



# REGULATION FOR THE SAKE OF APPEARANCE

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*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 arguments. First, working definitions are offered to distinguish appearance from reality. Second, potential relationships between appearance and reality are identified. Sometimes reality is insulated from appearance, sometimes appearance drives reality over time, and sometimes appearance and reality collapse from the outset. Third, these relationships are used to isolate normative questions. These questions involve aesthetic judgments, transparency concerns when reality may deviate from appearance, and the probability that a self-fulfilling prophecy will pull reality back toward appearance. A final section applies these ideas to broken windows policing and campaign finance regulation. Leading empirical studies are examined and, throughout, the Article draws on contributions from various disciplines including philosophy, sociology, psychology, economics, and political science.*

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*Attention, comrades! . . . . We have won the battle for production!<sup>†</sup>  
Backed by the full faith and credit of the United States government.<sup>††</sup>  
At the tone, twenty hours, twenty-two minutes, Coordinated Universal Time.<sup>†††</sup>*

Appearances matter. Countless decisions are explained and justified by the resulting appearance and not, or not only, by the resulting reality. Most people in the United States probably do not leave home before considering how their physical appearance will influence the perceptions of others. Cosmetics and cosmetic surgery are multibillion dollar industries, after all,<sup>1</sup> to say nothing of commercial advertising and its image focus since before the 1960s.<sup>2</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 can influence 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 on the comfort it would give to fair-minded critics of the new government, whose supporters professed no interest in crossing these lines anyway.<sup>3</sup> An especially familiar example arises in codes of judicial conduct. They obligate judges to recuse when their impartiality can be reasonably questioned, not only when rightly questioned.<sup>4</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 escalation.<sup>5</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>6</sup>

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<sup>†</sup> GEORGE ORWELL, NINETEEN EIGHTY-FOUR 58 (Signet Classic 1977) (1948).

<sup>††</sup> From the logo of the Federal Deposit Insurance Corporation, which is reproduced in decal form at <http://www.fdic.gov/about/learn/learning/who/runs.html>.

<sup>†††</sup> From the National Institute of Standards and Technology's radio broadcast, available by telephone at 303-499-7111. See *History of WWV*, <http://www.nist.gov/physlab/div847/grp40/wwv-history.cfm>. On the discontinuation of a similar service through local telephone companies, see David Lazarus, *Time of Day Calling It Quits at AT&T*, L.A. TIMES, Aug. 29, 2007.

<sup>1</sup> See DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 34–35, 50–53 (2010) (stating that people in the United States spend more money on grooming than on reading material).

<sup>2</sup> See FIRST RESEARCH, *INDUSTRY PROFILE: ADVERTISING AND MARKETING* 2 (May 3, 2010) (estimating annual revenue for advertising and marketing at \$75 billion in the United States); C.C. Laura Lin, *Corporate Image Advertising and the First Amendment*, 61 S. CAL. L. REV. 459, 459, 462–67 (1988) (discussing the rise of corporate image advertising); see also THOMAS FRANK, *THE CONQUEST OF COOL: BUSINESS CULTURE, COUNTERCULTURE, AND THE RISE OF HIP CONSUMERISM* 62–67 (1997) (describing the advertising campaign for Volkswagen's Beetle in the 1960s).

<sup>3</sup> See 1 ANNALS OF CONGRESS 144 (1789) (remarks of Rep. Madison) (arguing that, “if we continue to postpone . . . it may occasion suspicions”); *id.* at 433 (offering amendments “to satisfy the public mind that their liberties will be perpetual”); BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 182 (1977).

<sup>4</sup> See, e.g., 28 U.S.C. § 455(a); MODEL CODE OF JUDICIAL CONDUCT Canon 2, Rule 2.11(A) (2007); *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2266–67 (2009) (emphasizing public confidence).

<sup>5</sup> See *infra* Part IV.A.

<sup>6</sup> See, e.g., *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 150 (2003); *Buckley v. Valeo*, 424 U.S. 1, 25–27, 46–

Although the justification is familiar, the special logic of appearance arguments is not well-theorized, particularly for legal institutions.<sup>7</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 non-corrupt without much explanation of how or why it should matter. Are we supposed to think that government is entitled to appear non-corrupt even if it is in fact riddled with corruption? Are defenders of existing campaign finance law claiming to know that the government is basically free of corruption? Is there anything more to the argument?<sup>8</sup>

This Article confronts the potential and problematics of appearance justifications. My principal aspiration is to construct a framework for understanding and evaluating claims that a government decision is justified because it will create a desirable appearance.<sup>9</sup> Decisions within legal institutions are my focus, but the logic of appearance management beyond government will be considered as well. Accordingly, I will present some conceptual work to distinguish appearance from reality, positive work to identify potential relationships between appearance and reality, and normative work to suggest key evaluative questions that depend on those relationships. The combination of these elements helps produce a sensible analytic framework that can be used consistently with a variety of moral and ideological commitments. To illustrate these ideas, I will apply them to two policies that otherwise have little in common: campaign finance regulation and broken windows policing. Although taking place in different places and

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48 (1976) (per curiam) (emphasizing public confidence); *infra* Part IV.B. The regulatory interest had included undue influence and its appearance, but this interest seems to have been abandoned by the Supreme Court. *See infra* note 174.

<sup>7</sup> Legal scholarship on appearance-based regulation is thick when it comes to law's expressive function, *see infra* note 63, and there is helpful work on law and aesthetics, *see, e.g.*, RHODE, *supra* note 1; SUSAN SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* (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 have been important contributions. For an effort to defend 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 consequentialist and otherwise 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 changing people's misperceptions of risk, *see* Amatai 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, *Cearsar's Wife: On the Moral Significance of Appearing Good*, 89 J. PHIL. 331, 341 (1992) (arguing that actions not intrinsically immoral can be wrongful when they seem immoral and observers are offended or copy their misperception of the action). There are, of course, many pockets of appearance-related scholarship on various legal questions. *See, e.g.*, 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); Fredrick Schumann, *"The Appearance of Justice": Public Justification in the Legal Relation*, 66 U. TORONTO FAC. L. REV. 189, 191 (2008) (regarding judges and non-sociological legitimacy); Larry D. Barnett, *Law as Symbol: Appearances in the Regulation of Investment Advisers and Attorneys*, 55 CLEV. ST. L. REV. 289, 291–92 (2007); *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>8</sup> *See infra* note 137 (collecting scholarship on the appearance justification for campaign finance regulation).

<sup>9</sup> I do not include prophylactic rules, which are norms that reach beyond conduct thought to be threatening 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 reason to tolerate this type of regulatory overbreadth is that the feared conduct is difficult to detect and so law might understandably use crude proxies. Depending on how the rule is fashioned, it might also provide clear guidance to interested parties. All of this is old news, and my analysis does not pay attention to prophylactic rules per se. Prophylactic rules do have a connection to appearance: They tend to target conduct that merely resembles bad conduct. But my interest is decisions that are defended in terms of the appearances that they are supposed to cause, not every decision that takes appearances into account. One could say that prophylactic rules amount to regulation that *applies* to appearances, while I am interested in regulation for the sake of *generating* appearances. These regulatory contexts are different and are not amenable to the same form of evaluation. Prophylactic rules do not raise the same aesthetic, transparency, or causation questions.

on different terms, these debates both involve appearance justifications and both can be renovated using the same general framework.

The Article proceeds in four stages. Part I discusses the concepts of appearance and reality. These ideas have a tangled heritage of many centuries but a few concise observations should suffice for present purposes. Part II explores certain relationships between appearance and reality. Perhaps most often, we think that, if anything, reality influences appearance and not the other way around. But looks are not always deceiving. Indeed, under certain conditions, an initial appearance will facilitate the emergence of a corresponding reality over time. These self-fulfilling prophecies can arise in banking, dating, democracy, and elsewhere. And, of course, sometimes there is no important difference between an appearance and the reality of interest. Appearances can be important for their own sake.

Part III uses this assortment of relationships to develop an evaluative framework for appearance justifications. When there is no relevant reality separate from appearance, normative evaluation is fairly straightforward even if observers disagree. The leading example is aesthetic judgment. When appearance and reality might diverge, additional questions arise. With respect to government decisions, often the appearance justification involves boosting public confidence, on which so many institutions depend for survival and efficacy. At least in democracies, one stock concern about such policies 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. But if a self-fulfilling prophecy is underway, the transparency concern is basically eliminated. What appears to be happening will turn into what is actually happening. At this point the key question moves from transparency to causation: What is the likelihood of a self-fulfilling prophecy? Different observers will assign different weights to aesthetic considerations, transparency concerns, and various self-fulfilling prophecies, especially given the diversity of contexts in which they arise. But most people will be interested in all three inquiries.

Part IV applies these ideas to campaign finance regulation and broken windows policing. The upshot is that the courtroom debate over appearances in campaign finance regulation has been insufficiently concerned about transparency and yet insufficiently curious about self-fulfilling prophecies involving corruption, while the policy debate over broken windows policing suffers from something like the opposite problem. Much scholarly effort on broken windows theories has thus far yielded evidence of modest or zero impact on serious crime rates without adequate recognition of resulting transparency issues—and perhaps without remembering the potentially beneficial aesthetic impact of certain forms of order maintenance policing. Some of these conclusions are fairly debatable, and serious investigation is still underway. To indicate the state of the art in these fields, I include an examination of empirical studies that is somewhat more detailed than is typical for law review articles. And throughout, I rely on contributions from a number of disciplines, including philosophy, sociology, psychology, economics, and political science. But whether readers agree with my assessment of particular debates is not so important. The crucial point, in my view, is that formulating sound evaluative questions requires understanding the different kinds of appearance-based justification.

## I. DISTINGUISHING APPEARANCE FROM REALITY

For an analysis to be worthwhile, the category of appearance-based justification must be distinctive in some way. We might begin by contrasting appearance and reality, as people commonly do, but is there a meaningful difference between them? Can we specify the difference

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>10</sup> These conceptual questions are addressed below. Of course the answers suggested here will not end any foundational philosophical debates. No article (let alone a law review article) can do that. The more humble goal of this short discussion is to distinguish appearance from reality in a way that is concise, 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 prove that the former is any less valuable than the latter. Today, aesthetic design choices have survived the form-follows-function dictates of high modernism,<sup>11</sup> symbols are taken seriously if not violently,<sup>12</sup> and digitized virtual realities allow second lives to be lived in socially meaningful ways.<sup>13</sup> If these count as appearances, they must count for something important. One might also think that appearance and reality are points on the same dimension rather than categorically different. References to appearance and reality often arrive together and relate to the same subject, as in the appearance and reality of safety or corruption or order. Further, 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 crucial.

Yet appearance and reality are supposed to be different, and perhaps they are. In ordinary usage, the notion of appearance is often linked to perception and belief. People regularly discuss the way an event appears to their senses, along with beliefs derived from that appearance. Dictionary definitions of appearance accordingly refer to an external show or to the outward aspect of something based on sense impression,<sup>14</sup> which can be processed into a belief about the world. (“That rusty bridge appears likely to collapse,” for example.) The idea of reality is perhaps more difficult to pin down but it is often distinguished 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>15</sup> (“In reality, there is a negligible chance that the bridge will collapse,” for example.) People thus tend to use the term appearance to signify superficial impressions, while reality means something like the objective truth. It is roughly the difference between keeping up appearances<sup>16</sup> and keeping it real.<sup>17</sup>

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<sup>10</sup> Supplemental Brief for Appellee 8, *Citizens United v. FEC*, 130 S.Ct. 876 (2010) (emphasis added).

<sup>11</sup> See, e.g., 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*, in ORNAMENT AND CRIME: SELECTED ESSAYS 167, 169 (Adolph Opel ed. 1998) (1908) (contending that “in economic respects [ornamentation] is a crime”).

<sup>12</sup> See, e.g., John Lancaster, *Pakistani Cleric Announces Bounty for Killing of Danish Cartoonists*, WASH. POST, Feb. 18, 2006; Luke Harding, *How One of the Biggest Rows of Modern Times Helped Danish Exports to Prosper*, THE GUARDIAN, Sept. 30, 2006; Patricia Cohen, *Yale Press Bans Images of Muhammad in New Book*, N.Y. TIMES, Aug. 12, 2009.

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

<sup>14</sup> See, e.g., MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 86 (10th ed. 1999); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 88 (3d ed. 1996).

<sup>15</sup> See, e.g., HERITAGE DICTIONARY, *supra* note 14, at 1505.

<sup>16</sup> E.g., MAXIMILIAN FOSTER, KEEPING UP APPEARANCES (1914) (telling the tale of a couple who move to the big city

The ability to distinguish appearance and reality is a sign of maturity in more than one way. It is both a marker of cognitive progress in children and the subject of refined intellectual study among adults. Thus most children grasp simple appearance/reality distinctions by the time they leave kindergarten. When shown an object behind a tinted transparency, for instance, a six-year old typically can tell the difference between what color the object “looks like” and what color the object “really and truly is.”<sup>18</sup> Professional philosophical inquiry also includes appearance/reality distinctions, albeit with more precision and lasting disagreement over the concepts. The relevant discourse has matured over many centuries and across several subdisciplines. It should be enough for present purposes, however, to briefly note a few fault lines within metaphysical and epistemological investigations into objectivity.

