100–01 (2011) (offering evidence that people in highly “corrupt” settings tend not to internalize the norm as good behavior).

<sup>200</sup> Susan Rose-Ackerman, *Truth, Honesty and Corruption: Reflection on the State-Building Process* 16 (Yale Law Sch. John M. Olin Ctr. for Studies in Law, Econ., & Pub. Policy, Working Paper No. 255, 2001); *see also* Emmanuelle Lavallée et al., *Corruption and Trust in Political Institutions in Sub-Saharan Africa* 3 (Afrobarometer, Working Paper No. 102, 2008) (“As informal institutions replace formal rules, citizens realize that respecting the formal rules is inefficient.”).

<sup>201</sup> Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 *J. ECON. LITERATURE* 1320, 1331 (1997) (discussing a frequency-dependent-equilibria account of corruption).

<sup>202</sup> *See id.* at 1334.

<sup>203</sup> This difficulty helps account for contribution limits as institution-wide signals. *See supra* pp. 1605–06.

enced by real levels of corruption is not enough to eliminate the degrading effect of bad appearances.

Additional forces might then tilt public officials toward corruption. Insofar as outsiders have only a weak basis for distinguishing among officials, self-restrained officials also become competitively disadvantaged. The corrupt quid pro quo often makes life easier for the recipient, whether by building an effective campaign or other personal benefit. Others are that much worse off. This competitive disadvantage folds into adverse selection effects. Otherwise ethical people will tend to opt out of public service, while those most comfortable with corrupt bargains are more likely to select in.<sup>204</sup> If a person wants to act ethically and wants to enjoy a reputation for ethical behavior, why enter an institution where people are likely to be tarred regardless? In an environment like this, political communities “may find themselves stuck in bad equilibria such that high-quality citizens avoid public office because so do other high-quality citizens.”<sup>205</sup>

This is an admittedly stark picture, perhaps unrealistic for the United States in the short term. Moreover, we might spin out a different theory on which a political community begins to sense that corruption is spreading and responds with pressure for reform.<sup>206</sup> Anti-corruption regulatory efforts can also backfire: observers might take regulatory efforts as a sign that the corruption problem is larger than they had thought.<sup>207</sup> Or the public response might be polarized. The community might be so heterogeneous that there is no useful “average” response to a given regulation. We might see hard-core moralists and crooks unmoved by anticorruption campaigns, confirmed cynics and unswerving optimists holding fast to their outlooks, rigidly ideological camps shifting hard, but in different directions — and only a relatively small persuadable group whose willingness to play fair depends on its members’ perceptions of how many others are equally willing. Any of these scenarios is conceivable.<sup>208</sup>

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<sup>204</sup> I am assuming that ethical people have a realistic alternative to government service, while corruption-oriented people are at least equally drawn to government service. Cf. Francesco Caselli & Massimo Morelli, *Bad Politicians*, 88 J. PUB. ECON. 759, 760–62 (2004) (showing multiple equilibria concerning the fraction of capable politicians based on selection effects, even if voters have perfect information about candidate types, where less-capable people are at a disadvantage in the private sector).

<sup>205</sup> *Id.* at 778.

<sup>206</sup> See Inna Čábelková & Jan Hanousek, *The Power of Negative Thinking: Corruption, Perception and Willingness to Bribe in Ukraine*, 36 APPLIED ECON. 383, 383 (2004) (indicating that reformist reactions are highly contingent).

<sup>207</sup> Because of the trend toward increasing anticorruption regulation in the United States, aside from repeal by judicial review, the effect of deregulation on perceptions is more difficult to study. It is nonetheless possible that regulatory efforts to create formal incentives will suggest to observers that many people share a need for such incentives.

<sup>208</sup> I thank Dan Kahan for helping me develop these thoughts.

But with a little creative effort, we can envision a set of pressures on private parties and public officials that sends a political system spiraling downward, with perceived and actual quid pro quo corruption rising in tandem. Catastrophic risks are worth taking into account even if those risks are small. Widespread political corruption is no exception. “Unchecked,” the World Bank has reported, “the creeping accumulation of seemingly minor infractions can slowly erode political legitimacy to the point where even noncorrupt officials and members of the public see little point in playing by the rules.”<sup>209</sup>

(b) *Causation Challenges.* — The foregoing is an image, and the next question is whether it fits reality. The best available information falls short of what we should demand given the severe political-system degradation already happening in parts of the world. The hopeful note is that serious researchers have turned their attention to the fascinating interrelationships among corrupt appearances, corruption experiences, confidence levels, and legal design. Here I will review a few leading research efforts and the barriers to achieving a comfortable level of certainty regarding law’s role in fighting self-fulfilling corruption prophecies.

The logic of such prophecies indicates causal links that are, in principle, empirically testable. These links include: (1) the conditions under which a given law, such as a contribution limit of X dollars, will likely influence perceptions about the frequency of quid pro quo corruption;<sup>210</sup> (2) the conditions under which these perceptions increase the likelihood of corrupt offers, their acceptance, and adverse selection effects discussed above; and (3) the conditions under which quid pro quo corruption is a net negative for society or otherwise wrongful. The answer to the third question is basically uncontested in the United States, and although a productive analysis of the issue is possible,<sup>211</sup> I leave it aside in favor of live debates.

The challenge of achieving better-than-provisional answers to the first two questions is evident. Numerous forces plausibly influence corruption levels.<sup>212</sup> Among these forces are urbanization and income

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<sup>209</sup> WORLD BANK, WORLD DEVELOPMENT REPORT: THE STATE IN A CHANGING WORLD 102 (1997); accord ROTHSTEIN, *supra* note 199, at 100, 146 (asserting that corrupt systems are sticky); Čábelková & Hanousek, *supra* note 206, at 383.

<sup>210</sup> A related question is whose perceptions are likely to be influenced, not just how many people’s.

<sup>211</sup> For the possibility that corrupt bargains can rightly circumvent misguided government policy, see Nathaniel H. Leff, *Economic Development Through Bureaucratic Corruption*, AM. BEHAV. SCIENTIST, Nov. 1964, at 8, 11–12, which observes that a corrupt and ineffective bureaucracy undermined Brazil’s attempt to implement food price controls, and Daniel Levy, *Price Adjustment Under the Table: Evidence on Efficiency-Enhancing Corruption*, 23 EUR. J. POL. ECON. 423, 439–40 (2007), which examines the potential efficiencies of corruption in the Republic of Georgia’s black markets.

<sup>212</sup> And here I leave aside the question of what should count as “corruption.” See, e.g., LAWRENCE LESSIG, REPUBLIC, LOST 230–31 (2011) (using systematic influences that change

levels, government scope and salary levels, competition for public office and access to information about government,<sup>213</sup> not to mention tradition and path dependence. Furthermore, a number of legal design choices, aside from campaign finance regulation, might influence corruption perceptions and corruption frequency. These choices include term limits, citizen initiatives, redistricting procedures, and civil service protections.<sup>214</sup> And corruption perceptions might usually follow the observer's general disapproval of those in office, or the unemployment rate, or even the community's "kvetch" quotient.<sup>215</sup>

We have already reviewed emerging empirical evidence on the first question (the effect of law on corruption perceptions). The results were mixed and modest, but sufficiently provisional to leave even minimally curious observers wanting more. Evidence on the second question (the effect of corruption perceptions on corruption levels) is in a similar state. Scholars are beginning to understand the risk of essentially perpetual corruption resulting from the reputation crash of a political system. But only beginning.

Discomfiting illustrations do exist. Take reputationally challenged political jurisdictions in the United States — places where corruption is taken as a fact of life, such as Louisiana, Rhode Island, and Illinois. The familiarity of former Illinois governors with the criminal justice system can be explained partly by adverse selection effects and greater opportunities for corrupt conduct, which are facilitated by expectations that such conduct will happen.<sup>216</sup> Similarly, local governments that suffer from corrupt practices along with high-profile scandals may remain trapped in a bad equilibrium. New Orleans's age-old reputation

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the intended influences on an institution); ANDREI SHLEIFER & ROBERT W. VISHNY, *THE GRABBING HAND* 91 (1998) (using a loose version of "sale by government officials of government property for personal gain"); Leff, *supra* note 211, at 8 (using extralegal influence on policymaking or implementation); Daniel Treisman, *The Causes of Corruption: A Cross-National Study*, 76 J. PUB. ECON. 399, 399 (2000) (using misuse of public office for private gain). Like recent Supreme Court majorities, I concentrate on quid pro quo trades of (campaign) cash in exchange for an official decision. *See supra* note 197.

<sup>213</sup> *See* Alt & Lassen, *supra* note 176, at 342–44; Natalia Melgar et al., *The Perception of Corruption*, 22 INT'L J. PUB. OPINION RES. 120, 121–22 (2010) (investigating a variety of factors that might influence corruption perceptions around the world, such as income inequality and education, but not law or law enforcement efforts); Treisman, *supra* note 212, at 399.