On the metaphysical side, several positions can be sorted out.<sup>19</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 human beings believe, even what we justifiably believe. Indeed, this objective reality might be inaccessible to anyone even under ideal conditions for judgment.<sup>20</sup> Some metaphysically objective things are concededly dependant on the mind, such as the feelings and beliefs in your head, but strong objectivists can accommodate psychological facts and proceed to argue about other parts of reality, such as rocks and bridges outside of your head.<sup>21</sup> On the other 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>22</sup> This conclusion might eliminate any important appearance/reality distinction. There are then intermediate positions in which what counts as metaphysically objective is partly dependent on our minds. One version uses the conclusions reached by some community of observers to identify objective truth, another uses the conclusion that would be reached under appropriate or ideal conditions for judgment.<sup>23</sup>

If there is an objective reality of some dimension, certain epistemological issues follow.<sup>24</sup>

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and live beyond their means); see also AESOP’S FABLES 15 (Jerry Pinkney illus. 2000) (telling the tale of a young mouse who mistakes risk for non-risk and non-risk for risk based on physical appearances, and stating that appearances can be deceiving).

<sup>17</sup> E.g., <http://www.sharptontalk.net/missed.html> (displaying the catchphrase for Al Sharpton’s radio show); see also Audrey Brown, *How to KILL Your Television and Get Back to Reality*, eHow, [http://www.ehow.com/how\\_4509533\\_kill-television-back-reality.html](http://www.ehow.com/how_4509533_kill-television-back-reality.html).

<sup>18</sup> See John H. Flavell, The Development of Children’s Knowledge about the Appearance-Reality Distinction, 41 AM. PSYCHOLOGIST 418, 418–24 (1986).

<sup>19</sup> See generally Nicholas Bunnin & Jiyuan Yu, *Objectivism*, in THE BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 483 (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>20</sup> This position was illustrated in Plato’s *Republic* through the allegory of the cave. See PLATO, THE REPUBLIC book VII. Recall that even the sunlit world above could provide only a link to the Forms.

<sup>21</sup> See Leiter, *supra*, note 19, 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)).

<sup>22</sup> For conflicting interpretations of the dictum, “Man is the measure of all things,” see C.M. Gillespie, *The Truth of Protagoras*, 19 MIND 470, 482–84, 492 (1910) (understanding it as relativist and subjectivist, at least as subsequently developed), and F.C.S. SCHILLER, PLATO OR PROTAGORAS? 8–10, 15–18, 21 (1908) (understanding it as pragmatic).

<sup>23</sup> See Brian Leiter, *Objectivity and the Problems of Jurisprudence*, 72 TEX. L. REV. 187, 192–94 (1993) (distinguishing modest objectivism based on ideal conditions from minimal objectivism based on community belief). These positions might be more intuitive for some examples than for others. Leiter suggests that tastiness fits with strong subjectivism, fashionableness with minimal objectivism, color with modest objectivism, and rocks with strong objectivism. See Leiter, *supra*, at 194–95.

<sup>24</sup> Even if nothing were metaphysically objective, there still would be practically important questions about how beliefs are best justified.

The core question is how we can rightly conclude that knowledge about the real world has been achieved. Committed skeptics observe 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>25</sup> Few of us hold to the highest standards of certainty for knowledge in most situations, however. We need not extend those stringent tests beyond “[t]he pastime of epistemology,” as David Lewis puts it.<sup>26</sup> Most people in New York City would understandably conclude, if pressed, that they *know* that there was in fact green grass in Central Park last summer. Perhaps as a matter of principle they should hold residual doubt about this, but not for any obvious practical purpose.

Even on a compromised test of knowledge, reasonable disagreement will continue over the best procedures for identifying truth. Given finite resources and limited cognitive capacity, hard choices will have to be made. There also is debate over which statements are rightly susceptible to testing for truth and falsity in the first place. Perhaps statements such as “that painting is beautiful” or “slavery is unjust” are declarations of value that cannot be true or false when honestly asserted.<sup>27</sup> But the wide consensus on the existence of objective reality and human knowledge is notable, as is the persistent need for tests of justifiable belief. These observations point toward useful working definitions of appearance and reality.

### B. Working Definitions

Fortunately, evaluating appearance-based justifications does not require a choice among all of the competing metaphysical and epistemological positions. A distinction between appearance and reality can be formulated that is informed by those positions but that avoids taking sides on the foundational question whether there is an objective reality in a strong sense. I have in mind the following: For a given proposition about the world, (1) *appearance* can be defined as a source for the perception of information that a given observer considers relevant to forming a belief about this proposition—whether or not this is a good source for forming a belief; and (2) *reality* can be defined as either the strong objective truth about this proposition or the best justified belief about this proposition that is held by any observer—whether or not this truth or best belief corresponds with a given appearance.

On these understandings, a person forms at least some beliefs based on perceptions of the world’s appearance, and these appearances need not lead to the objective truth or the best available belief about the truth. Another way to restate the relationship is that appearance involves readily accessible information that might or might not accurately reflect reality. An appearance is like a potentially imperfect proxy for a variable of interest. But with these

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<sup>25</sup> See, e.g., RENÉ DESCARTES, *Meditations on First Philosophy*, in DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 45, 62–63 (Donald A. Cress trans., 4th ed. 1998) (1641); HILARY PUTNAM, REASON, TRUTH, AND HISTORY 5–8, 12–23 (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: A CASE FOR SCEPTICISM 1, 5–6 (1978) (contending that “no one ever *knows* anything about anything” and thus “no one is ever *justified* or at all *reasonable* in anything,” perhaps even in believing these claims); see *id.* at 11–12 (suggesting limits on the classical form of the argument). Cf. IMMANUEL KANT, PROLEGOMENA TO ANY FUTURE METAPHYSICS \_\_ (Lewis W. Beck ed. 1950) (1783) (arguing that people cannot have knowledge of objects in themselves but that they can have knowledge of objects as they appear, and that this knowledge of phenomena is important).

<sup>26</sup> David Lewis, *Elusive Knowledge*, 74 AUSTRALASIAN J. PHIL. 549, 549, 562–67 (1996) (suggesting that, in securing knowledge, different possibilities are properly ignored in different contexts, with the domain of epistemology being naggingly inclusive); cf. Ronald Dworkin, *Objectivity and Truth: You’d Better Believe It*, 25 PHIL. & PUB. AFFAIRS 87 (Spr. 1996) (partitioning truth claims by discourse). A simple restatement of this position is Gerald J. Erion & Barry Smith, *Skepticism, Morality, and The Matrix*, in THE MATRIX AND PHILOSOPHY 16, 22–25 (William Irwin ed. 2002).

<sup>27</sup> See Leiter, *supra* note 19, at 975–76 (discussing semantic objectivity).

definitions, it does not matter whether a mind-independent reality exists or can be known by human beings with certainty. Reality is defined broadly enough to work either way. These definitions do mix metaphysical and epistemological concepts, to be sure. Despite the resulting impurity, however, they are operable and applicable to legal debates.

To illustrate, consider the recent case of *Baze v. Reese*,<sup>28</sup> which upheld a popular lethal injection protocol. Chief Justice Roberts's majority opinion concluded that states may paralyze a prisoner during the execution to "preserv[e] the dignity of the procedure, especially where convulsions or seizures could be misperceived as signs of consciousness or distress."<sup>29</sup> Perhaps this conclusion is troubling because paralysis conceals relevant information about inmate pain, as Justice Stevens argued.<sup>30</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 (*i.e.*, convulsions) regarding some proposition about the world (*i.e.*, an inmate is experiencing 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.<sup>31</sup>

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 appearances regarding an inmate execution that has not yet occurred. Furthermore, estimated probabilities about the likelihood of pain might not be objective.<sup>32</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

Whatever the conceptual and practical differences between appearance and reality, understanding the connections between them will be crucial to normative evaluation. In fact there are several possibilities, in the same way that two variables can have several possible statistical associations—correlated and uncorrelated, positive and negative, causal and noncausal, linear and nonlinear. Below, I concentrate on three plausible relationships that are plainly relevant to government decisions: (1) reality insulated from appearance, (2) appearance influencing reality, at least over time, and (3) reality more or less collapsing into appearance. Positive causal associations are most intuitive in the following examples but I do take up potentially negative associations at certain points in the discussion.

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<sup>28</sup> 553 U.S. 35 (2008).

<sup>29</sup> *Id.* at 57.

<sup>30</sup> See *id.* at 73 & n.3 (Stevens, J., concurring) (rejecting the "esthetic rationale" but concurring on grounds of stare decisis).

<sup>31</sup> Which is not to conclude that experts beat amateurs to the truth in the *Baze* context or any other—only that epistemic abilities vary across observers.

<sup>32</sup> Alternatively, perhaps "God plays dice" and some aspects of a metaphysically objective reality are irreducibly probabilistic.

### *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 to potential users, officials want a bridge design 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 it is decked out to meet 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 appeared safe when it was actually ready to collapse, but it would be a waste if the bridge were quite safe without looking safe.<sup>33</sup>

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, for instance, and so is architecture.<sup>34</sup> Professional architects understand that casual observers tend to associate the appearance of certain materials with rigidity (e.g., opacity) and others with fragility (e.g., transparency), regardless of expert risk calculations. Architects have been known to include visible elements, such as struts, with no effect on the physical integrity of a structure in hope of producing a calming effect on untrained observers.<sup>35</sup> As for governments, illustrations can be found in road safety efforts which often push people's perceptions toward danger. Recently, Chicago officials ordered transverse lines painted across a stretch of road that includes a particularly dangerous curve on Lakeshore Drive. The lines become closer together as they approach the curve, giving many drivers a sense of speed greater than otherwise.<sup>36</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>37</sup> Judicial judgments are analogous. Wearing standardized robes, sitting on elevated benches, publishing explanations, and sometimes recusing themselves, judges in the United States accumulate sufficient confidence in their work that other officials are willing to enforce their judgments and litigants often abide without enforcement efforts. 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

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<sup>33</sup> For an example in which an elevated highway might be ready to collapse, that risk is widely known, yet the structure continues in use and without a plan to reduce the risk, see Susan Gilmore, *Seattle's South Park Residents Desperate to Resolve Bridge Issue*, SEATTLE TIMES, Apr. 10, 2010.

<sup>34</sup> See JONATHAN E. SCHROEDER, VISUAL CONSUMPTION 92 (2002) ("Architecture is a language . . .").

<sup>35</sup> I thank Chris Thompson, a Chicago architect, for these examples.

<sup>36</sup> See Jon Hilkevitch, *Drive's Curve to Get New Stripes*, CHI. TRIB., Sept. 8, 2006, at 3 (metro) (noting that similar strategies are used elsewhere). In rural China, one curve in Highway 215 has a posted body count; at another point, a smashed car is suspended fifteen feet above the ground along with a painted inscription, "Four People Died." PETER HESSLER, COUNTRY DRIVING: A JOURNEY THROUGH CHINA FROM FARM TO FACTORY 121 (2010). As discussed in Part III, one might object to an engineered slippage between appearance and reality in situations like these; but a thorough normative evaluation requires an appropriate baseline for judging which perception is best. See generally RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 37–38, 246–48 (2008).

<sup>37</sup> Including known controversies over methodological choices, such as excluding discouraged workers from the unemployed. For a review of allegations in the 1970s from the out party that the in party was rigging economic statistics, see David Zarefsky, Erwin Chemerinsky & Alan S. Loewinsohn, *Government Statistics: The Case for Independent Regulation—A New Legislative Proposal*, 59 TEX. L. REV. 1223 (1981).

radically, from reality. Whether the proposition is the shakiness of a bridge or the number of unemployed workers or the crookedness of a government, the easily perceived features might not correspond with the truth of the matter. And, at least at the time of those perceptions, appearances will not influence reality. Simply believing that a bridge is safe does not make it safe in fact, no matter how many people share that belief. A certain kind of optimist might hope that appearance usually conforms to reality, but there is no obvious reason to think that the former dictates the latter in these situations.<sup>38</sup>

### B. Banks—Appearance Driving Reality

Now suppose that town residents want a banking system. One type of desired financial institution will accept deposits that remain available to depositors on demand, while lending most of the take to entrepreneurs willing to pay interest. As long as some critical number of depositors do not want their money back at the same time, 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 (a minority of) depositors making a run on them. 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 simplified story is part of the actual history of U.S. banking.<sup>39</sup> Banks became a crucial source of credit and depositor confidence was addressed by reserve requirements, regulatory oversight, discount windows, insurance—even architecture. Thus, the First Bank of the United States building in Philadelphia had a marble facade and European styling reminiscent of the Bank of England;<sup>40</sup> the Second Bank building, like many government buildings of the era, was fashioned after Greek temples.<sup>41</sup> Pivoting away from the Great Depression, many new banks shifted to a fortress model with emphasis on steel and granite.<sup>42</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>43</sup> Such design choices signal private information 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

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<sup>38</sup> As indicated below, there might be *nonobvious* reasons to believe that appearances will influence reality *over time* in these examples—positively or perhaps negatively. Judges might psychologically internalize the norms that they display. See *infra* Part II.B (self-fulfilling prophecies). And people might scurry from a dangerous-looking bridge in a way that makes the structure safer for those who go ahead, or they might crowd a safe-looking bridge in a way that makes the structure even less safe during the next time period. See *infra* note 55 and accompanying text (self-defeating prophecies). But it will help to keep my simplified version of the bridge model in mind as a stand-in for situations in which reality is insulated from appearance.