<sup>214</sup> The direction of influence, if any, from some of these variables is theoretically ambiguous. For instance, civil service protection might professionalize a bureaucracy such that its employees refuse bribes, or it might increase corrupt bargains by providing those employees with an unwarranted sense of security.

<sup>215</sup> *See* Daniel Kaufmann & Shang-Jin Wei, *Does "Grease Money" Speed Up the Wheels of Commerce?* 16 (Int'l Monetary Fund, IMF Working Paper No. WP/00/64, 2000).

<sup>216</sup> *See* William Spain, *A Compendium of Corrupt Illinois Governors*, WALL ST. J., Dec. 10, 2008, <http://online.wsj.com/article/SB122885197858492201.html>.

must make it difficult to alter real corruption levels.<sup>217</sup> The same thought applies to political systems beyond our national borders in which appearances, expectations, and the best indicators of actual corruption all tank together. The Afghanistan example is inviting, so to speak. Reports are that a sizable fraction of Afghanistan's public business, ranging from the allocation of land titles to government jobs, operates through transactions that are formally illegal and that the average person expects.<sup>218</sup>

These are case studies, but broader investigations have been conducted.<sup>219</sup> Part of this research covers the propensity to make corrupt offers when corruption perceptions are high rather than low.<sup>220</sup> A pioneering study is Professors Inna Čábelková and Jan Hanousek's work on post-Soviet Ukraine. Their basic finding was that people reported greater willingness to engage in bribery of officials when their perceptions of corruption were higher.<sup>221</sup> This result is consistent with a self-fulfilling prophecy theory, regardless of why the former attitude tends to come with the latter perception or why the perception arises in the

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<sup>217</sup> As Professor Clay Gillette has suggested to me, public tolerance for corruption in New Orleans might have diminished after Hurricane Katrina. See Mike Tolson, *Katrina's Mark on New Orleans Remains 5 Years After Storm*, HOUS. CHRON., Aug. 29, 2010, <http://www.chron.com/news/nation-world/article/Katrina-s-mark-on-New-Orelans-remains-5-years-1587771.php>. Shifts in public expectations regarding corruption might come from exogenous shocks, including exposure to other systems via the post-Katrina diaspora.

<sup>218</sup> See Dexter Filkins, *Afghan Corruption: Everything for Sale*, N.Y. TIMES, Jan. 2, 2009, <http://www.nytimes.com/2009/01/02/world/asia/02iht-corrupt.1.19050534.html>; *Corruption Perceptions Index*, TRANSPARENCY INT'L, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi) (last updated Dec. 1, 2011) (reporting aggregations of surveys on corruption perceptions and showing Afghanistan's falling from 117th out of 159 ranked countries in 2005 (scoring 2.5/10.0) to 179th out of 180 in 2009 (scoring 1.3/10.0)). For a partial success story about Indonesia's Anti-Corruption Commission and Anti-Corruption Court, see Simon Butt, "Unlawfulness" and Corruption Under Indonesian Law, 45 BULL. INDONESIAN ECON. STUD. 179, 179-82 (2009), which points out the advantages of a new, specialized, and noncorrupt enforcement regime, along with the potential for overdeterrence from vague and overbroad anticorruption norms.

<sup>219</sup> The theoretical and empirical literature on corruption is growing with the recognition that corrupt political regimes pose hurdles to economic development. See, e.g., Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 OXFORD REV. ECON. POL'Y 271, 271-72 (2009) (finding that corruption experiences among business managers and general corruption perceptions are negatively correlated with per capita wealth, while only the corruption-perception measure correlated with per capita GDP changes). Additional case studies from abroad can be found in ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988). See also Federico Varese, *The Transition to the Market and Corruption in Post-Socialist Russia*, 45 POL. STUD. 579, 580 (1997). A leading account of corruption from economic, political, and cultural perspectives is SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT* (1999). See also SHLEIFER & VISHNY, *supra* note 212, at 11-12, 91-108.

<sup>220</sup> See Čábelková & Hanousek, *supra* note 206, at 383; Susan Rose-Ackerman, *Trust and Honesty in Post-Socialist Societies*, 54 KYKLOS 415, 423-25 (2001) (reviewing perception studies and noting a result in which respondents' predicted happiness at achieving success through bribery depended on the perception that others were engaged in similar transactions).

<sup>221</sup> See Čábelková & Hanousek, *supra* note 206, at 390, 396.

first place.<sup>222</sup> In some ways, the Ukraine of the late 1990s is exceptional. Over sixty percent of the respondents indicated that they thought government did *nothing* to fight corruption, and twenty-five percent reported a personal experience with corruption.<sup>223</sup> Yet parts of the world today are similar or at risk of becoming so.

There are also ongoing, large-scale empirical investigations into the effects of corruption perceptions. One revealing study uses the 2008 Gallup World Poll to reach 78,000 people in ninety countries.<sup>224</sup> Among several bracing conclusions, Bianca Clausen and her coauthors find that corruption perceptions have an independent effect on willingness to support violence as a means of change and willingness to exit the political jurisdiction.<sup>225</sup> This influence of perceptions is not as strong as that of reported corruption experiences, and the authors are rightly concerned that corruption perceptions are more vulnerable to reverse causation than are reported corruption experiences.<sup>226</sup> But the relationship between high corruption perceptions and attitudes toward violence and exit seems to hold independent of the effect on confidence in government (corruption perceptions are associated with low confidence, as well). These findings suggest that widespread corruption perceptions have several potentially destructive consequences, perhaps including an environment of cynicism in which actual corruption thrives.<sup>227</sup>

Scholars are now trying to pin down the relationship between corrupt appearances and practices. An important attempt by Professors Wonbin Cho and Matthew F. Kirwin concentrates on seventeen countries in Africa.<sup>228</sup> The authors describe a vicious circle in which cor-

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<sup>222</sup> The authors studied several information sources and their effects on perception, such as media and friends. Unsurprisingly, a respondent's reported experience with corruption strongly influenced corruption perceptions. *See id.* at 390.

<sup>223</sup> *Id.* at 384.

<sup>224</sup> *See* Bianca Clausen et al., *Corruption and Confidence in Public Institutions: Evidence from a Global Survey 2* (World Bank Dev. Research Grp., Working Paper No. 5157, 2009).

<sup>225</sup> *See id.* at 24. Even controlling for kvetch proxies. *See id.* at 14–16.

<sup>226</sup> A respondent's reported corruption perceptions might be a function of that person's disapproval of incumbent policies. There is somewhat less reason to think that a respondent is more likely to report actual corruption experiences based on other such variables, although it is possible, especially in ambiguous situations.

<sup>227</sup> *See* Alvaro González et al., *The Incidence of Graft on Developing-Country Firms* pt. 5 (World Bank, Policy Research Working Paper No. 4394, 2007) (concluding that firms' corruption perceptions adjust slowly to experiences); Lavallée et al., *supra* note 200, at 16 (finding that corruption perceptions and experiences are associated with lower trust in political institutions in the African countries studied, although the negative effect of perceptions weakens as access to services degrades while the negative effect of experiences rises).

<sup>228</sup> Wonbin Cho & Matthew F. Kirwin, *A Vicious Circle of Corruption and Mistrust in Institutions in Sub-Saharan Africa: A Micro-Level Analysis 1* (Afrobarometer, Working Paper No. 71, 2007).

ruption experiences and perceptions feed each other.<sup>229</sup> They test the theory with survey data, homing in on access to health care and education. Isolating causal pathways is a major challenge, and the authors had only cross-sectional data. But Cho and Kirwin's results are consistent with a prophetic role for corruption expectations, albeit initially built on reported corruption experiences. "[T]he experience of corruption decreases popular satisfaction with government service delivery in basic health care and education sectors," the authors conclude, "and perceptions of an unjust government service delivered by corrupt public officials motivate[] citizens to pay a bribe or give a gift to obtain public services."<sup>230</sup> And then the cycle repeats.

More valuable work in this area can be done — including research on the United States, where political campaigns are relatively expensive yet corruption levels might be fairly low. Appearance of corruption can do only so much damage, after all. A lesson we can draw from the Clausen study involves the power of actual corruption experiences. The study's data show that nationally aggregated corruption perceptions vary widely among countries with relatively *low* rates of reported corruption experiences, but the perception tends to remain high among countries with relatively *high* rates of reported corruption experiences.<sup>231</sup> In other words, a country with widespread corruption experiences is probably stuck with a bad appearance, whereas a country in which corruption is rarely experienced might end up with a clean reputation, a dirty reputation, or something in between. The United States probably fits in the latter category, where several forces might influence the appearance of quid pro quo corruption, including campaign finance law. Total absence of the bank model in most of our campaign finance debates is, all told, a glaring omission.

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Among the potentially litigable issues today is whether and to what extent contributions to political candidates can be restricted by law, consistent with the judiciary's prevailing constitutional views. Litigation is pushing in a deregulatory direction while the politics of the post-Watergate era have trended in the opposite direction. The proper role of appearance justifications in the analysis is not yet well understood. No straightforward clock model applies to contribution caps, and any confident depictions of the situation soon fall away. Whether these restrictions are more like bridges or banks is open to serious debate. Evaluators probably should consider both models for the time

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<sup>229</sup> See *id.* at 10.

<sup>230</sup> *Id.* at 16.

<sup>231</sup> See Clausen et al., *supra* note 224, at 30 fig. 1.



being, estimating the probability and probable effects of each. To the extent that a bridge model cannot be ruled out, proponents of regulation should be asked why democratic transparency norms are safe or overridden by other values. To the extent that a bank model cannot be ruled out, critics of regulation should be asked why the theory and emerging evidence on self-fulfilling corruption prophecies do not adequately support the status quo.

Again, efficacy questions persist regardless of which model fits best. On the above theories, contribution limits cannot influence either participation rates or actual corruption levels without influencing observers first. And effective campaign finance regulation is costly. Contribution limits prevent donors from facilitating political messages that they support, and prevent recipients from more easily fueling their campaigns. Evidence on efficacy is mixed, and observers in the “money is speech” camp will demand large demonstrable benefits before supporting inhibitions on the money trail in politics. But not everyone holds such extreme constitutional views. Moderates will be curious whether, for instance, eliminating contribution limits would not only deepen public cynicism, but also increase the likelihood of illicit quid pro quo deals. Those who frown at any system other than public financing will be even more tolerant of such regulation. These issues of efficacy, need, and cost cannot be resolved in this space, but they are among the relevant questions.

However you might answer them, courts have performed poorly on nearly every one. Setting aside the disputed valuation of cash contributions in constitutional terms, judges have waded into questions of appearance without a functional navigation system. They make untested yet confident assertions about the effects of regulation. They myopically picture the political system as if it were a bridge in need of public confidence but without pressing core transparency concerns. And they have not explored self-fulfilling corruption prophecies at all. Judicial treatment is simultaneously too permissive, insufficiently creative, and disengaged from serious empirical inquiry. Only by miraculous happenstance would these mistakes cancel out. While institutional choice and design factors might help explain current judicial behavior,<sup>232</sup> the argument over appearance in campaign finance litigation is no good for anyone trying to get a serious handle on the strengths, weaknesses, and uncertainties surrounding the issue.

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<sup>232</sup> See *supra* section III.C (discussing expertise/bias trade-offs); *infra* section IV.C (comparing judicial treatment of campaign finance challenges with policy debates over broken windows policing).

### B. Broken Windows Policing

1. *Policy Debates and Prophetic Theories.* — Debates over broken windows policing have their own shortcomings, but they have been remarkably different from debates over campaign finance regulation. Aside from attracting little direct judicial attention, this policing strategy has been tightly connected to a bank model. Policymakers, scholars, and others have struggled with the question whether a concentrated government attack on perceived disorder will pay dividends in terms of reduced crime rates. Broken windows theories are not always detailed, but many versions indicate that neighborhood appearance drives the reality of neighborhood safety. A critical question for this field is whether policymakers and scholars have been too devoted to the creative sophistication of a bank model, at the expense of models and arguments that are simpler and more reliable.

We can begin by separating broken windows theories of *misconduct* and *policing*.<sup>233</sup> In general terms, the former assert that the appearance of disorder is causally related to the amount of disorderly behavior.<sup>234</sup> “[I]f a window in a building is broken and is left unrepaired,” Professors James Q. Wilson and George Kelling hypothesized, “all the rest of the windows will soon be broken.”<sup>235</sup> There is no simple and stable definition of “disorder,” but the notion is invariably connected to neighborhood appearance. Professor Wesley Skogan’s physical and social dimensions of disorder are both immediately observable:

Disorder is evident in the widespread appearance of junk and trash in vacant lots; it is evident, too, in decaying homes, boarded-up buildings, the vandalism of public and private property, graffiti, and stripped and abandoned cars in streets and alleys. It is signaled by bands of teenagers congregating on street corners, by the presence of prostitutes and panhandlers, by public drinking, the verbal harassment of women, and open gambling and drug use.<sup>236</sup>

A broken windows theory of misconduct was popularized before it was specified,<sup>237</sup> and there is more than one conceivable version. Different versions can suggest different hypotheses regarding the rate of misconduct, the seriousness of misconduct, and the mechanism by which either is influenced by appearances. Thus, one might hypothe-

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<sup>233</sup> See Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 278–87 (2006).

<sup>234</sup> See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 16, 19–20 (1996).

<sup>235</sup> James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31 (emphasis removed).

<sup>236</sup> WESLEY G. SKOGAN, *DISORDER AND DECLINE* 2 (1990).

<sup>237</sup> See Wilson & Kelling, *supra* note 235, at 29–32 (explaining the idea based on observations, logic, and a few analogous studies).

size that the appearance of a broken window will soon lead to an outbreak of window breaking and nothing else, or that much more serious misconduct will follow. Much scholarship concentrates on the implications for serious crime, such as homicide or robbery.<sup>238</sup> Equally significant, more than one mechanism might be at work. All versions of the theory suppose that the appearance of a location influences behavior in that location, but the influence might occur through norm internalization, signals about the state of the neighborhood, herding behavior among the ill-informed, shifts in social meaning ascribed to what had been considered misconduct, or something else.<sup>239</sup> Not every possible mechanism directly implicates a self-fulfilling prophecy that runs through shared perceptions and expectations. But a theme in broken windows theories of misconduct is that the appearance of disorder suggests to observers that disorder is uncontrolled, and this perception prompts some people toward even greater disorder that is, in fact, not controlled.

These hypotheses are not just academic curiosities. They now form the rationale for a common policing policy. Broken windows theories of misconduct were matched with broken windows policing strategies, which took hold in several jurisdictions. The most notable example is New York City.<sup>240</sup> Following Kelling's arguments, in 1990 the city's transit police began more aggressive enforcement of misdemeanor offenses, such as turnstile jumping. Subway misdemeanor arrests and ejections tripled within a year, with arrestees booked quickly on a mobile "Bust Bus."<sup>241</sup> In 1994, the strategy moved above ground. The plan was for city police to boost arrests for fairly minor, if quite visible, misdemeanors and ordinance violations — such as graffiti, littering, panhandling, public drunkenness, public urination, and prostitu-

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<sup>238</sup> See, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER* 76–78 (2001) (reporting on robbery, rape, burglary, assault, and also purse snatching); SKOGAN, *supra* note 236, at 73–75 (reporting on robbery); Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 608, 628–30, 637–38 (1999) (reporting on homicide, burglary, and robbery).

<sup>239</sup> See, e.g., KELLING & COLES, *supra* note 234, at 19–20 (focusing on signals, albeit not in the technical economic sense that involves credible communication of one's private information); Harcourt & Ludwig, *supra* note 233, at 281–82 & n.37 (noting the possibility of herding and information cascades); Kahan, *supra* note 72, at 370–71 (concentrating on social meaning).

<sup>240</sup> See HARCOURT, *supra* note 238, at 1, 46–51 (describing the so-called "quality-of-life initiative"); GEORGE L. KELLING & WILLIAM H. SOUSA, JR., *DO POLICE MATTER?: AN ANALYSIS OF THE IMPACT OF NEW YORK CITY'S POLICE REFORMS 2* (2001), available at [http://www.manhattan-institute.org/pdf/cr\\_22.pdf](http://www.manhattan-institute.org/pdf/cr_22.pdf) (same).

<sup>241</sup> See WILLIAM BRATTON WITH PETER KNOBLER, *TURNAROUND* 154–56 (1998) (describing the strategy); KELLING & COLES, *supra* note 234, at 131–32, 133 figs.4.1 & 4.2 (showing numbers).

tion.<sup>242</sup> The police department announced that such enforcement measures would be “the linchpin” of its effort “to reduce crime and fear in the city. By working systematically and assertively to reduce the level of disorder in the city, the NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible.”<sup>243</sup> Between 1994 and 1998, adult misdemeanor arrests increased by at least 40,000 per year.<sup>244</sup> During the 1990s, the violent crime rate plunged. For example, the total number of homicides in New York City dropped more than seventy percent between 1990 and 1998 (from 2245 to 633).<sup>245</sup>

New law enforcement strategies and favorable changes in crime rates lent credibility to broken windows theories of misconduct and policing. It was at least possible that broken windows policing had improved the orderly appearance of affected neighborhoods, that an orderly appearance generated expectations that order would be maintained, and that those expectations influenced conduct in ways that pulled reality toward those expectations. Perhaps more law-abiding people became confident that looking out for each other and collaborating with police would be effective and acted accordingly; perhaps more law-breaking people expected this or other inconvenient reactions to the risk of serious crime; perhaps a combination of the foregoing took place. Regardless, concerned members of a community might feel that they have reason to attend to the visible remnants of low-level misconduct. They might do so in the hope of preventing more of the same, or worse. New York City had a success story.