<sup>39</sup> See generally RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 2–32 (4th ed. 2009); BENJAMIN J. KLEBANER, *AMERICAN COMMERCIAL BANKING: A HISTORY* 138–238, 241, 243–44 (1990).

<sup>40</sup> See Susan Wagg, *A Critical Look at Bank Architecture*, in *MONEY MATTERS: A CRITICAL LOOK AT BANK ARCHITECTURE* 15, 23–24, 250, 254 (1990).

<sup>41</sup> See *id.* at 26–28, 250; see also Robert Nisbet, *Men and Money: Reflections of a Sociologist*, in *MONEY MATTERS*, *supra* note 40, at 7, 8 (comparing banks to churches and the importance of faith).

<sup>42</sup> See Wagg, *supra* note 40, at 228–30, 235–36, 251–52 (describing the Chase Manhattan Bank building in New York, the Federal Reserve Bank building in Minneapolis, and others).

<sup>43</sup> *Id.* at 252.

soundness, and government-run deposit insurance for many banks was implemented in 1933.<sup>44</sup> FDIC-insured banks are now required to display the assurance of protection in their branch locations and in certain advertising.<sup>45</sup> Deposit insurance and regulatory oversight seems to soothe many people who choose banks with these features, and they likely help achieve greater bank longevity in the United States.<sup>46</sup>

The bank-run problem and its confidence-based solution represent two forms of self-fulfilling prophecy, a concept now familiar in a range of 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>47</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 authored the phrase and extended the idea from bank runs to race relations in 1948.<sup>48</sup> African Americans were viewed as undisciplined strikebreakers by union members after World War I, Merton asserted, partly because they were left with little alternative after being excluded from unions based on that same view.<sup>49</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>50</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>51</sup> Under certain conditions, shared expectations become the basis for common strategies.<sup>52</sup>

The notion of a self-fulfilling prophecy is expandable in other ways, as well. Merton

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<sup>44</sup> See Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162; 2 JERRY W. MARKHAM, A FINANCIAL HISTORY OF THE UNITED STATES 163–66 (2002). A recap of the debate over the deposit insurance component of the Act is Mark D. Flood, *The Great Deposit Insurance Debate*, 74 FED. RESERVE BANK ST. LOUIS REV. 51 (1992).

<sup>45</sup> See 12 CFR 328.0–.04.

<sup>46</sup> See CARNELL *ET AL.*, *supra* note 39, at 47, 309–10.

<sup>47</sup> See *Self-Fulfilling Prophecy*, in A DICTIONARY OF PSYCHOLOGY (Andrew M. Colman ed. 2009); see also Lawrence E. Blume & Steven N. Durlauf, *Stigma*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008); L. Jussim, *Self-Fulfilling Prophecies*, in ENCYCLOPEDIA OF SOCIAL AND BEHAVIORAL SCIENCES 13830, 13830–31 (2001) (requiring false beliefs, finding modest effects in existing studies in education, and noting that new settings seem more susceptible to the dynamic); J.M. Olson, N.J. Roese & M.P. Zanna, *Expectancies*, in SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 211, 222 (E.T. Higgins & A.W. Kruglanski eds. 1996) (“In a self-fulfilling prophecy, the perceiver’s expectancy serves to elicit behavior from the target that confirms the expectancy and that might not have occurred otherwise.”). There are now much looser uses of the term, 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), on which I will not rely.

<sup>48</sup> See Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193, 193–94 (1948); see also ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 475 (1968).

<sup>49</sup> See Merton, *supra* note 48, at 196–97.

<sup>50</sup> *Id.* at 194. Merton drew from William and Dorothy Thomas: “If men define situations as real, they are real in their consequences.” WILLIAM I. THOMAS & DOROTHY SWAINE THOMAS, THE CHILD IN AMERICA: BEHAVIOR PROBLEMS AND PROGRAMS 572 (1928) (using children and people with mental illnesses for examples).

<sup>51</sup> See Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401, 403 (1983).

<sup>52</sup> See generally DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 39 (1996) (discussing unpredictable outcomes and focal strategies in games with multiple equilibria); Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J. POL. ECON. 992, 1009, 1013 & n. 28 (1992) (asserting that bank runs can result from socially costly yet fragile information cascades involving uncertainty, private information, and early movers).

concentrated on false beliefs and “the perversities of social logic,”<sup>53</sup> yet a similar dynamic applies to beneficial consequences and to beliefs that were 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 appearances or their consequences; shared beliefs that underwrite reality may come about more spontaneously than that. Furthermore, the key behavioral effects might occur in several places: in those who perceive the appearances, in those who are the subject of perceptions, or both.<sup>54</sup> Beliefs of many kinds and from many sources can influence behavior that, in time, keeps reality close to those beliefs.

Note finally that prophecies can be self-defeating instead of self-fulfilling. The bank run is the classic illustration of the latter, while physical crowding is used to illustrate the former.<sup>55</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 as most people avoid the expected crowd by not showing up. This outcome depends on touchy variables, including how one person anticipates another person responding to pessimistic conventional wisdom about the future. In any event, theory and logic indicate that expectations can have quite different influences on reality over time depending on the details of the social environment.

Two analogous dynamics can now be distinguished. First, positive-feedback loops overlap with but are not the same as self-fulfilling prophecies. Feedback loops encourage path dependence insofar as alternative paths 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 the right environment; 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 based on perceptions, but they need not take the form of self-fulfilling prophecies. People believing that the risk of detection is 50% will not always lead to conduct making it more likely that the risk of detection actually is 50%; and of course the risk of detection can be 50% without people believing it. Whatever role appearances play in criminal justice, there is no necessary link between the identified beliefs and the corresponding facts.<sup>56</sup>

### *C. Clocks—Reality Collapsing into Appearance*

Now suppose that town residents, having become more interconnected, wish to temporally coordinate their activities. 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

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<sup>53</sup> Merton, *supra* note 48, at 195–96, 208–10. Merton was more successful at illustrating virulent in-group/out-group prejudices and dynamics, *see id.* at 197–208, than he was at explaining where the impetus for “deliberate institutional controls” would come from, *id.* at 210. Merton was an important contributor to the notion of unintended consequences, too. *See* Robert K. Merton, *The Unanticipated Consequences of Purposeful Social Action*, AM. SOCIOLOGICAL REV. 894 (1936).

<sup>54</sup> *See* Olson *et al.*, *supra* note 47, at 222.

<sup>55</sup> *See Self-Fulfilling Prophecy*, in A DICTIONARY OF THE SOCIAL SCIENCES (Craig Calhoun ed. 2002).

<sup>56</sup> Again, not-so-straightforward causal links between appearances, perceptions, beliefs, conduct, and reality might exist. For example, 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.

the time benchmark for town residents. Later, townspeople more frequently interact with nonresidents as transportation and communications technologies improve. This generates demand for coordinating time conventions across more and more jurisdictions, leading to regional standard times and standardized differences between regions.

The foregoing is roughly what happened with standard time during the last two centuries.<sup>57</sup> Railroads, astronomers, diplomats, and others worked to spread stable conventions regarding time and their efforts were remarkably successful.<sup>58</sup> In the United States today, asking *Google*, “What time is it?,” yields a link to a website maintained by the National Institute of Standards and Technology and the Naval Observatory. This website displays “Official U.S. Time” based on a set of atomic clocks.<sup>59</sup> The time and time intervals indicated by this system are the reference points for countless information systems, including computer 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 underappreciated Weights and Measures Clause of the Constitution.<sup>60</sup>

Clock towers and similar phenomena are reminders that appearance and reality may, more or less, 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 p.m. basically *is* the reality of the matter. To complain, as some early critics did,<sup>61</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 individual subjective belief; it is a reality about which a broken clock can give false appearances. But here the relevant reality is formed 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 aesthetics and expression. Here appearances can be evaluated without any reference to a related reality. The relevant reality is nothing more than the appearance that attracts attention. Thus a clock tower’s form or a person’s clothes can be assessed for beauty without suggesting that there is any truth of the matter beyond individual subjective valuation. As well, 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 their other functions, can be viewed as symbols of disrespect or welcome.<sup>62</sup> Each of these phenomena—architecture, fashion, icons, laws, and so on—may be evaluated for aesthetic or expressive quality without invoking another reality.<sup>63</sup>

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<sup>57</sup> See IAN R. BARTKY, *SELLING THE TRUE TIME: NINETEENTH CENTURY TIMEKEEPING IN AMERICA* 1–3, 205 (2000) (emphasizing the role of astronomers in the U.S.); Eviatar Zerubavel, *The Standardization of Time: A Sociohistorical Perspective*, 88 AM. J. SOCIOLOGY 1 (1982) (emphasizing the role of railroads even absent legal norms).

<sup>58</sup> See Ian R. Bartky & Elizabeth Harrison, *Standard and Day-Light Saving Time*, SCIENTIFIC AMERICAN, May 1979, at 46, 46–53 (noting, however, resistance to daylight savings and certain pressures to redraw time zones).

<sup>59</sup> See Demetrios Matsakis, *Timekeeping at the US Naval Observatory*, IEE AESS SYS. MAG., June 2003, at 9, 9–12; <http://www.usno.navy.mil/USNO/time/master-clock>.

<sup>60</sup> See U.S. CONST. art. I, § 8, cl. 5.

<sup>61</sup> See MICHAEL O’MALLEY, *KEEPING WATCH: A HISTORY OF AMERICAN TIME* 6–10 (1990); Jenni Parrish, *Litigating Time at the Turn of the Twentieth Century*, 36 AKRON L. REV. 1, 4, 6 n. 30 (2002).

<sup>62</sup> See Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 SUP. CT. REV. 135 (observing that symbols not only can have emotional impact but also may serve a signaling function that facilitates sorting).

<sup>63</sup> See, e.g., Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492 (2001); Elizabeth S.

Making those evaluations can be terribly controversial, to be sure. The thought for now, however, is that people may assess the aesthetic, insulting, and validating qualities of the world on those measures alone.

### III. EVALUATING APPEARANCE JUSTIFICATIONS

Although they do not exhaust the possibilities, we now have three useful models for the relationship between appearance and reality. For the clock, appearance and reality are largely the same. For the bridge, the two might be dangerously different. For the bank, an appearance of stability can pull the institution toward that reality over time. Hence the effect of confidence in the bank should be differentiated from the effect of confidence in the bridge, and associated a bit more closely with the aesthetics of the clock. True, self-fulfilling prophecies depend on potentially brittle dynamics.<sup>64</sup> More generally, decision makers in a given context may have little control over appearances, or how different cohorts of observers react to them. And the applicable model will not always be clear to anyone. But with distinct appearance/reality models in mind, we are in a better position to assess the persuasiveness of appearance justifications. As it happens, these justifications should prompt different evaluative questions depending on the posited relationship between appearance and reality. Without intelligent questions, we cannot hope to get intelligent answers. This Part searches for key normative questions.

These questions, by the way, do not seem hitched to any conventional metric of ideology. Appearance justifications are both embraced and rejected by leftists, rightists, libertarians, statist, and others.<sup>65</sup> In Supreme Court decisions, for example, the evaluation of appearance arguments is sometimes unanimous. All participating justices condemned an attempt to dampen white panic selling by banning for-sale signs for houses,<sup>66</sup> while there seems to be an equally wide consensus that judges should appear impartial in the hope of boosting public confidence. Furthermore, so-called conservative and so-called liberal judges each use appearance justifications, albeit to reach different conclusions. The former faction invoked appearances to support the lethal injection protocol in *Baze v. Reese*,<sup>67</sup> and the latter faction invoked

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Anderson & Richard M. 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 the public meaning associated with actions); 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 Harms*, 60 MD. L. REV. 467 (2001), and Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000). For distinct usage of the term, see Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (discussing solutions to coordination problems), and Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024–31 (1996) (investigating law as one method of expression for the purpose of changing problematic social norms in order to, for example, solve collective action problems).