2. *Causation Problems for the Bank Model.* — Troubling for the broken windows theory, however, is the fact that many large cities experienced significant drops in their recorded crime rates during the same time frame. Not all of these cities implemented broken windows policing. Nor was this policing strategy the only potentially relevant event in New York City.<sup>246</sup> Economic news was good, for instance. So there are competing hypotheses.<sup>247</sup> Perhaps atypically large drops in

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<sup>242</sup> See N.Y.C. POLICE DEP'T, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 29–32 (1994) [hereinafter POLICE STRATEGY NO. 5].

<sup>243</sup> *Id.* at 5.

<sup>244</sup> See HARCOURT, *supra* note 238, at 2 (noting that reported stop-and-frisk activity increased even more).

<sup>245</sup> See ANDREW KARMEN, NEW YORK MURDER MYSTERY 25 tbl.1.2 (2000).

<sup>246</sup> See, e.g., KELLING & SOUSA, *supra* note 240, at 5, 11–12 (stating that police initiatives other than broken windows policing are difficult to track with measurable proxies and noting the development of Compstat procedures); David Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 CRIMINOLOGY & PUB. POL'Y 421, 424–33 (2003) (studying Compstat-like programs and their diffusion).

<sup>247</sup> See, e.g., KELLING & SOUSA, *supra* note 240, at 2–3 (contrasting root-cause theories and police-impact theories); Magdalena Cerdá et al., *Misdemeanor Policing, Physical Disorder, and*

crime followed atypically large increases as a matter of reversion to the mean, not as a result of policing strategies. Perhaps a crime wave in the 1980s and early 1990s was a product of violence surrounding burgeoning crack cocaine markets, and this storm of violence dissipated for reasons unrelated to policing.<sup>248</sup>

No scholarly consensus has emerged on either broken windows theories of misconduct or their affiliated policing strategies. These ideas still attract vocal support and determined criticism. The relevant empirical issues have, however, received sustained and constructive attention that provides the beginning for intelligent analysis.

On broken windows theories of misconduct, two leading investigations come from Skogan and Professor Bernard Harcourt. In 1990, based on data from thirty neighborhoods, Skogan found a statistically significant relationship between resident perception of physical/social disorder and robbery victimization.<sup>249</sup> Importantly, the association held after he controlled for racial demographics, poverty indicators, and proxies for neighborhood stability.<sup>250</sup> “[D]irect action against disorder could have substantial payoffs,” Skogan wrote.<sup>251</sup> In 2001, however, Harcourt reanalyzed the same data and offered major caveats. He emphasized that there were missing data on robbery and disorder, and that survey respondents were not questioned about the location of their victimization.<sup>252</sup> This observation might make readers skeptical about the statistically demonstrable impact of perceived disorder on any crime rate. In addition, Harcourt reported that there was no statistically significant relationship between disorder perceptions and rape, burglary, assault, or purse snatching.<sup>253</sup> Even if people rely on the same visual cues for neighborhood disorder, and even if those cues are reliable and untroubling as a basis for policymaking,<sup>254</sup> the causal impact of such perceived disorder on serious crime is reasonably contested.<sup>255</sup>

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*Gun-Related Homicide: A Spatial Analytic Test of “Broken-Windows” Theory*, 20 EPIDEMIOLOGY 533, 533 (2009) (collecting alternative theories).

<sup>248</sup> See, e.g., Cerdá et al., *supra* note 247, at 533.

<sup>249</sup> See SKOGAN, *supra* note 236, at 73–74, 193 tbl.A-4-1.

<sup>250</sup> See *id.* at 73.

<sup>251</sup> *Id.* at 75.

<sup>252</sup> See HARCOURT, *supra* note 238, at 60–61.

<sup>253</sup> See *id.* at 60–61, 78.

<sup>254</sup> Cf. Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCHOL. Q. 319, 336–37 (2004) (finding that racial and economic variables influence whether individuals perceive disorder).

<sup>255</sup> See Sampson & Raudenbush, *supra* note 238, at 603, 608, 628–30, 637–38 (finding that coded levels of disorder in Chicago neighborhoods generally do not mediate the effect of other neighborhood characteristics on homicide, burglary, and robbery, and emphasizing the importance of collective efficacy alone). *But cf.* Pamela Wilcox et al., *Busy Places and Broken Windows? Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 SOC. Q. 185, 199–200 (2004) (reporting results from a cross-sectional study that physical disorder does

Although much more could be said about broken windows theories of misconduct, our focus on appearance-justified government decisions suggests that we move to the evidence on policing strategies. With respect to their effect on serious crime, we can look to several relatively recent efforts. The optimistic side is represented by George Kelling and William Sousa's 2001 report for the Manhattan Institute.<sup>256</sup> They investigated precincts in New York City during the 1990s and found a large and statistically significant relationship between misdemeanor arrests and violent crime (a combined measure of homicide, rape, robbery, and felony assault).<sup>257</sup> Kelling and Sousa could not find a significant positive relationship between the violent crime rate and proxies for cocaine use, the young male population, or poor economic conditions.<sup>258</sup> These proxy variables are by definition imperfect, as is the correspondence between misdemeanor arrests and what can plausibly be called broken windows policing,<sup>259</sup> and perhaps an omitted variable was driving violent crime rates down. That said, the numbers are striking. The authors claim that precincts "could expect to suffer one less violent crime for approximately every 28 additional misdemeanor arrests,"<sup>260</sup> and that "[o]ver 60,000 violent crimes were prevented from 1989 to 1998 because of 'broken windows' policing."<sup>261</sup>

On the skeptical side, the standout response is a 2006 law review article by Harcourt and Professor Jens Ludwig.<sup>262</sup> They gathered data to match Kelling and Sousa's. But Kelling and Sousa examined the average misdemeanor arrest rate per precinct across the entire decade rather than yearly changes in these arrest rates, and they did not control for the possibility of mean reversion in violent crime rates.<sup>263</sup> So Harcourt and Ludwig made two notable adjustments: controlling for the violent crime rate in each precinct leading up to 1989, and shifting from the decade-long average arrest rate in each precinct to yearly per-

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mediate the effect on violence and burglary from business-oriented public spaces, but not from schools or playgrounds).

<sup>256</sup> See KELLING & SOUSA, *supra* note 240, at i–ii.

<sup>257</sup> See *id.* at 5, 8–10.

<sup>258</sup> See *id.* at 4–5, 8 (detailing their proxy variables as including data on hospital discharges for cocaine-related treatment at the borough level, young male enrollment in public high schools at the precinct level, and the number of unemployed persons at the borough level). The study found higher unemployment associated with *falling* violent crime rates. See *id.* at 9.

<sup>259</sup> See *id.* at 18 (emphasizing quality, not just quantity, of enforcement).

<sup>260</sup> *Id.* at 9 (emphasis omitted).

<sup>261</sup> *Id.* at i (executive summary); see also Hope Corman & Naci Mocan, *Carrots, Sticks and Broken Windows*, 48 J.L. & ECON. 235 (2005) (studying citywide data on monthly misdemeanor arrests and finding an association with declines in car theft and robbery but not other crimes).

<sup>262</sup> See Harcourt & Ludwig, *supra* note 233.

<sup>263</sup> See *id.* at 289–93.

precinct totals for 1989 to 1998.<sup>264</sup> With the controls for mean reversion, more than two-thirds of the association between misdemeanor arrests and violent crime disappeared.<sup>265</sup> With several more precinct-level control variables, including changes in poverty and vacant housing, the association shrank further and lost statistical significance.<sup>266</sup> And with a shift to yearly changes in misdemeanor arrests, the association turned around in some model specifications, with misdemeanor arrest increases correlating with violent crime increases.<sup>267</sup> These results leave mean reversion as a plausible alternative explanation. “[P]recincts that received the most intensive broken windows policing during the 1990s are the ones that experienced the largest increases in crime during the city’s crack epidemic of the mid-to-late 1980s.”<sup>268</sup>

Harcourt and Ludwig also tried to find out what happens when people are moved from disorderly neighborhoods into more orderly locations. They studied the criminal behavior of current and former residents of public housing projects in high-poverty areas. Applicant families were randomly assigned housing vouchers that could be used only in low-poverty areas, housing vouchers that could be used anywhere, or no housing voucher.<sup>269</sup> This program design could not isolate the effect of neighborhood disorder by itself, considering that moving families usually experienced changes in neighborhood affluence and were conceivably subjected to more attentive neighbors or police officers;<sup>270</sup> moreover, use of the vouchers did not yield much racial integration as measured by census tract.<sup>271</sup> But the results are suggestive. Based on self-reports and arrest records, it seemed that the voucher recipients had more favorable opinions of their neighborhoods compared to the control group, but they did not show significantly different offending rates.<sup>272</sup> By reassessing the New York City data and

<sup>264</sup> See *id.* at 290–93, 295 (explaining the mean-reversion control variables as 1989 violent crimes and 1984–1989 change in violent crimes).