<sup>64</sup> See William E. Wilkins, *The Concept of a Self-Fulfilling Prophecy*, 49 SOCIOLOGY OF ED. 175, 180 (1976) (pointing out that self-fulfilling prophecies might be a function of misperceptions, ignorance, or values, each of which might or might not be changed without changing the environment).

<sup>65</sup> Obviously, people sharing these ideologies will support appearance justifications under different conditions. But none of the familiar ideological groupings indicate *systematically* greater acceptance of appearance justifications.

<sup>66</sup> See *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 87–88, 95–98 & nn. 9–10 (1978) (questioning the efficacy of the regulation and distinguishing efforts to reduce misleading information, to publicize the number of white residents, and to subsidize residential stability).

<sup>67</sup> 553 U.S. 35, 57 (2008); see also *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 197, 202–03 (2008) (lead opinion) (“[P]ublic confidence in the integrity of the electoral process . . . encourages citizen participation in the democratic process”); *id.* at 204–09 (Scalia, J., concurring) (applying an even more deferential standard). Justice Stevens did write the lead opinion in *Crawford* for himself, Chief Justice Roberts, and Justice Kennedy; Justices Scalia, Thomas, and Alito concurred.

appearances to support limits on contributions to political parties in *McConnell v. Federal Election Commission*.<sup>68</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 decision makers should take them into account. Moreover, the inquiry into appearances is complicated because there is no uniform answer for all occasions. The discontinuity with familiar ideological cleavages helps demonstrate this. Nobody in their right mind should accept or reject appearance justifications in all situations, and so the task is to sort more plausible from less plausible arguments.

#### *A. Appearance/Reality Integration*

Begin with the relatively simple case of social constructions, such as standard time, social status, physical beauty, or race (in one sense<sup>69</sup>). They can be used for virtuous or dastardly ends, and there can be disagreement over which is which. Social constructions can ease the organization of deserving liberation movements or dreadful subordination campaigns. Whether an effort to promote a social construction is justifiable depends on an evaluation of purposes or functions. This means understanding the objectives, the likelihood of success, and the costs of creating focal points or shared meanings. In so doing, a normative framework is required, whether utilitarian, egalitarian, prioritarian, libertarian, or something else. After that, however, the task becomes more straightforward. At least there is no need to worry about successful social constructions failing to match reality. If everyone understands that the construction is meant to be its own mind-dependent reality, questions about deception are inapposite.

Similar thoughts govern aesthetics and expressive impact. Observers must interpret the meaning of the appearance in question and apply their values to that perception, and sometimes people disagree on these matters. Thus California's Proposition 8 was viewed by some as a stigmatizing devaluation of gay and lesbian relationships and an endorsement of discrimination; others might see the law as democratic confirmation of a traditional and religiously required aspect of marriage.<sup>70</sup> Even with agreement on the message, however, people might take different positions on the law's merit. Still, other challenging issues are sidelined. Observers looking for social meaning and making aesthetic judgments need not confront additional complications associated with appearance/reality gaps. A shirt or a city or a constitution can be ugly or pretty without any reference to any (other) reality with which it might not correspond. Likewise, a speech or a sign or a law can be insulting or validating regardless of whether the message influences behavior.

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 entertain constitutional challenges to

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<sup>68</sup> 540 U.S. 93, 150 (2003). Both factions also invoke appearances when raising stare decisis concerns. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (“[C]ontrary expectations must be disappointed.”); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 856 (1992) (retaining a modified abortion right and invoking stare decisis); *Van Orden v. Perry*, 545 U.S. 677, 697 (2004) (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>69</sup> See PIERRE L. VAN DEN BERGHE, *RACE AND RACISM: A COMPARATIVE PERSPECTIVE* 9 (1967).

<sup>70</sup> See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 932–38 (N.D. Cal. 2010) (relating testimony of Proposition 8 opponents and proponents).

government-hoisted Confederate battle flags<sup>71</sup> even as litigation over government-appropriated religious symbols is commonplace.<sup>72</sup> Nevertheless, pure clock model debates are streamlined in important respects. They take place within a logic and a value set special to aesthetics and expressivism. These debates do share issues with other appearance/reality models—such as whether a given effort at appearance management will be effective with respect to the target audience and what the effort will cost. But the other models demand even more.

### *B. Appearance/Reality Separation*

The bridge and bank models raise two other sets of considerations. In the bridge model, the possibility of slippage between appearance and reality raises transparency questions about information insiders manipulating outsider beliefs. In the bank model, by contrast, the possibility of appearance driving reality raises causal questions about the force of appearances. Other issues are relevant (efficacy, cost) and the bridge model is not entirely separate from the bank model.<sup>73</sup> Crudely speaking, however, bridge-type situations present special issues of transparency while bank-type situations present special issues of causation.

#### *1. Bridge models and transparency*

When appearances can diverge from reality, and when appearances cannot drive reality, efforts to control appearances should be viewed cautiously. Take the bridge situation. If the structure is unsafe yet designed so that the untrained eye sees safety, then typical bridge users will be at risk without the ability to accept or reject this risk based on the best available knowledge. Depending on additional details, this situation presents a form of misrepresentation, or negligent failure to warn, or other problematic conduct on the part of those responsible for the structure. As such misconduct becomes pervasive, society becomes more hierarchical and dysfunctional. At the extreme, citizens are mired in an Airstrip One dystopia in which information is fabricated by those with power to control those who lack it. This is the downside of institutions learning how to enhance perceptions of fairness and levels of sociological legitimacy without otherwise reforming their operations.<sup>74</sup>

Today's catchphrase for the problem is lack of "transparency." Although the label is shallow,<sup>75</sup> the notion of transparency is grounded in fundamental concerns—concerns about agents failing to serve the interests of their principals and about strangers depriving each other of the power to make informed decisions affecting their well-being.<sup>76</sup> While these worries are less serious for the clock and bank models, they nag the bridge model. At the same time, it is worth remembering the normative complexity of transparency, even as applied to democracies. When people disapprove of information access restrictions, they decry "secrecy," and when they

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<sup>71</sup> See, e.g., *NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (regarding standing and battle flags).

<sup>72</sup> For now. Cf. *Salazar v. Buono*, 130 S.Ct. 1803 (2010) (regarding standing and religious symbols).

<sup>73</sup> The bank model represents a subset of all behavioral effects caused by appearances—albeit an especially interesting and pertinent subset of effects that are useful in evaluating government institutions where transparency is often valued.

<sup>74</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). For foundational work on the relationship between perceived fairness and willingness to accept adverse results, see, for example, E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 66–83 (1988); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIM. & JUST. 283 (2003).

<sup>75</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).

<sup>76</sup> See Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA LAW REV. 909, 916–22 (2006).

approve, they extol “privacy.” Even artifice might play a tragically needed role in an imperfect world.<sup>77</sup> Along with self-preservation in the face of unjustified threats to life, there are situations in which deception might be morally acceptable. Examples include covert military operations against wartime enemies and sting operations against domestic criminal organizations. Perhaps the safest normative statement about deception is that it is usually immoral or unethical and sometimes unlawful, but there are exceptions.

*a. Combinations and proposals.* The safe-looking bridge hypothetical illustrates a serious transparency problem, but it shows only one way in which appearance and reality diverge. There are four crude combinations, normatively speaking:

	APPEARANCE GOOD	APPEARANCE BAD
REALITY GOOD	(1)	(2)
REALITY BAD	(4)	(3)

The most comforting combination obviously is a good appearance paired with a good reality (cell 1), as when a bridge looks and is reasonably safe. The least comforting combination is probably a good appearance joined with a bad reality (cell 4). Extraordinary situations may call for a false sense of security, and in other cases the appearance/reality gap might be self-correcting over time.<sup>78</sup> But strong objection to a sturdy looking yet rickety bridge is the standard reaction. The remaining combinations are more difficult to rank. 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>79</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 problem is that observers might demand “corrective action” that is wasteful or dangerous. Public reaction to the perceived risks of terrorism in the 2000s and Communism in the 1950s might be examples.<sup>80</sup> Fear is itself a kind of injury,<sup>81</sup> and it will influence behavior whether or not well-founded.<sup>82</sup>

Whatever the appropriate rankings, these four situations come with intuitive policy

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<sup>77</sup> See SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 34–49 (1979) (reviewing commonly accepted positions that justify certain lies, excuse certain lies, or define away the objection to lying). For the extreme position, see IMMANUEL KANT, *On a Supposed Right to Lie from Altruistic Motives* (1797), in *CRITIQUE OF PRACTICAL REASON AND OTHER WRITINGS IN MORAL PHILOSOPHY* 346 (Lewis White Beck trans. 1949).

<sup>78</sup> Cf. Merton, *supra* note 48, at 204 (“[L]ife in a world of myth must collide with fact in the world of reality.”).

<sup>79</sup> This is part of the case for hallucinogenic drugs and experience machines. Although drug-induced experiences are “real” on their own terms, I refer, as usual, to situations in which appearances and reality are related to the same proposition of interest. That is, hallucination is designed to take the place of a “real” life.

<sup>80</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>81</sup> See Matthew D. Adler, *Fear Assessment: Cost-Benefit Analysis and the Pricing of Fear and Anxiety*, 79 CHI.-KENT L. REV. 977, 977 (2004).

<sup>82</sup> See generally THE PERCEPTION OF RISK (Paul Slovic ed. 2000). Institutional responses to such misconceived demands might be best, if the reality cannot be credibly communicated to mass audiences. For indications that prosecution of suspected subversives and minorities was partly an effort by federal officials to harness and even moderate populist demand for persecution, see PAUL L. MURPHY, *WORLD WAR I AND THE ORIGINS OF CIVIL LIBERTIES IN THE UNITED STATES* (1979).

recommendations, and caveats for this level of abstraction. (1) *Good appearance/good reality* generally is worth preserving or working toward. The questions are how to get and stay there. On the simplest bridge model, appearance and reality must be maintained separately. (2) *Bad appearance/good reality* ordinarily calls for improvement in the former.<sup>83</sup> Under the bridge model, a bad appearance will not 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 then engage in signaling,<sup>84</sup> erect strong behavioral safeguards,<sup>85</sup> or otherwise conform to the picture of safety held by outsiders—but without hope that reality will improve as a result. Indeed, if appearances cannot feasibly be improved, degrading reality might be preferable to certain transparency problems. (3) *Bad appearance/bad reality* situations are far different. Making the bridge appear safer will not make it safer, so the real risk of bridge collapse should be reduced if not too costly. Perhaps one could defend appearance manipulation aimed at making the risk appear even worse, to create pressure for improvements, but that strategy is morally controversial at best. Equally controversial is improving appearances without improving reality, which is possible on the bridge model.<sup>86</sup> (4) *Good appearance/bad reality* also prompts fairly clear recommendations on the bridge model: Reality should be made better and/or appearances should be made worse, depending on costs. Warnings might be sent to potential bridge users and the bridge’s structural integrity might be improved at the same time. But a pleasant appearance, whatever its benefits, will not change the bridge’s structural integrity.

	APPEARANCE GOOD	APPEARANCE BAD
REALITY GOOD	(1) Bridge Model – preserve status quo.	(2) Bridge Model – improve appearance.
REALITY BAD	(4) Bridge Model – improve reality.	(3) Bridge Model – improve reality.

*b. Uncertain realities.* We can make these crude combinations more nuanced. After thorough consideration, even the most capable decision maker can be left with indeterminacy. Both commoners and experts may suffer from residual doubt about the appropriate value set, doubt about the correct application of those values to a given decision problem, doubt about relevant facts, or doubt about relevant predictions. Whether or not uncertainty and other forms of indeterminacy are part of an objective reality, they are part of the human experience. When that experience is the “reality,” what should be the appearance?<sup>87</sup>

Intuitions might loosen here, and only a few thoughts are sensible in the abstract. But when reality is uncertain, appearances probably should display uncertainty as well. If the risk of

<sup>83</sup> Similar logic applies to situations in which appearances are worse than reality, regardless whether appearance or reality should be characterized as “bad.” I use the good/bad dichotomy for clarity in exposition.

<sup>84</sup> See ERIC POSNER, *LAW AND SOCIAL NORMS* 18 (2000) (discussing costly conduct that may help separate good types from bad types). A signal is an appearance as I have defined the term.

<sup>85</sup> Here I refer to preventative measures, including prophylactic rules.

<sup>86</sup> Again, reality might be too difficult to move and appearances might be too awful to tolerate. But this “blue pill” situation, we can hope, is only an occasional problem.

<sup>87</sup> I assume that an appearance cannot be uncertain with respect to any given observer, although there can be disagreement across observers regarding how something appears.

a bridge collapse this year cannot rationally be pinned down between 25% and 0.0025%, no one should believe that the risk is any clearer. This reaction aligns with the usual desire to align appearance and reality. Reducing appearance/reality gaps empowers people to make judgments based on the closest approximation of truth. Further, intellectuals do not have a standard prescription for dealing with fundamental doubt. There is a longstanding scholarly discussion about how best to manage irreducible uncertainty as opposed to mere risk,<sup>88</sup> the options include maximin, maximax, randomization, and other strategies.<sup>89</sup> Given the controversy, perhaps protocol choices for decisions under uncertainty should be decentralized to the individual level when possible. If so, it is best for uncertain realities to have uncertain appearances.

Once again, there might be exceptions. Socially beneficial action might be possible only if most people are under the impression that uncertainties have been eliminated. Suppose that experts on a particular issue rightly identify a residual domain of uncertainty, and rightly select a method for decision given this unknown. A morally acceptable course for the experts conceivably could be to convince the rest of us that the uncertainty is unimportant or nonexistent, if such persuasion is necessary to carry out the socially best course of action. One account of the global climate change debate has this complexion.<sup>90</sup> Nor is it far from the Supreme Court's rationale for allowing states to paralyze inmates during their executions,<sup>91</sup> and to demand voter identification at polling places.<sup>92</sup> Following this route is itself fraught with risk, of course. The authoritarian dangers are familiar while the likely gains are, by definition, unclear. Plus, opening the possibility for this kind of elitist judgment might create temptations to overuse appearance control techniques at the expense of popular decision-making. 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>93</sup>

*c. Necessity and efficacy.* Two cautionary notes should be offered now, in addition to a reminder that each of the recommendations above is provisional. First, appearance management is sometimes unnecessary. Appearance/reality gaps can be unstable without anyone trying to close them, as with large-scale conspiracies where secrecy is difficult to maintain. As well,

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<sup>88</sup> See FRANK H. KNIGHT, *RISK, UNCERTAINTY AND PROFIT* 20, 231–34 (1921).

<sup>89</sup> See, e.g., SIMON FRENCH, *DECISION THEORY: AN INTRODUCTION TO THE MATHEMATICS OF RATIONALITY* ch 2 (1986); David Kelsey & John Quiggin, *Theories of Choice Under Ignorance and Uncertainty*, 6 J. ECON. SURV. 133, 133–42 (1992); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1 (2009).

<sup>90</sup> The argument would be that state-of-the-art scientific inquiry into climate change yields conclusions that there is a substantial risk of terrible consequences in the long run, that changes in human behavior can substantially reduce that risk, and that reasonable people would want to make those costly changes—but that most nonexperts will not agree, perhaps because of relative ignorance and what can be called cognitive bias.

<sup>91</sup> See *Baze v. Reese*, 553 U.S. 35, 57 (2008). To be fair, the proposition regarding inmate pain was debated as a question of risk rather than uncertainty, although we can question whether the available evidence justified the former. In addition, the Court indicated that the state's legitimate interest was partly the "dignity" of the process.

<sup>92</sup> See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 194–97, 202–03 (2008) (opinion of Stevens, J.); *id.* at 204–09 (Scalia, J., concurring). 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.

<sup>93</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) (discussing "the veneer of random deployment"), and tax returns for Internal Revenue Service audits, see INTERNAL REVENUE MANUAL § 4.19.11.1.5.1.8–10 (Nov. 9, 2007). I bracket the question whether uncertainty is a special state of mind, perhaps especially psychologically burdensome or especially likely to produce perverse behavior.

image advertising can only do so much to control the beliefs of people who use the product.<sup>94</sup> Optimists might think that appearance/reality gaps are usually eliminated in short order. Such faith is hard to maintain in the face of Bernard Madoff's Ponzi scheme or the Johnson administration's lasting spin on the Vietnam War, not to mention the time it took for people to accept that the earth revolves around the sun. But even modest pessimists will admit that reality often has a gravitational pull on appearance. Second, successfully manipulating appearances can be difficult or impossible. Different people perceive and interpret events differently, sometimes unpredictably. The causes are numerous. They include differential access to information, differential resources for processing information, and differential sensitivity to influences such as cognitive bias,<sup>95</sup> emotional states,<sup>96</sup> cultural identity,<sup>97</sup> and ideology.<sup>98</sup> Each of these factors affects whether a program to manage appearances will succeed.

Consider voter fraud. One theory is that a potential voter's perception of widespread fraud demoralizes the observer, making him less likely to vote, and that requiring photo identification at polling places will moderate these perceptions. The Supreme Court has relied on this logic.<sup>99</sup> But there are other theories and little evidence. Perhaps perceptions of fraud prompt outraged citizens to vote in greater numbers. Or perhaps a statutory response will be ignored. It is not as if we have a terrific theory of why people vote in the first place. Existing empirical research also leaves doubt. Studying cross-sectional polling data and voting records, Stephen Ansolabehere and Nathaniel Persily found no correlation between beliefs about vote fraud prevalence and turnout, nor between the strength of voter identification requirements and beliefs about vote fraud.<sup>100</sup> The devastating suggestion is that neither causal element of the appearance justification is demonstrable. But the study raises questions, too. Perhaps anti-fraud efforts are more likely in places with concerns about voter fraud, and these measures reduce those concerns—but only enough to washout differences between high and low regulation jurisdictions. The study cannot rule this out, which probably requires time-series data.<sup>101</sup>

In addition, law might have a disparate impact across observers. Aside from those who pay no attention, ideological commitments may influence estimations of a law's effect. Voter identification requirements like Indiana's (which was supported and opposed along partisan lines in the legislature) could prompt some people to believe that the system is getting better, others to

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<sup>94</sup> See, e.g., GEORGE A. FLANAGAN, *MODERN INSTITUTIONAL ADVERTISING* 63–69 (1967).

<sup>95</sup> See, e.g., CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005); Cass R. Sunstein, *Terrorism and Probability Neglect*, 26 J. RISK & UNCERTAINTY 121 (2003).

<sup>96</sup> See, e.g., J.S. Lerner, R.M. Gonzalez, D. A. Small & B. Fischhoff, *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCH. SCI. 144 (2003); Paul Slovic, M.L. Finucane, E. Peters & D.G. MacGregor, *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 397 (T. Gilovich, D. Griffin, & D. Kahneman eds. 2002).

<sup>97</sup> See, e.g., MARY DOUGLAS & AARON B. WILDAVSKY, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* 73, 194–95 (1982); Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (discussing differing risk perceptions and priorities); see also 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>98</sup> See, e.g., Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1111–12, 1118–19 (2006) (suggesting that a "normative bias" is a form of bounded rationality, and questioning the independent force of cultural-cognition categories).

<sup>99</sup> See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 200–02 (2008) (lead opinion of Stevens, J.).

<sup>100</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>101</sup> Cf. *id.* at 1755 n. 43 (recognizing that fraud perceptions may drive fraud regulation).

believe that it is getting worse, and still others to perceive a problem that they had not thought about until the legislation. Voter identification might then be akin to airport security efforts that some believe are necessary inconveniences and others disparage as “security theater.”<sup>102</sup> All of this indicates that those evaluating appearance justifications should be attuned to problems regarding necessity and efficacy.

## 2. Bank models and causation

Although questions of necessity, efficacy, and cost are inescapable, the possibility of appearance positively influencing reality changes the picture. If appearances can be controlled, and if they help produce an environment favorable to a reality that matches those appearances, then the set of normatively plausible options changes.

First of all, appearance manipulation can move a situation 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. For example, unstable banks might become and remain stable through confidence-building measures such as deposit insurance. This 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 bridge model in which reality and appearance must be maintained separately, a bank model shifts attention to appearance by itself.

In addition, the upper right quadrant (cell 2) and the lower left quadrant (cell 4) become unstable under the bank model—for reasons different from any 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 more widespread financial panic, while poorly functioning banks can survive for a bit if access to that fact 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 should be 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. To the extent that we have good grounds to believe that a self-fulfilling prophecy is in place, we may rely on appearance as a proxy for unobservable reality.

	APPEARANCE GOOD	APPEARANCE BAD
REALITY GOOD	(1) Bridge Model – preserve status quo. Bank Model – preserve status quo.	(2) Bridge Model – improve appearance. Bank Model – unfortunately unstable.
REALITY BAD	(4) Bridge Model – improve reality. Bank Model – fortunately unstable.	(3) Bridge Model – improve reality. Bank Model – improve appearance.

a. *Causation.* These differences depend on the likelihood of a self-fulfilling prophecy—

<sup>102</sup> See Thomas A. Baldwin, Arkaigud Ramaprasad & Michael E. Samsa, *Understanding Public Confidence in Government to Prevent Terrorist Attacks*, 5 J. HOMELAND SEC. & EMERGENCY MGMT., iss. 1, art. 4, at 16 (2008) (identifying response patterns among a small group of non-randomly selected subjects who watched mock news broadcasts regarding smallpox and other terrorist attacks); Jeffrey Goldberg, *The Things He Carried*, THE ATLANTIC MONTHLY, Nov. 2008.

an essential and 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>103</sup> On par would be a claim that inmate pain depends on audience perception. Only the most offbeat believer in mind over matter can conclude that the appearance of immobility means the reality of a pain-free execution. At other times, a self-fulfilling prophesy 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 experience and prompt the quick end of a relationship. And there is empirical support for the proposition that pre-existing anxious expectations of rejection lead people to perceive ambiguous cues negatively, and to behave differently during conflicts in ways that decrease the probability of a prolonged relationship.<sup>104</sup>

Seeing a correspondence between beliefs and results is not the same as understanding the undergirding mechanisms. To fully comprehend self-fulfilling prophecies, one must know the environments in which appearances, perceptions, and beliefs form in ways that encourage reality to align with them.<sup>105</sup> The underpinnings of the bank confidence example are perhaps most confidently known. FDIC insurance along with greater federal oversight was followed by a period of remarkable stability for covered banks. Many factors contributed to greater stability, to be sure; the country experienced interest-rate spikes and waves of savings-and-loan failures during the 1980s and 1990s. Part of that problem seems to have been troubled thrifts taking riskier gambles with insured money as the government looked on, hoping that these institutions would right themselves. Nevertheless, there is good reason to think that post-1933 insurance and regulation increased bank stability.<sup>106</sup> Regardless of the particular mechanism, such stability was likely increased by widespread depositor confidence.

In other situations, however, self-fulfilling prophecies are hard to validate or limited in effect. Among the most studied hypotheses is the impact of teacher expectations on student performance. The classic study is Robert Rosenthal and Lenore Jacobsen’s *Pygmalion in the Classroom*.<sup>107</sup> It involved elementary school teachers being 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>108</sup> The control group for all grade levels gained about 8 points between the two tests, while the treatment group gained about 12; the gap for first and second graders was about 25 points and about 9 points, respectively.<sup>109</sup>

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<sup>103</sup> *The Secret to Riches* 1:03 (2010), available at <http://thesecret.tv/secret-to-riches>.

<sup>104</sup> See Geraldine Downey et al., *The Selffulfilling Prophecy in Close Relationships: Rejection Sensitivity and Rejection by Romantic Partners*, 75 J. PERS. & SOC. PSYCH. 545, 545–53, 556–59 (1998) (reporting past findings and the results of a study based on diary entries by heterosexual Columbia student couples).

<sup>105</sup> *Accord id.* at 557–58.

<sup>106</sup> See, e.g., CARNELL ET AL., *supra* note 39, at 47, 309–10; Diamond & Dybvig, *supra* note 51, at 401.

<sup>107</sup> ROBERT ROSENTHAL & LENORE JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPILS’ INTELLECTUAL DEVELOPMENT* 161–97 (1968).

<sup>108</sup> *See id.* at 74–82.

<sup>109</sup> *See id.* at 74–76.

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 themselves warned that their results might be sensitive to the student population and surrounding community.<sup>110</sup> That warning turned out to be sound, if not always heeded in the excitement over the idea. 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>111</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. But these are merely suggestions. A more powerful message from this literature is that context is important. While we have reason to believe that self-fulfilling prophecies occur in a variety of situations,<sup>112</sup> we do not always have a comfortable grip on when and how they happen.

*b. Valuation.* When a self-fulfilling prophecy is in play, there remains the question whether to instigate or inhibit the dynamic. Were it possible to increase student intelligence by increasing teachers' expectations, that course might be supported by a large majority—setting aside the inconvenient possibility that teachers might have to be systematically deceived. Other efforts to control appearances are more debatable. Deposit insurance plus regulation is one method of reducing bank runs without the inconveniences of bank holidays, but there are downsides, apart from the potentially distorting effects of tax-financed insurance. A deposit insurance program can backfire. If not coupled with accurate risk-based premiums or effective regulation of bank reserves and investment decisions, depositors might monitor their banks less seriously and banks might become too happy to make low-probability/high-return loans. Subsidized insurance allows a bank to amass deposits at a level detached from the risk of the bank's investments.<sup>113</sup> The savings-and-loan crisis has been associated with this moral hazard.<sup>114</sup>

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<sup>110</sup> See *id.* at 96 n.4 (describing different preliminary findings in a study of students at two schools with higher income and fewer race-minority families).