<sup>265</sup> See *id.* at 294 tbl.2, 295. According to the table, adding either the 1989 variable or the 1989 and 1984–1989 change variable had this effect, but the 1984–1989 change variable lost statistical significance when combined with the 1989 variable.

<sup>266</sup> See *id.* at 294 tbl.2, 295–96; see also *id.* at 318 (explaining that census-tract data was translated into precincts).

<sup>267</sup> See *id.* at 296, 297 tbl.3; *Errata*, 74 U. CHI. L. REV. 407, 407 (2007) (showing that Table 3, Row 1 displays coefficients for misdemeanor arrest changes, and that these coefficients were positive in Models 2–6, although the variable lost statistical significance in Model 6). In no model for Table 3 is there a negative and statistically significant association between misdemeanor arrest changes and violent crime changes.

<sup>268</sup> Harcourt & Ludwig, *supra* note 233, at 276.

<sup>269</sup> See *id.* at 301.

<sup>270</sup> See *id.* at 310 n.90, 313–14 (explaining the possible difference in police monitoring).

<sup>271</sup> See *id.* at 305 tbl.5 (indicating that voucher users tended to move into higher-income and lower-crime census tracts, but not racially mixed census tracts).

<sup>272</sup> See *id.* at 307–14 (noting that lower arrest rates for female youths were offset by higher rates for other subgroups). The results reported there are based on Jeffrey R. Kling et al., *Neigh-*

by assessing a randomized experiment, Harcourt and Ludwig made it far more difficult to accept broken windows theories of disorder or of policing — at least in the form of increasing misdemeanor arrests to drive down violent crime.

Since then, serious empirical work on broken windows policing has become, in some respects, more modest and targeted. First, several studies report that the effect of broken windows policing is small compared to the effect of other measurable variables.<sup>273</sup> This conclusion is controversial; it depends on what counts as small when lives are at stake and when people have only so many policy levers to pull. However, policing strategies are unlikely to account for anything approaching the whole story. Consider the recent contribution from Professor Richard Rosenfeld and his coauthors. Taking seriously the warnings of Harcourt and Ludwig, the Rosenfeld team controlled for mean reversion in New York City by using 1984 and 1988 precinct-level data on robbery and homicide rates.<sup>274</sup> They still found a statistically significant association with misdemeanor and ordinance-violation arrests from 1988 to 2001.<sup>275</sup> On the other hand — and at least as importantly — the authors were able to credit these arrests with only seven to twelve percent of the homicide decline and one to five percent of the robbery decline.<sup>276</sup> Perhaps these findings should not have been surprising. Even broken windows-enthusiast George Kelling estimated, in a less-publicized part of his work with Sousa, that misdemeanor arrests accounted for only five percent of the violent crime decline in the city.<sup>277</sup>

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*borhood Effects on Crime for Female and Male Youth: Evidence from a Randomized Housing Voucher Experiment*, 120 Q.J. ECON. 87 (2005).

<sup>273</sup> See Cerdá et al., *supra* note 247, at 539 (characterizing the effect of misdemeanor arrests on gun-related homicides between 1990 and 1999 as “small”); Steven F. Messner et al., *Policing, Drugs, and the Homicide Decline in New York City in the 1990s*, 45 CRIMINOLOGY 385, 401, 405 (2007) (controlling for mean reversion and finding a statistically significant but modest effect of misdemeanor arrests on gun-related homicides and robberies between 1990 and 1999, and also finding a relationship between a proxy for cocaine use (cocaine-related accidental deaths in hospital records) and lower homicide rates); Richard Rosenfeld et al., *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988–2001*, 45 CRIMINOLOGY 355, 377 (2007) (similar for robberies and homicides); see also Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163, 176–83 (2004) (crediting increased imprisonment, increased numbers of police officers, deflated crack markets, and legalized abortion for widespread crime-rate declines during the 1990s).

<sup>274</sup> See Rosenfeld et al., *supra* note 273, at 362, 374.

<sup>275</sup> See *id.* at 377–78.

<sup>276</sup> See *id.* at 377.

<sup>277</sup> See KELLING & SOUSA, *supra* note 240, at 10 (using 1989–1998 precinct-level data). Kelling and Sousa also report that about forty-five percent of the variance in violent crime was not explained by the four independent variables in their model. See *id.* at 24 n.43.



Second, broken windows policing probably has hope of influencing the rate of only some serious crimes perpetrated against only some victim classes. To date, misdemeanor arrests have little or no demonstrable effect on homicides without guns.<sup>278</sup> One theory is that arrests for minor crimes reduce homicide rates by getting guns off the street during coincidental searches and seizures; this theory does not reach non-gun violence.<sup>279</sup> Furthermore, misdemeanor arrests seem to protect only certain segments of the population from homicide, to the extent that homicides decline at all. And it is worth noting that the mechanism of influence remains unclear. Misdemeanor policing might not be getting at serious crime rates through improved physical appearance of neighborhoods, but rather, if anything, through ordinary deterrence or incidental police contact with arrestees who commit both minor and serious offenses.

On the theme of limited and selective impact, consider the incisive 2010 study conducted by Professor Magdalena Cerdá and six colleagues.<sup>280</sup> This team had given up on a causal relationship between broken windows policing and non-gun-related homicide, and, in an earlier study, had failed to find evidence that visual disorder was the mechanism by which misdemeanor arrests might influence more serious crime.<sup>281</sup> So they decided to break down New York City gun homicides into three victim age groups at the precinct level.<sup>282</sup> When examined from this angle, higher misdemeanor arrest rates did have a statistically significant negative association with gun homicide between 1990 and 1999 — but only for adult victims aged thirty-five or older.<sup>283</sup> Other variables were linked to fewer gun homicides among this

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<sup>278</sup> See Messner et al., *supra* note 273, at 405 (separating gun-related from other homicides, then finding a statistically significant association between misdemeanor arrests and the former but not the latter).

<sup>279</sup> See *id.* (citing Jeffrey Fagan et al., *Declining Homicide in New York City: A Tale of Two Trends*, 88 J. CRIM. L. & CRIMINOLOGY 1277, 1322 (1998)); see also Jeffrey Fagan & Garth Davies, *Policing Guns: Order Maintenance and Crime Control in New York*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA 191, 204–06 (Bernard E. Harcourt ed., 2003) (concluding that stop-and-frisk activity in 1998 did not predict homicide rates in 1999, with the exception of stops for violent or drug offenses and the ensuing homicide victimization rate for Hispanics).

<sup>280</sup> Magdalena Cerdá et al., *Investigating the Effect of Social Changes on Age-Specific Gun-Related Homicide Rates in New York City During the 1990s*, 100 AM. J. PUB. HEALTH 1107 (2010).

<sup>281</sup> See *id.* at 1108; Cerdá et al., *supra* note 247, at 536, 538–39 (finding a “weak” inverse association between misdemeanor arrests and gun homicides over time, but not via a proxy variable for neighborhood disorder based on sidewalk cleanliness).

<sup>282</sup> See Cerdá et al., *supra* note 280, at 1108 (excluding only Central Park and relying on medical examiner records for locations of injury and causes of death).

<sup>283</sup> See *id.* at 1110, 1111–13 tbls.2, 3 & 4. The authors measured misdemeanor policing according to misdemeanor and ordinance arrests, see *id.* at 1108, which is not necessarily coextensive with broken windows policing. The study does, however, control for citizen complaint rates, the

older cohort, too: lower levels of cocaine use and higher levels of public assistance receipt.<sup>284</sup> So depending on relative costs, reducing cocaine consumption and spreading the economic safety net might be superior to vigorous misdemeanor enforcement strategies if a city's goal is to protect adults from homicide.

Furthermore, if the goal is to protect younger people from homicide, then the Cerdá study offers no statistically significant support for misdemeanor policing. Instead, the study points to policies that reduce cocaine use, increase public assistance availability, and reduce alcohol consumption.<sup>285</sup> These three variables, but not misdemeanor arrests, were linked to falling homicide rates for victims under age thirty-five. And recall that the first two of those three variables were also associated with lower homicide rates for adults aged thirty-five or older. Changes in cocaine use and public assistance seem to do double duty. Consider one comparison: an increase of one standard deviation in the misdemeanor arrest rate was associated with a drop of 7.4 homicides for older adults per 100,000 people, while an increase of one standard deviation in public assistance receipt was associated with 10.5 fewer homicides for young adults *plus* 2.9 fewer homicides among older adults.<sup>286</sup> Which policy or combination of policies is optimal cannot be established by a single study, of course. And, unfortunately, it does not seem that this study controlled for mean reversion. But creative takes on the available data open wide the possibility that policing strategies are just one modest part of the successful management of one slice of the violent crime problem in the United States.

Finally, to the extent that broken windows theories of misconduct deserve respect, crude versions of broken windows policing are not responsive to the theory. The fit between misdemeanor arrests and pleasant neighborhood aesthetics is rather poor, after all. A randomized policy experiment in Lowell, Massachusetts, speaks to this point. Professors Anthony Braga and Brenda Bond chose thirty-four high-crime areas, divided them into matched pairs, and randomly selected one of each pair for experimental treatment.<sup>287</sup> The experimental areas

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ratio of felony arrests to felony complaints, and the number of officers assigned to each precinct. *See id.*

<sup>284</sup> *See id.* at 1109, 1113 tbl.4. The proxy for precinct-wide cocaine use was the percentage of accidental deaths with positive toxicology results for cocaine. *See id.* at 1108.

<sup>285</sup> *See id.* at 1109, 1111–12 tbs.2 & 3 (finding that the homicide rate for youths aged fifteen to twenty-four fell with declining cocaine consumption and that the homicide rate for young adults aged twenty-five to thirty-four fell with declining alcohol consumption and increasing receipt of public assistance); *see also id.* at 1109 (stating that increasing incarceration rates were associated with increasing homicide rates for youths aged fifteen to twenty-four).

<sup>286</sup> *Id.* at 1109–10, 1111–13 tbs.2, 3 & 4. A standard deviation increase for misdemeanor arrests was 737 per 10,000 population, *id.* at 1110, and for public assistance was 10.1%, *id.* at 1109.

<sup>287</sup> *See* Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 *CRIMINOLOGY* 577, 582–85 (2008) (explaining that hot spots were

received a variety of interventions that are not easily summarized.<sup>288</sup> They experienced some combination of (1) “order maintenance interventions,” including increases in misdemeanor arrests, stops-and-frisks, patrols, and dispersal orders for loiterers; (2) “situational strategies” against disorder, such as cleaning and security for vacant lots, more street lighting, more video surveillance, destruction of abandoned buildings, and inspection of problem taverns; and (3) “social service” strategies involving connections with mental health workers, homeless shelters, and youth recreation.<sup>289</sup> This semirandomized experimental research design helps sidestep the issue of mean reversion.

After a year, the experimental areas had nearly twenty percent fewer emergency calls than the controls, including at least thirty percent fewer robbery, burglary, and nondomestic assault calls.<sup>290</sup> Situational strategies showed the strongest statistical association with fewer calls; the effect of misdemeanor arrests was less clear yet still statistically recognizable; and social service strategies failed to achieve conventional levels of statistical significance.<sup>291</sup> Furthermore, and unsurprisingly, a large majority of the experimental areas were recorded as having a decreased appearance of social and physical disorder — comprising loitering, public drinking, drug selling, homelessness, vacant lots, abandoned buildings, abandoned cars, street trash, and graffiti.<sup>292</sup> Braga and Bond therefore oppose a simplistic “zero tolerance policing model” focused on arrests.<sup>293</sup>

3. *Transparency Problems and Aesthetics.* — On the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken windows policing is uncertain, low, or confined in important ways. Even if evaluators should be more optimistic, the difficulty in proving that a bank model dominates here should redirect attention to other possibilities. One alternative is a bridge model, in which the appearance of order exerts no downward

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identified partly by emergency calls placed in 2004 but that the matching was “primarily . . . qualitative,” *id.* at 583 n.5). The study also tested for displacement effects in two-block adjoining areas. *See id.* at 591–92, 596–97 (finding no statistically significant effect on emergency calls).

<sup>288</sup> *See id.* at 584–85 (describing the “Compstat-like process,” *id.* at 584, in treatment areas). The study did not measure the impact of data-driven oversight processes.

<sup>289</sup> *Id.* at 585; *see id.* at 585–86, 594 (calculating the misdemeanor arrest increase in experimental areas compared to control areas as approximately twenty-nine percent, and noting that only twelve of seventeen experimental areas received social service strategies).

<sup>290</sup> *See id.* at 587–88, 592–93 & tbl.1 (noting that social disorder was measured by researcher counts during five-minute periods and that physical disorder was based on researcher coding of photographs of the blocks in question).

<sup>291</sup> *See id.* at 594–95 & fig.1 (showing that situational strategies were statistically significant at the .05 level and misdemeanor arrests at the .10 level).

<sup>292</sup> *See id.* at 596 & tbl.2.

<sup>293</sup> *Id.* at 600.

pressure on serious crime rates. If that is the applicable model, then broken windows policing becomes vulnerable to a transparency objection.

This policing strategy came with an asserted hypothesis when it was initiated. The strategy was advertised as an effective technique for reducing violent crime, not just urinating in public. In New York City, for example, officials indicated that aggressive misdemeanor enforcement could reduce the rate of more serious crimes. *Police Strategy No. 5*, which announced the department's broken windows policing effort, was openly concerned with resident "perception" that the city was in decline, based not only on violent crime rates but also on "an increase in the signs of disorder."<sup>294</sup> The document goes on to note the broken windows work of Wilson, Kelling, and Skogan:

By examining the Wilson-Kelling hypothesis in more than 40 cities, Wesley Skogan has found that disorder is indeed the first step in what he terms "the downward spiral of urban decay." Fear exacerbated by disorder causes people to abandon [public spaces] . . . , and even leave the city altogether. . . . NYPD will act to undercut the ground on which more serious crimes seem possible and even permissible.<sup>295</sup>

As statistics on serious crime began looking more and more favorable during the 1990s, some prominent officials and observers credited broken windows policing. As the mayor put it in 1998: "We didn't become the City people most want to live in and visit by encouraging an atmosphere of disorder and disrespect for the rights of others. . . . We have made the 'Broken Windows' theory an integral part of our law enforcement strategy. . . . The broken windows theory works."<sup>296</sup> The former head of the transit police and police department wrote in the same year: "We were proving the Broken Windows theory."<sup>297</sup> Indeed, the Kelling and Sousa study discussed above attracted media attention.<sup>298</sup>

Such promotion and credit attribution indicates a transparency problem, to the extent that ordinary people became overly persuaded that broken windows policing drove violent crime down. Many New York City residents do seem to have held high regard for the policing strategy and the theory of disorder behind it. A poll conducted for the

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<sup>294</sup> POLICE STRATEGY NO. 5, *supra* note 242, at 4.

<sup>295</sup> *Id.* at 4–5.

<sup>296</sup> Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City* (Feb. 24, 1998), <http://www.nyc.gov/html/rwg/html/98a/quality.html>.

<sup>297</sup> BRATTON, *supra* note 241, at 156 (discussing transit authority policy); *see also id.* at 228–29 (discussing crime declines and *Police Strategy No. 5* but emphasizing that it was only one of many NYPD strategies).

<sup>298</sup> *See* Harcourt & Ludwig, *supra* note 233, at 274–75 (collecting media reports); *see also* KARMEN, *supra* note 245, at xii–xiii (stating that the media orthodoxy was to give credit to NYPD).

Citizens Commission in 2000–2001 is on point.<sup>299</sup> It found over seventy percent support for a broken windows theory of crime.<sup>300</sup> Similarly, the police department’s overall quality-of-life enforcement strategy garnered a sixty-six percent approval rating,<sup>301</sup> with similar levels of support across racial lines.<sup>302</sup> Part of this popular support surely is based on a belief that broken windows policing helped reduce violent crime. According to a 2004 report from the National Research Council, “[t]here is a widespread perception among police policy makers and the public that enforcement strategies (primarily arrest) applied broadly against offenders committing minor offenses lead to reductions in serious crime,” even though “[r]esearch does not provide strong support for this proposition.”<sup>303</sup> More recent empirical research adds nuance to the picture, as discussed above, but a gap remains between broken windows policing as promoted and as tested.

No clean excuse fully pardons this appearance/reality gap. Like campaign finance regulation, the situation involves policy as advertised to ordinary citizens, not just to enemies of the state. Moreover, justifications for broken windows policing do not include fooling potential lawbreakers into believing that misdemeanor arrests cause lower serious crime rates. However vague, the theory behind broken windows policing turns on the response to neighborhood appearance and not the response to assertions that those appearances cause changes. We are left with a situation in which the connection between the policing strategy and serious crime has been at least arguably overstated to the general public, which has at least arguably overestimated the strength of that link.