<sup>111</sup> Lee Jussim & Kent D. Harber, *Teacher Expectations and Self-Fulfilling Prophecies: Knowns and Unknowns, Resolved and Unresolved Controversies*, 9 PERS. & SOC. PSYCHOL. REV. 131, 151 (2005) (observing that, in hundreds of studies, the coefficients are generally on the order of 0.1 or 0.2); see *id.* at 152 (“[S]ome 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.”). For a relatively restrained use of the findings, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1518 n. 140 (2005).

<sup>112</sup> See, e.g., T. Alexander Aleinikoff & Rubén Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?*, 13 GEO. IMMIGR. L.J. 1, 2 (1998) (asserting that the manner in which people become society members “influences their joining behavior which, in turn, influences how the society invites others to join it”); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 367–73 (1997) (discussing order-maintenance policing and serious crime rates); 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 prospective employee decisions not to invest in human capital); 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. 585, 633–36 (similar); see also *Shaw v. Reno*, 509 U.S. 630, 647–48 (1993) (stating that “reapportionment is one area in which appearances do matter,” in part because officials might get the message that they should represent only certain racial groups and also because a district designed to consolidate voters on race might increase the chances of racially polarized voting); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982) (“[T]he university’s admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy.”); cf. Stewart J. Schwab, *Is Statistical Discrimination Efficient?*, 76 AM. ECON. REV. 228, 233 (1986) (noting the difficulty of identifying the effects of statistical discrimination).

<sup>113</sup> See generally J.R. Macey & E.H. Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 YALE J. REG. 215, 220 (1988). FDIC now attempts to vary the assessments it imposes on banks

There also is evidence that government insurance is not closely correlated with financial sector stability in developing countries.<sup>115</sup> Hence we have grounds to wonder whether the U.S. regime is the most cost-effective path to bank stability.<sup>116</sup>

It is perhaps too easy to adopt a cynical attitude about the corrective potential of regulation in the post-Camelot era. Dark theories should not overwhelm convincing experience, however, and many decades of reliable banking is that kind of evidence.<sup>117</sup> Equally significant, the financial sector is, like others, subject to politics. Popular demand for official action to increase reliability is not a force that can be ignored in the real world. Ultimately, each observer must value the benefits and costs of appearance management. If a self-fulfilling prophecy is possible, the analysis becomes more taxing and more exciting. In addition to the aesthetic and expressive aspects of a decision, one should consider the chance of appearance swaying reality, the good accomplished by aligning the two, and the side effects of proceeding in this way. Some negative consequences will seem prohibitively costly, while others will seem overrun by positive effects. But everything depends on this kind of analysis, however challenging it might be to perform and however unlikely that every observer will agree.

### *C. Institutional Choice and Design Problems*

Finally, issues of institutional choice and design ought to be recognized. The familiar idea is that a decision's character and quality depend on who participates in the decision process and how that process is structured.<sup>118</sup> People acting within an institution designed in a particular way will be more likely to achieve justifiable conclusions for some subset of social decisions. Societies allotting decision-making power therefore face choices among different institutions with different strengths and weaknesses. Questions surrounding the design and choice of institutions add a layer of complexity, but confronting them is better than ignoring them.

The standard advice is to compare decision costs along with likely error costs across different institutions. Decision making within certain institutions usually involves relatively high decision costs (such as formal agency rulemaking), while other institutions tend to be more frugal (such as arbitration). And certain institutions are expected to reach beneficial decisions

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according to each bank's risk.

<sup>114</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>115</sup> See Asli Demirgüç-Kunt & Enrica Detragiache, *Does Deposit Insurance Increase Banking System Stability? An Empirical Investigation*, 49 J. MONETARY ECON. 1373 (2002) (finding decreases in bank stability associated with explicit deposit insurance programs run by governments between 1980 and 1997, especially when interest rates are deregulated and domestic institutions are relatively weak).

<sup>116</sup> For an argument that the 1933 enactment of FDIC insurance is best explained as a concession to small unit banks rather than an economically efficient response to bank run problems, see Nicholas Economides, R. Glenn Hubbard & Darius Palia, *The Political Economy of Branching Restrictions and Deposit Insurance: A Model of Monopolistic Competition Among Small and Large Banks*, 39 J.L. & ECON. 667 (1986).

<sup>117</sup> Also worth noting are creative near-substitutes for "banks" not subject to insurance and other requirements, which make the regulatory system more like an option that people may 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 an unregulated shadow banking system, see GARY B. GORTON, *SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007* (2010), but that debate is beyond the scope of this Article.

<sup>118</sup> See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 5 (1994); David L. Weimer, *Institutional Design: An Overview*, in *INSTITUTIONAL DESIGN* 1, 12 (David L. Weimer ed. 1995); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1280 (2001) (distinguishing choice from design).

quite often, while others have less impressive reputations. The differences are partly a function of healthy incentives and relevant expertise, which are all too often inversely related.<sup>119</sup> Furthermore, dynamic effects should be taken into account, to the extent that behavior will change in response to changing roles for decision makers.<sup>120</sup> There also is the possibility that a decision is best left *uninstitutionalized*. Decision costs plus error costs plus problematic dynamic effects could mean that a supposedly social decision should be individualized.<sup>121</sup>

The breadth of appearance-related decisions precludes specific advice about the allocation of power. There is too much diversity in the subject matter surrounding 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, there are two aspects in which appearance justifications might well be special for institutional analysis.

On one hand, appearance justifications can present a high risk of self-serving motivation facilitated by transparency problems. Whether the appearance managers are politicians, corporate executives, or anyone else, outsiders may worry that false impressions are being generated for the purpose of hoarding power. These concerns escalate when decision makers control their own images without checks to ensure correspondence with the reality of their performance. True, outsiders suffer from expertise shortages—an inferior ability to evaluate decision-maker performance and the need for appearance management. But expertise deficits are pervasive in institutional choice problems, and they do not seem systematically different for appearance justifications. Thus the relatively high risk of bad motives flowing from information asymmetries distinguishes many appearance arguments, insofar as outsider incompetence is less troubling than insider motivation problems. This recommends skepticism when decision makers defend themselves based on the 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 tightly related to bridge models and not bank models, let alone clock models, of the appearance/reality relationship. Concern about selfish motives peaks when appearance managers create images of their performance that cannot influence the reality of their conduct backstage. When reality will be pulled toward appearances over time, however, the transparency problem fades—and so does the motivation concern. Outsiders need not be so worried whether decision makers 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 decision makers.

None of this avoids the task of identifying the most likely appearance/reality relationship. Even if bank models indicate less deference to appearance managers while bridge models indicate the opposite, evaluators must choose a model for a given situation. At times this will be uncontroversial, as in the lethal injection case. Situations like those are more suitable to oversight by outsiders, becoming as well-educated as they reasonably can be in matters that are not their assigned function. But the true relationship among appearances, perceptions, beliefs, and behavior is at least occasionally foggy and delicate. How all of these considerations net out will depend on additional detail.

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<sup>119</sup> See Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 661 (2006).

<sup>120</sup> See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 78–79 (2006) (suggesting a few testable hypotheses regarding cross-institutional interaction).

<sup>121</sup> See generally JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

#### 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 the influence of appearance (the bridge model), appearances might pull reality into alignment over time (the bank model), or reality might collapse into appearances (the clock model). Each model requires a value set to be normatively useful, and each presents issues of cost and efficacy. However, each model also raises a different set of evaluative questions for appearance justifications. In simple terms, the bridge model often triggers transparency concerns while the bank model indicates a dynamic that may eliminate them. These general impressions are now ready for more concrete application. This Part narrows the focus to prominent debates over campaign finance regulation and broken windows policing—two applications that show sharp contrasts within the same analytic framework.

##### *A. Campaign Finance Regulation*

###### *1. Litigation under the bridge model*

The Supreme Court and the advocates before it have treated the appearance justification for campaign finance regulation like the proverbial bridge. Justices have shown varying levels of sympathy to advocate worry about public confidence,<sup>122</sup> and this worry follows a causal path from perceived official misconduct to citizen demoralization and then to loss of confidence in government. The ultimate dangers are not fully specified but they seem to be much like a bridge made useless by its risk-ridden reputation. Low confidence, low participation levels, and low respect for official decisions obviously undermine effective government.

Courtroom attention to this public relations problem seems to have developed between World War II and Watergate. Consider treatment of the Hatch Act, which restricts political activities of federal employees. In 1947, the Court rejected an as-applied free speech challenge to the Act asserted by a U.S. Mint employee who was also a party ward boss.<sup>123</sup> The majority opinion relied on a sizable list of factors but it never clearly invoked public perception.<sup>124</sup> By 1973, the arguments shifted. *Civil Service Commission v. National Association of Letter Carriers*<sup>125</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>126</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*

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<sup>122</sup> See, e.g., KURT HOHENSTEIN, COINING CORRUPTION: THE MAKING OF THE AMERICAN CAMPAIGN FINANCE SYSTEM 225–26 (2007) (recounting Senator Howard Baker’s concerns about public trust and confidence during the debates over post-Watergate campaign finance legislation); JOHN MCCAIN, WORTH THE FIGHTING FOR \_\_ (2002) (“Questions of honor are raised as much by appearances as by reality in politics, and because they incite public distrust, they need to be addressed no less directly than we would address evidence of expressly illegal corruption.”).

<sup>123</sup> See *United Public Workers of America v. Mitchell*, 330 U.S. 75, 91–92 & nn. 23–24, 103–04 (1947).

<sup>124</sup> See *id.* at 94–104 (citing tradition, deference to Congress, threats to efficiency, threats to government “integrity” when citizens might not receive service without political connections, and “informed public opinion”).

<sup>125</sup> 413 U.S. 548 (1973).

<sup>126</sup> *Id.* at 565 (listing other regulatory interests, as well).

*Carriers* was decided during an era of deep ideological divisions, 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>127</sup> and the federal government’s conduct in Vietnam had not done its reputation any favors. “[F]rom 1964 to 1970, there was a virtual explosion of anti-government feeling” that was “sustained by the Watergate experience.”<sup>128</sup> True, showcasing official perfidy is awkward for government attorneys defending regulation. It amounts to a claim that your superiors are so corrupt that they require license to restrain themselves and perhaps innocent parties, too. But the appearance justification goes down easier. A practical problem of corrupt appearances can exist even if corrupt bargains are rare in fact. And this problem must have seemed all too real in 1973.

The landmark Federal Election Campaign Act Amendments followed in 1974,<sup>129</sup> and the Supreme Court imported the appearance justification in *Buckley v. Valeo*.<sup>130</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>131</sup> This argument was not enough to preserve every element of the legislation; the Court invalidated caps on independent expenditures. In addition to supposedly greater constitutional value for spending independent of candidate campaigns, the majority thought that uncoordinated expenditures presented less risk of corrupt bargains between spenders and candidates.<sup>132</sup> Yet the Court did rely on the appearance of corruption in upholding dollar limits on contributions to candidates.<sup>133</sup> Here the risks of actual corruption were considered higher and thus the problem of corrupt appearances seemed worse.

The appearance justification thus played a modest supporting role in *Buckley*, as it has in cases since. It is hard to know exactly how modest. But consider this: There seems to be no campaign finance decision, from any court, holding that the regulatory interest in fighting corruption was insufficient but that the interest in combating corrupt appearances was strong enough.<sup>134</sup> Equally notable, the appearance justification always has been theoretically stunted.

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<sup>127</sup> Haldeman and Ehrlichman were purged after oral argument in *Letter Carriers* and before the decision issued. See Laurence Stern & Haynes Johnson, 3 *Top Nixon Aides, Kleindienst Out*, WASH. POST, May 1, 1973.

<sup>128</sup> SEYMOUR MARTIN LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP 16–17 (1983); see also ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND THE COURTS: THE MAKING OF FEDERAL CAMPAIGN FINANCE LAW 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, 30 (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 “most of the time” to “some of the time”); Gary Orren, *Fall From Grace: The Public’s Loss of Faith in Government*, in WHY PEOPLE DON’T TRUST GOVERNMENT 77, 80–82 (Joseph S. Nye, Jr., Philip D. Zelikow & David C. King eds. 1997).

<sup>129</sup> 88 Stat. 1263. For helpful background, see HOHENSTEIN, *supra* note 122, at 202–34, MUTCH, *supra* note 128, at 1–82 (1988), and Richard L. Hasen, *The Nine Lives of Buckley v. Valeo*, in FIRST AMENDMENT STORIES \_\_ (Richard W. Garnett & Andrew Koppelman eds. forthcoming 2011).

<sup>130</sup> 424 U.S. 1 (1976) (per curiam).

<sup>131</sup> *Id.* at 27 (quoting *Letter Carriers*, 413 U.S. at 565).

<sup>132</sup> See *id.* at 19–21, 47.

<sup>133</sup> See *id.* at 27–28 (“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 9, can stand on its own without making the reduction of corrupt appearances a significant independent goal.