The magnitude of this transparency problem is not especially great, however, and probably less troubling than the possible appearance/reality gap for political corruption. The broken windows transparency issue involves overclaiming about the causal effect of a policing strategy, rather than misleading the public about violent crime or misdemeanor arrest rates. Perhaps no one was lulled into a failure to

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<sup>299</sup> See Harold Takooshian & Richard H. Tashjian, *Citizen Attitudes Toward Police and Crime, 2001*, in CITIZENS CRIME COMM’N OF N.Y.C., CRIME, POLICE, AND THE COMMUNITY 4 (2001). The survey was conducted before 9/11. See CITIZENS CRIME COMM’N OF N.Y.C., *supra*, at ii–iii.

<sup>300</sup> See Takooshian & Tashjian, *supra* note 299, at 6; *id.* app. B tbl.1 (showing fifty percent responding “definitely” and only eight percent “not at all”).

<sup>301</sup> See *id.* at 6 (noting that thirty-nine percent “definitely” approved and twenty-seven percent “probably” approved). Respondents opposed enforcement regarding street vendors and jaywalking, albeit slightly, but they supported other order-maintenance policing initiatives. See *id.* app. B tbl.4.

<sup>302</sup> See *id.* at 8, app. B tbl.3.

<sup>303</sup> NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING 229 (Wesley Skogan & Kathleen Frydl eds., 2004); see also Braga & Bond, *supra* note 287, at 579.

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take appropriate precautions on account of this policing strategy. In addition, the disparity between information insiders and information outsiders might be small. In New York City, the strategy was publicly announced and its effect is subject to testing. Although officials surely have special access to valuable information, professional empiricists have acquired useful data and are using it to critique the policy. Ordinary citizens are not expert statisticians, but they can bear some responsibility for mismatches between popular perception and the demonstrable effects of a high-profile policing strategy.

Resolving this particular transparency issue decisively is less important than identifying it as a relevant normative issue. The question becomes pressing as soon as broken windows policing or any other government decision moves away from the bank model and toward the bridge model. The above discussion illustrates the significance of appearance/reality relationships to sensible normative evaluation. At the same time, broken windows policing was not promoted solely on its predicted effect on serious crime, nor was the strategy sold as a one-dimensional plan to maximize misdemeanor arrests. There always was much more to the broken windows debates. Indeed, doubts about a self-fulfilling prophecy plus an arguable transparency problem should direct attention toward a model that is simpler.

Striking out the complications of bank models and bridge models returns us to clock models — even if we doubt that policing will beneficially change the social meaning of throwing rocks through windows, and setting aside any benefits to the politically influential from simply expressing condemnation of disorder through law. There is a straightforward case for a brand of broken windows policing that is no deeper than aesthetics. Part of this policing strategy was meant to improve the appearance of neighborhoods according to the tastes of the mainstream, majority population. To the extent that the strategy changes local optics in the intended direction, gains in well-being will be achieved even if the strategy does absolutely nothing to change the rate or seriousness of misconduct. Most people seem to find graffiti ugly, loitering discomfoting, and public urination obnoxious. If it effectively targets these problems, broken windows policing could be worth the cost without any benefit other than aesthetic comfort for mainstream residents.

Changing the atmosphere was always part of the mission for broken windows policing, and this change does not strictly require lower violent crime rates. From the beginning, Kelling and Wilson were interested in a cure for urban anxiety. They thought police officers walking their beats could reduce “the fear of being bothered by disorderly people. Not violent people, nor, necessarily, criminals, but dis-

reputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.”<sup>304</sup> They did make bolder causal claims regarding crime rates, and some people are not queasy around panhandlers. A notable lack of tolerance unites popular desires to sweep up the trash on account of ugliness and to sweep out less-valued people on account of anxiety. But no doubt large majorities of city residents prefer neighborhoods without litter, graffiti, and broken windows, regardless of the crime rate and the people who frequent those locations. Broken windows theories of misconduct and policing were partly founded on these sensibilities.

The aesthetically focused versions of these theories do not suffer from the same challenges involving efficacy, causation, and transparency. Few doubt that law enforcement can have an effect on the rate of window breaking and, if officials take time to fix windows that are broken, the aesthetic gain becomes uncontroversial. Equally obvious, a direct response to neighborhood aesthetics is basically impervious to transparency concerns. The policy and its success are defined by what people perceive. What you see is what you get. And in this case people will perceive largely the same thing, even if they will disagree at the margin over what counts as beautiful and what counts as ugly. “American conceptions of the appropriate level of public order have changed dramatically over time,”<sup>305</sup> Skogan concedes, but “the evidence suggests that [many forms of disorder] are not experienced differentially . . . and that major economic, social, and lifestyle divisions in urban areas are not reflected in real differences over appropriate levels of order.”<sup>306</sup> In any event, the capacity of policing strategies to influence the relevant aesthetics is a fairly straightforward proposition to test.

At the same time, simplistic versions of broken windows policing are poorly designed for refurbishing shabby neighborhoods. A zero-tolerance policy for misdemeanor and code violations, even if it were realistic, is not a solution to ugliness or even to visible signs of disorder. “[A]rrest strategies do not deal directly with physical conditions,” Braga and Bond observe.<sup>307</sup> Something like a real estate policy would do much better. “[D]ealing with disorderly conditions requires an array of activities, such as securing abandoned buildings, removing trash from the street, and managing homeless populations, which are not

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<sup>304</sup> Wilson & Kelling, *supra* note 235, at 30.

<sup>305</sup> SKOGAN, *supra* note 236, at 5.

<sup>306</sup> *Id.* at 9. For warnings that people convert perceptions of poverty and the presence of racial minorities into perceptions of disorder, see Sampson & Raudenbush, *supra* note 238, at 336.

<sup>307</sup> Braga & Bond, *supra* note 287, at 600.

captured in one-dimensional misdemeanor arrest measures.”<sup>308</sup> In fact, arrests can worsen the aesthetic. Arrests themselves tend to be disorderly. While they indicate that police officers care, arrests also indicate something troubling for the officers to care about. Furthermore, if it appears that members of disadvantaged groups are feeling the brunt of the policing effort, yet another negative aesthetic consequence must be factored in along with complaints of domination and other injustices.<sup>309</sup>

The above is a reminder that aesthetic justifications are not uncontroversial. People disagree over the right aesthetic, and some policies are not especially well suited to achieving pure gains toward beauty and comfort. Broken windows policing recalls some of these difficulties. An aesthetic justification for the policy is less convenient than a demonstrable self-fulfilling prophecy in which the appearance of order matches the reality measured by crime rates of all kinds. Under those conditions, we could identify consensus goals and a policy that left little space for transparency problems. Unfortunately, existing empirical evidence is not as comforting as broken windows theories. At this point, probably the best defense of broken windows policing involves a practice and an argument trained on aesthetics.

### C. Reflections

The foregoing debates are different in several noteworthy respects. Arguments over campaign finance regulation often migrate to the courts in the form of constitutional litigation, while broken windows policing remains a policy debate with little direct judicial review. Furthermore, the former debate proceeds largely on theory as relevant evidence develops, while the latter features a sizeable body of on-point empirical work already. Not only do we think that recorded murder and robbery rates are more reliable than are estimates of political corruption (a notoriously private activity, even when precisely defined), but causation empiricists working on U.S. policy have a head start on broken windows policing. And although the analysis of both issues

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<sup>308</sup> *Id.* at 579; see also RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS* 22 (2001) (distinguishing the effects of different types of neighborhood disorder or incivilities on crime and decline, and indicating different kinds of policy responses); Harcourt & Ludwig, *supra* note 233, at 282 (“[T]he broken windows hypothesis [of misconduct] is, in principle, consistent with a variety of potential policy levers, ranging from changes in policing to community organizing.”); Sampson & Raudenbush, *supra* note 238, at 638 & n.36 (“Attacking public disorder through tough police tactics may thus be a politically popular but perhaps analytically weak strategy to reduce crime . . . .” *Id.* at 638.).

<sup>309</sup> See, e.g., Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1249 (2000); *id.* at 1267 (“One might infer that minority communities tend to lose confidence in police fairness as order-maintenance policies become more stringent.”); Ralph B. Taylor, *Incivilities Reduction Policing, Zero Tolerance, and the Retreat from Coproduction: Weak Foundations and Strong Pressures*, in *POLICE INNOVATION* 98, 107–08 (David Weisburd & Anthony A. Braga eds., 2006).



can be improved with attention to appearance/reality relationships, the respective recommendations are quite different. The campaign finance debate has been pinned down by a bridge model and closed off from a bank model, while the broken windows debate suffers from something like the opposite problem — along with an underappreciated clock model perspective, which is not similarly applicable to the campaign finance context.