<sup>134</sup> The closest counterexample I have seen is *Jacobus v. Alaska*, 338 F.3d 1095, 1112 n. 24 (9th Cir. 2003) (indicating that soft money contributions to political parties create corruption appearances regardless of how the money is actually spent, but

Judges may worry about public confidence in government but they do not assert that the appearance of corruption also causes 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>135</sup> Government lawyers have argued in similarly limited terms. In *Buckley*, for instance, the Justice Department relied on *Letter Carriers* and its concern about public demoralization,<sup>136</sup> not the risk of a downward spiral into widespread corruption in fact. And, on this score, legal scholarship is not more creative. Appearance justifications for campaign finance regulation are not much different in character from courtroom arguments.<sup>137</sup>

From this standpoint, *Citizens United* did not mark a major change. The case addressed independent expenditures so it does not directly threaten contribution limits.<sup>138</sup> More important, the Court took the orthodox approach to appearance arguments. The feared consequence was sagging public confidence,<sup>139</sup> not more actual corruption; 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 tradition of unflinching empirical claims about the effects of campaign finance law. Ten years earlier, in *Nixon v. Shrink Missouri Government PAC*, a majority relied on their sense of plausibility to uphold contribution limits as an effective method of reducing real and perceived corruption.<sup>140</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>141</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>142</sup>—and that “[t]he appearance of influence or access . . . will not cause the

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also relying on an undue influence rationale).

<sup>135</sup> *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 390 (2000) (emphasis added).

<sup>136</sup> See Brief for the Att’y Gen. & Fed. Election Comm’n 22, *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *id.* (citing *United States v. Auto Workers*, 352 U.S. 567, 570 (1957) (referring to “popular feeling that aggregated capital unduly influenced politics”)); *id.* (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 campaign finance regulation, but public-pacification arguments still fall under the bridge model.

<sup>137</sup> The mountain of legal scholarship on campaign finance regulation touches on the argument from appearances but sustained treatment is remarkably elusive. See, e.g., Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 394–95, 397 (2009) (arguing for a broadly defined anti-corruption norm and downplaying the significance of appearances); D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About “Big Money” and Protecting Incumbents*, 52 ADMIN. L. REV. 687 (2000) (presenting a lawyer’s argument for stronger evidence of efficacy in litigation); see also PETER W. MORGAN & GLENN H. REYNOLDS, *THE APPEARANCE OF IMPROPRIETY* 2, 5 (1997) (asserting that focus on appearance of ethical behavior has been counterproductive); Peter W. Morgan, *The Appearance of Propriety: Ethics Reform and the Blifil Paradoxes*, 44 STAN. L. REV. 593 (1992) (complaining that appearance-based ethics norms make criticism easy and incentivize officials to concentrate on appearances alone); 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>138</sup> See *Citizens United v. Federal Election Comm’n*, 130 S.Ct. 876, 901–03, 908–11 (2010) (relying on *Buckley*).

<sup>139</sup> See *id.*

<sup>140</sup> See *Nixon*, 528 U.S. at 390–95 (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>141</sup> *Id.* at 391; see also *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 144 (2003).

<sup>142</sup> *Citizens United*, 130 U.S. at 909. The majority later observed that the record in *McConnell* had not identified instances of independent expenditure quids for vote quos. See *id.* at 911.

electorate to lose faith in our democracy.”<sup>143</sup> Justices supporting and opposing regulation seem equally confident in estimating the effect on public opinion.

Perhaps this 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 third-party confidence to maintain a role in social life.<sup>144</sup> This experience makes the bridge model seem fairly 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 the actual levels of judicial propriety. Believing in dispassionate judges—something Justice Jackson suggested was “mystical”<sup>145</sup>—does not convert the optimistic view into reality. This would have been familiar logic when judges began facing challenges to campaign finance regulation.

## 2. *Unvetted transparency and efficacy problems*

The next question is whether this particular logic has been all-too-familiar. In my view, the answer is yes, in two respects. In the first place, judges have been insufficiently demanding of appearance justifications in campaign finance cases by inadequately testing arguments under the bridge model. In the second place, judges and advocates have been insufficiently creative about appearance justifications by overlooking the potential for a bank model. This section takes up the first weakness.

a. *Transparency.* Criticizing courts for permissiveness on the appearance justification might seem counterintuitive. The argument has a mixed track record, at best. But if judges have been operating on the bridge model—in which appearance does not influence a corresponding reality—they have been disturbingly timid. The objection is not that the government’s legitimacy problem is insignificant. Indeed, it might be more serious than any government lawyer is comfortable claiming in a public forum. The basic problem lies elsewhere: Judges entertain appearance justifications without assuring the rest of us that the *actual* incidence and likelihood of corruption is *at least as low* as the appearance that regulators hope to create. Judges have given us little reason to believe that any good appearance attributable to regulation is accompanied by a good reality, or even a solid indication that they are convinced of this. And that is a major problem within the bridge model.

Any presumption in favor of transparency and against deception has special force in the campaign regulation context. The targets for appearance manipulation are voters or citizens or some other cohort in good standing. They are ordinarily the principals in democratic theory—something like the opposite of enemies of the state. And they are presumptively entitled to assurances that the apparent effect of campaign finance regulations aligns with the actual effect. In this case, moreover, government officials are not communicating their claims to freedom from corruption through talk or simple forms of self-regulation. They are attempting to reprogram the paths of third-party political resources.

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<sup>143</sup> *Id.* at 910.

<sup>144</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>145</sup> *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

From this view, even Justice Kennedy is too soft. Critics in his camp complain that much campaign finance law is ham-handed overkill for legitimate spending on political speech that also protects incumbents or preferred speakers,<sup>146</sup> but this does not show doubt about the law's ability to minimize quid pro quo corruption. In fact, there seems to be tacit agreement on the Court that contribution caps actually reduce this threat. Certainly the defenders of contribution limits hold that the caps will reduce the actual frequency of corruption;<sup>147</sup> they do not confess that corruption is widespread and then ask for authority to convince the public otherwise.

True, today's limits might well reduce corruption in the form of campaign contributions exchanged for official favors from presidents and federal legislators.<sup>148</sup> The attention of these officials is worth substantial sums, one would think, even if they lack any sense of ethics. But no guarantee has been given that public appearances attributable to contributions limits will roughly reflect the actual prevalence of such quid pro quo deals. If the caps positively influence public perception, we should want evidence that corruption will drop at least as far as the advertised level. This evidence is obviously difficult to obtain. Participants in unlawful bargains prefer to keep their dealings quiet. If, however, the best justified belief is that the real level of corruption is uncertain within wide bounds, then this should form the logical footing for evaluating appearance-based justifications for the caps—not a more optimistic assumption.

Finally, note that contribution limits risk information losses in the form of candidate signals.<sup>149</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 he warrants that his judgment as an official will depend on the best interests of his constituents, or on his campaign platform, and will not be sold to the highest bidder. But across-the-board regulation is unlikely to create a separating equilibrium. If competing politicians are all bound by the same rule, they are presumptively indistinguishable within the domain of prohibited conduct. True, politicians do constrain themselves further than the law requires, as when candidates refuse to take political action committee money or return contributions from unpopular donors. But one would expect additional distinguishing behavior in the absence of regulation.<sup>150</sup> Election law could instead authorize candidates to choose their own limits on contributions, if any, advertise those choices, and enforce those promises.<sup>151</sup> This only deepens the transparency problem associated with today's contribution limits.

*b. Efficacy.* The analysis so far has concentrated on information problems but other

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<sup>146</sup> See, e.g., *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 247–64 (2003) (Scalia, J., dissenting); *id.* at 286–88 (Kennedy, J., dissenting); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 411–30 (2000) (Thomas, J., dissenting); see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

<sup>147</sup> See, e.g., *supra* note 10. Among other arguments, of course.

<sup>148</sup> See 2 U.S.C. §§ 441a(a)(1) & 441a(c); FEDERAL ELECTION COMM'N, CONTRIBUTION LIMITS (Feb. 2011) (showing inflation adjusted limits for 2011–2012, including a \$2,500 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—the practice of a single person collecting multiple donations and delivering them to a candidate or committee in a bundle.

<sup>149</sup> See generally *supra* note 84.

<sup>150</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>151</sup> If there is a signaling justification for statutory contribution limits, it must be institution-wide. Congress, for instance, might be competing with other institutions in the private sector for the confidence of people concerned with social problems. But that story is more complicated—in part, we would need to know the extent to which the competitor institutions impose campaign-finance-like restrictions on behavior in order to assess the likely selection effects—and it would not recover the value of lost information about individual candidates, anyway.

objections are possible under the bridge model. Appearance manipulation by regulation might not be effective, leaving us with costs and no efficacious response to perceptions of corruption. This concern has been investigated by a few scholars, although expert empirical study of the issue is still scarce.<sup>152</sup>

Nathaniel Persily and Kelli Lammie attacked the claim that corruption perceptions follow campaign finance regulation.<sup>153</sup> They reviewed polls asking respondents, for example, whether they believe that there are many “crooked” people running the government and whether government is run by a few big interests.<sup>154</sup> These numbers have changed but not obviously in response to law. The data show perceptions improving after Watergate and the 1974 campaign finance amendments, but the authors emphasize that perceptions deteriorated after the Bipartisan Campaign Reform Act of 2002 (BCRA).<sup>155</sup> Several causes might explain the trends. Indeed, Persily and Lammie find 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, preferences for a larger government role in society, and relatively high levels of trust in general.<sup>156</sup>

The study asks an essential question but the answer is, unfortunately, only suggestive. Regulation was not an independent variable in the study,<sup>157</sup> and so the relationship between campaign finance law and public opinion was not directly tested. Although the raw numbers are enough to indicate that past legal change has not dramatically affected public opinion, we should want to know the magnitude of the effect, if any, from various regulatory regimes. We also might wonder whether more radical legal change—such as robust public financing or elimination of contribution limits—could move the numbers further. It is also possible for the sensitivity of public opinion to change. Rising pessimism could help explain improved perceptions after the 1974 amendments yet worsening perceptions after BCRA, without indicating that *deregulation* would be no threat to the government’s image. Deregulation is a change about which one can be pessimistic, as well. Further, there is an identification problem here: Respondents’ perceptions of corruption might be influencing some of the independent variables, such as presidential approval. Corruption perception during the late Nixon administration surely affected that President’s numbers. To the extent this is true, the importance of forces that influence corruption perceptions, including law, might increase.

Another step forward comes from James 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>158</sup> Journalists are, of course,

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<sup>152</sup> See David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23, 23 (2006) (concluding, in 2006, that “no study has directly examined the connection between existing campaign finance laws and how citizens view their government”); Timothy Besley & Anne Case, *Political Institutions and Policy Choices: Evidence from the United States*, 41 J. ECON. LIT. 7, 32 (2003) (similar for the effects of campaign finance laws in general, and studying the relationship between corporate contribution prohibitions and election outcomes).

<sup>153</sup> See Persily & Lammie, *supra* note 137.

<sup>154</sup> See *id.* at 145–46 (drawing on the National Election Study).

<sup>155</sup> See *id.* at 147–49 & fig. 1.

<sup>156</sup> See *id.* at 150, 156–57, 160, 167 n. 119, 168.

<sup>157</sup> See *id.* at 145 (noting data limitations).

<sup>158</sup> See James E. Alt & David Dreyer Lassen, *The Political Economy of Institutions and Corruption in American States*, 15 J. THEORETICAL POLITICS 341, 350 (2003) (excluding Alaska, Hawaii, Massachusetts, New Hampshire, and New Jersey). The survey on which the authors relied was Richard T. Boylan & Cheryl X. Long, *Measuring Public Corruption in the American*

freakishly well-informed. Alt and Lassen were not studying general public perceptions. They were, however, interested in the effects of campaign finance regulation and other political design choices. It turned out that 57% of the variation in journalists' corruption estimates was explained by statewide education levels (negatively correlated), per capita government revenue (positively correlated), metro population share (positively correlated), and income level (negatively correlated).<sup>159</sup> But this left substantial room for other factors, including law.<sup>160</sup> "Campaign expenditures restrictions, by and on behalf of a candidate, are associated significantly with lower corruption," the authors concluded, speculating that such regulation might counteract the fundraising advantages of incumbents.<sup>161</sup> This correlation persisted after a host of control variables were added, including measures of government size and regulatory burden.<sup>162</sup> Alt and Lassen did not better specify their campaign finance regulation variable,<sup>163</sup> so the significance 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, David Primo and Jeffrey Milyo broke down state-level campaign finance law into five categories, including candidate contribution limits. The authors then studied the relationship to perceived political efficacy, such as whether respondents agreed with the statement "[p]eople like me don't have any say about what the government does."<sup>164</sup> This measure is not exactly perception of corruption, nor does it target perceptions about state government.<sup>165</sup> And the study tested the influence of any kind of candidate contribution limit, regardless how high or how loosely enforced.<sup>166</sup> In other respects, though, the study is useful. The timeframe was long; the authors investigated whether regulation tended to lag behind efficacy perceptions as a way of getting at the reverse causation problem; and several other plausible influences were controlled for, including partisan affiliation and identification with the party in power.<sup>167</sup> The results were notably mixed. Public financing was associated with lower

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*States: A Survey of State House Reporters*, 3 STATE POLITICS & POLICY Q. 420 (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 (1998), which is partly a function of law enforcement priorities. In a hideously dysfunctional regime, there would not be a positive correlation between corruption prosecutions and high corruption levels. A third proxy, used in cross-national studies, involves surveys of people's experience with corruption. See *infra* Part IV.A.3.