We might wonder whether these differences intimate a sensible division of labor across institutions. On the one hand, judiciaries are not well built to process complex empirical issues, while academics are supposed to do so, and policymakers might be expected to do the best they can. On the other hand, the labor is not actually divided so neatly. Judges repeatedly make empirical assertions in campaign finance litigation. Courts are toying with efficacy and causation questions, just not in anything close to expert fashion.<sup>310</sup> Simultaneously, the policy-making process is not doing an especially good job with the contested data on which broken windows theories depend. One might believe that policy-related empirical questions are most legitimately determined by legislative politics or bureaucratic processing, but those institutions show their own shortcomings. And judicial “tampering” with empirical questions is not likely to end soon.

Even if we should generally prefer that academics and officials grapple with statistics while judges perform other tasks, many appearance justifications have a peculiar character. When an appearance is proffered for something more than its intrinsic value, officials can be called on to defend themselves without enjoying impermeable deference and without suffering implacable skepticism.<sup>311</sup> The risk that officials will perniciously manipulate the appearance of their operations motivates the creation of significant safeguards, including some outsider oversight. But the questionable competence of outside evaluators, along with the likelihood of a self-fulfilling prophecy, indicates that oversight should come with a measure of restraint. Whether the authority for oversight is lodged in a judiciary or some other institution, it will often make sense to seriously test appearance justifications, empirical components and all. Obviously the outcome may depend on contested value commitments, including the constitutional value as-

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<sup>310</sup> Casual judicial empiricism is in no way restricted to campaign finance cases. *See, e.g.*, Ansolabehere & Persily, *supra* note 104, at 1750–60 (casting doubt on judicial understanding of the impact of voter identification laws); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 840–43 (2009) (doubting the Court’s ability to characterize risk uncontroversially based on a high-speed-chase video); Janice Nadler, *No Need to Shout: Bus Sweeps and the Psychology of Coercion*, 2002 SUP. CT. REV. 153, 155 (detecting an “ever-widening gap between Fourth Amendment consent jurisprudence . . . and scientific findings about the psychology of compliance and consent”).

<sup>311</sup> *See supra* section III.C.

signed to campaign donations and the human value of living in a neighborhood free from “disorderly conduct” (or constant monitoring therefor). But for those who are not so certain or not extraordinarily wedded to those particular values, the problems of transparency and the emerging empirical lessons of the best scholarly efforts will become critically important. Even if you doubt that the broken windows policy debate will improve, we easily can imagine judges becoming curious about self-fulfilling corruption prophecies.<sup>312</sup>

Whatever is the likely or optimal combination of decisionmakers, any conscientious observer should have an intelligent set of questions and lessons from the discussion above. One lesson is that attention should be smoothed out across the different models for appearance/reality relationships. A comprehensive judgment on broken windows policing or campaign finance regulation must consider more than one model. Concentrating on the exciting possibility that graffiti cleanup can result in fewer murders will shunt aside the risks of public misinformation, along with the simple benefits of aesthetic pleasure and a sense of safety. Concentrating on the importance of public confidence to an effective government will miss transparency threats to the most rudimentary versions of democracy, along with the possibility that contribution limits help ameliorate those concerns by preventing a corruption-inducing self-fulfilling prophecy.

None of this is to argue that all of us should be struggling with all of these questions to the same extent. Nor is it true that everyone engaged in these debates pretends to be offering comprehensive judgments when they examine one part of the overall analysis.<sup>313</sup> But at least someone should be paying serious attention to multiple aspects of these issues. The general analytic framework suggested above is a kind of checklist for determining whether significant aspects are being left out, regardless of the appearance-based justification on offer. The prominent campaign finance and broken windows debates reviewed here illustrate differing highs and lows in attention levels.

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<sup>312</sup> Serious judicial concern about *transparency* and contribution limits is not highly likely, in my judgment. Judges are partly an extension of the political system and not the leading candidates for attacking its legitimacy. Furthermore, charging widespread corruption might reinforce the perceived need for more regulation, which several Justices plainly oppose, and the Justices who are more tolerant of regulation might not want to effectively concede that law has been ineffective so far. That said, mainstream judges with different ideological commitments might be willing to point out that defenders of campaign finance regulation cannot be sure what the actual corruption level would be if current regulations were invalidated. Those judges also might be willing to consider the risk of a destructive self-fulfilling corruption prophecy.

<sup>313</sup> For a responsibly limited take on an empirical conclusion, consider Messner et al., *supra* note 273, at 407, which closes with a caution about resource allocation issues and the negative effects associated with order-maintenance policing.

At a more micro level, there are lessons about self-fulfilling prophecies. They are curious phenomena that operate on sometimes hazy and touchy social mechanics. It takes creativity to see possibilities for self-fulfilling prophecies, perhaps running in different directions, and the dynamics can be exciting. A strong self-fulfilling prophecy can cure a transparency concern. Indeed, when the feared consequences fall into the catastrophic categories of political corruption or homicides, even small probabilities of self-fulfilling prophecies will substantially boost the expected beneficial consequence of law. No regulatory interest more subtle than fighting a downward spiral into government-for-sale or extreme physical insecurity is necessary. Avoidance of transparency questions, furthermore, can sidestep contentious normative questions, such as the trade-off between ineffective government institutions and accurate public perception, or the aesthetic and other value of vigorous enforcement of quality-of-life laws.

But strongly influential self-fulfilling prophecies are not well understood today. High hopes have been unfulfilled in more than one setting, such as teacher expectations and broken windows policing. In those fields, beneficial effects triggered by physical appearance or widespread belief remain believable yet modest and sensitive to context, as far as we can tell. They are real and qualified. Perhaps the growing work on self-fulfilling corruption prophecies will have a similar trajectory — ingenuity followed by excitement and then moderation. In any event, one challenge is to remain open-minded about the applicability of bank models without undue enthusiasm. Campaign finance litigation shows poorly on the former virtue, while some broken-windows-policing advocacy tips over into the latter vice. Another challenge is to preserve the conditions for progress in understanding self-fulfilling prophecies. In the policing context, we have the advantage of local variation, which provides data for quasi-experimental empirical research, not to mention a few randomized policy trials. In the campaign finance situation, however, there is a chance that judges will diminish policy diversity by shrinking the policy space through uniformly deregulatory constitutional doctrine. Thus far, meaningful candidate contribution limits are still acceptable to judges. But there is reason to worry that additional constitutional constraint will be imposed in an information-forfeiting manner.

From this cautionary note, I want to reissue several warnings about the general framework deployed here. First, it does not cover every relationship between appearance and reality over time. Instead I have emphasized select relationships that seem especially relevant to appearance arguments involving government decisions. Second, certain value choices will have to be inserted before yielding conclusive judgments. The analysis above attempts to avoid telling you exactly what to value and, no doubt, even readers with shared values will interpret the strength of various appearance arguments differently. Third, the

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framework draws on different models for appearance/reality relationships, but it does not instruct the user how to choose across those models. Often more than one model may be in action. My objective has not been to solve the problem of model selection but rather to promote its importance. Finally, I want to emphasize that no two debates can reveal terribly much about a practice as widespread as appearance justifications for official decisions. Even a complete treatment of campaign finance and broken windows would not say everything worth knowing about appearance arguments. Additional work is warranted. And I encourage inspired readers to start seeing appearance arguments everywhere — and for what they really are.

#### CONCLUSION

This Article suggests a workable distinction between the elusive concepts of appearance and reality, along with several ways in which the two can be related. Often we think that reality is insulated from any influence that can be linked to appearance, but sometimes an appearance becomes the basis for conduct that fosters a corresponding reality over time, and sometimes the concepts collapse in the first place. Grasping these relationships is important for reaching sensible normative judgments about appearance-based justifications. The evaluative issues are comparatively simple when appearance and reality are essentially the same. As always, cost, necessity, and efficacy of appearance management will be relevant, but still other questions arise when appearance and reality might diverge. If reality seems insulated from appearance, the key question involves transparency: whether, for example, attempts to build public confidence can be justified despite the risk of a gap between the apparent and actual conduct of officials. If instead reality might be a function of appearance over time, the transparency issue becomes subordinate to another causal question: whether, for example, the appearance of good behavior will help produce a beneficial self-fulfilling prophecy.

These ideas were illustrated with debates over campaign finance regulation and broken windows policing, but any number of other applications could have been used. The basic point is not so much about which applications are most interesting or the proper conclusion to draw about any particular argument. Answers to those questions will depend on individual ideological commitments that I do not pretend to reconcile. Instead I have presented a general framework for analyzing appearance-based justifications in government decisions that is compatible with a large spectrum of values. We need this. Every day, decisions are made in order to generate good looks, including good-looking government operations. We ought to have a thoughtful set of questions to ask about those appearances, any underlying reality, and the connection between the two.