<sup>159</sup> See Alt & Lassen, *supra* note 158, at 352–53 & tbl. 1.

<sup>160</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 with slack. See also *id.* at 356 & tbl. 2 (same for states with higher relative government salaries). The theory is that an otherwise lucrative government job makes engaging in corruption less attractive.

<sup>161</sup> *Id.* at 354–355 & tbl. 2.

<sup>162</sup> See *id.* at 357–59 & tbl. 3.

<sup>163</sup> Limits on the total amount spent by candidates would presumably be held unconstitutional, unless as a condition on receiving public financing. 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 expenditures on behalf of a candidate. The latter might be a form of contribution under First Amendment doctrine.

<sup>164</sup> See Primo & Milyo, *supra* note 152, at 23, 29–30 (relying on National Election Studies surveys from 1948 through 2000). On average, 60% disagreed with the statement quoted in text.

<sup>165</sup> See *id.* at 30 n. 16 (recognizing the problem).

<sup>166</sup> See *id.* at 29. Few states imposed any limit on individual contributions to candidates before 1976, but about two thirds of the states had them by 2000; in contrast, a majority of states imposed limits on organizational contributions to candidates before 1976, and this number drifted upward to over forty states by 2000. See *id.* at 28–29. Note also that, by 1976 and Buckley, expenditure limits are plunging to zero from about half the states while disclosure laws are surging from over half the states to all of the states. See *id.* at 29.

<sup>167</sup> See *id.* at 31–32.

levels of perceived efficacy, while disclosure laws and contribution limits on organizations (corporations, unions, and political action committees) correlated with marginally higher levels.<sup>168</sup> Interestingly, Primo and Milyo found no statistically significant relationship between efficacy perceptions and contribution limits on both organizations and individuals.<sup>169</sup> A cautious inference is that legal design can modestly influence general public perceptions but that this effect should not be assumed.

The most provocative study is the most recent. Beth Ann Rosenson found that an index of campaign finance laws is *positively* correlated with journalists' perception of corruption.<sup>170</sup> Controlling for several variables, journalists covering state legislatures tend to report somewhat higher perceived 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 the perceptions of a broader public. 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 these 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>171</sup> And her findings are a proper warning that reform efforts in low-confidence environments can backfire.

Studies such as these are bounded by the variation in state law. Aside from more drastic attempts to channel the flow of money in elections—a possibility made unlikely by political barriers as well as Supreme Court resistance—we might experience spirited deregulation in the near future. Elimination of all candidate contribution caps through judicial review is not unthinkable. We cannot be sure that the relationship of regulation to public perception at the state and federal levels is similar enough. Different segments of the public might pay more or less attention to system changes depending on their locus. But the limits of empirical study in this field provide grounds for healthy skepticism, not disregard. The power of campaign regulation to greatly influence public perceptions about the political system, perhaps 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 constitutional debate has been left behind.

### 3. *Potential for the bank model*

What is the alternative to the bridge model? Nobody can rationally believe that the appearance and reality of quid pro quo corruption are conceptually the same thing, nor is Section 441a(a)(1) of Title 2 of the United States Code pretty enough to be defended on aesthetics alone. This leaves a bank model for campaign finance regulation—a model in which appearance influences reality—and three reasons to investigate it. First, unlike the bridge model, the bank

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<sup>168</sup> See *id.* at 33–34 (finding a 3% increase over the average in the likelihood of a respondent reporting that they have a say in government in states with a disclosure law, a 4% increase in states with an organizational contribution limit, and a 5% decrease in states with a public financing system). These effects were almost nothing compared to having a college degree, or even a high school diploma. See *id.*

<sup>169</sup> See *id.*

<sup>170</sup> See Beth Ann Rosenson, *The Effect of Political Reform Measures on Perceptions of Corruption*, 8 ELECTION L.J. 31, 34, 40 (2009).

<sup>171</sup> See *id.* at 35–36.

model reduces transparency concerns. Appearances become a resource for gauging reality rather than a tool for deception. Second, the chance of a beneficial self-fulfilling prophecy reduces concerns about regulatory efficacy. Evaluators still must judge whether regulation can successfully change perceptions, but success would have a larger expected benefit if appearances might drive reality toward lower actual corruption levels. Third, as I attempt to explain below, a bank model for campaign finance regulation (or political design in general) is logically appealing even if empirically debatable.

*a. Theoretical sketches.* The theoretical claim for a self-fulfilling prophecy in this context is fairly straightforward, although the claim partly depends on what kind of prophecy is contemplated. Two possibilities are appearances of undue influence yielding greater likelihood of such influence in fact, and appearances of quid pro quo corruption yielding greater likelihood of such corruption in fact.<sup>172</sup> The first possibility is simpler but it is probably ruled out as a matter of constitutional doctrine, at least in the short run. The quid pro quo corruption possibility takes a bit more work to explain, but it seems perfectly admissible under current doctrine.

Widespread perception of undue political influence (somehow defined) begetting actual undue influence (similarly defined) is a fairly uncomplicated idea. Individuals have the choice 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 more influence on outcomes, the first set might not participate in the first place. Their subjectively expected impact on outcomes would fall without the cost of participation falling in tandem. Granted, a sophisticated understanding of political participation is 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, self identification, or to comply with social norms can end up disgusted with and disaffected from the political system when subsets of the population appear to be pulling the strings. These self-perceived outsiders might unplug completely—if nothing else to send a message of disaffection. But unplugging itself reduces the likelihood that a person's values will be taken into account in politics. More people dropping out might make it socially comfortable for still others to do the same.

This form of self-fulfilling prophecy is not free from doubt. Outrage can take many forms, including plugging into a system to change it. Nor is campaign finance reform a surefire mechanism for adjusting perceptions of undue influence; it might be insignificant compared to, for instance, lowering the costs of voting. Similarly, feelings that the system is rigged can be derived from many aspects of a political system, including gerrymandering. Plus different cohorts of people will feel differently about what influence is “due” other cohorts. Each of these concerns begs for empirical testing.<sup>173</sup> At the same time, the interest in correcting something called “undue influence” has been under assault at the Supreme Court. The interest has not clearly survived *Citizens United*, certainly not as to unequal levels of access to public officials

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<sup>172</sup> There are other forms of corruption and other objectives for campaign finance regulation, such as equalizing political influence across persons. I chose the two in the text because they are prevalent in contemporary legal debates.

<sup>173</sup> A study of state law and its effect on voter turnout disaggregates different kinds of campaign finance regulation, and finds somewhat mixed results, is David M. Primo & Jeffrey Milyo, *The Effects of Campaign Finance Laws on Turnout, 1950–2000*, at 2 (2006) (unpublished manuscript) (finding no positive impact on turnout from state campaign finance laws post-*Buckley*, finding a negative effect from public financing post-*Buckley*, but finding a positive effect from contribution limits on organizational donors pre-*Buckley*).

prompted by independent expenditures.<sup>174</sup>

To focus our inquiry, therefore, and to make it more theoretically challenging, we can turn to quid pro quo corruption. A self-fulfilling prophecy for quid pro quo corruption might be counterintuitive and it has not been a common aspect of the campaign finance debate. Indeed this particular dynamic does not necessarily have anything to do with citizen demoralization, which is the phenomenon typically singled out in litigation. Yet it has a charming logic.

The idea is that the occasions for quid pro quo corruption will increase, and the political consequences of such corruption may recede, if the public's general perception is that illicit bargains are commonplace. Imagine a situation in which the vast majority of the population is convinced that unlawful quid pro quo deals between citizens and officials are the norm. People believe that such bargains are part of the government's standard operating procedure, and they expect that the situation will be stable for the foreseeable future. Of course 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 bad appearances and an existing reality that is good, bad, or uncertain—might operate given these beliefs and expectations. One strong possibility is that corrupt offers and acceptances will increase over time compared to a situation in which such corruption is considered rare.

The pressure toward more corruption may come from several sources. First, people are more likely to adopt than repudiate what seems to be normal behavior. Acting consistently with a perceived norm of illicit bargaining must be psychologically more comfortable than entering corrupt bargains absent such norms. Indeed 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 sense, or tradition. One can more easily discount the likelihood and severity of social sanctions, such as shaming, if one believes 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, and regardless of social norms, there will be perceived competitive pressure to follow a perceived norm of corrupt bargaining. From the citizen's perspective, restraining oneself despite the corrupt bargains accepted by others disadvantages abstaining parties when it comes to government benefits and burdens. It amounts to unilateral disarmament in a battle for scarce resources. Even when 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,” Susan Rose-Ackerman has observed.<sup>175</sup> “Corruption is a coping strategy for citizens . . . .”<sup>176</sup> The decision to employ this strategy depends on an estimate

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<sup>174</sup> See *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 909–10 (2010) (Kennedy, J.) (“When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”) (citations omitted); accord *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 298 (2003) (Kennedy, J., concurring in part and dissenting in part).

<sup>175</sup> Susan Rose-Ackerman, *Truth, Honesty and Corruption: Reflection on the State-Building Process*, 42 *EURO. J. SOCIOLOGY* 526, 546 (2003).

<sup>176</sup> *Id.*; see also Emmanuelle Lavallée, Mireille Razafindrakoto & François Roubaud, *Corruption and Trust in Political Institutions in Sub-Saharan Africa* 3 (Afrobarometer Working Paper No. 102, Oct. 2008) (“As informal institutions replace formal rules, citizens realize that respecting the formal rules is inefficient.”).

of its necessity, which is a matter of appearance. Again, more people perceiving the necessity or usefulness of such payoffs can lead to more people offering such payoffs (and so on).

A third corruption-escalating force comes from the officials' side of the equation. In addition to other forms of psychological comfort when entering corrupt bargains, officials might become less fearful of punishment for doing so when most people consider it normal. Part of the reason could be societal shifts in ethical standards that redefine bad behavior away from such quid pro quo deals. But another factor is the difficulty in credibly distinguishing oneself as a law-abiding official. Once the political system is tarnished by a poor reputation for corruption, it is not clear how a participant can escape that reputation. 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>177</sup> That these perceptions are influenced by real levels of corruption is not enough to eliminate the degrading effect of negative perceptions.

Additional forces might then lean public officials toward corruption. Insofar as outsiders have only a weak basis for distinguishing among officials, a competitive disadvantage for self-restrained officials will arise. The corrupt quid often makes life easier for the recipient, whether by more easily building an effective campaign or by otherwise personally benefiting the official or office-seeker. 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>178</sup> If a person wants to conduct themselves ethically and wants to enjoy a reputation for ethical behavior, why enter an institution in which you are likely to be tarred regardless of your conduct?<sup>179</sup> 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>180</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, legal and otherwise.<sup>181</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>182</sup> Or the public response might

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<sup>177</sup> This helps account for contribution limits as institution-wide signals. See *supra* text accompanying notes 149–151.

<sup>178</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 as to the fraction of capable politicians based on selection effects, even when voters have perfect information about candidate types, where less-capable people are at a disadvantage in the private sector and where the fraction of capable politicians effects "ego rents" from office holding).

<sup>179</sup> See Claudio Bravo-Ortega & Daniel Hojman, *Political Animals and Civic Participation* 3 (2004) ("If politicians are perceived as corrupt, honest prospective politicians may not actually enter politics in the presence of a better outside option."), available at <http://www.dii.uchile.cl/~cea/respaldo/pags/seminarios/papers/animals.pdf>.

<sup>180</sup> Caselli & Morelli, *supra* note 178, at 778; see also *id.* (adding that countries "may experience persistent low quality of the policy making class, whereby low-quality policy makers in one period set up next period's incentives so as to keep high-quality ones from seeking office").

<sup>181</sup> See Inna Cabelkova & Jan Hanousek, *The Power of Negative Thinking: Corruption, Perception and Willingness to Bribe in Ukraine*, 39 APPLIED ECON. 383, 383 (2004) (indicating that reformist reactions are highly contingent).

<sup>182</sup> Note the distinction between enacting new regulation and letting stand existing regulation. Because of the general trend toward increasing anti-corruption regulation in the United States (aside from repeal by judicial review), the effect of deregulation on public perceptions is probably more difficult to study. It is also possible that regulatory efforts to create formal incentives will suggest to observers that many people share a need for such incentives, whereas private ordering could have been more selectively attentive to small segments of the population requiring special treatment.

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 anti-corruption 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 their perceptions of how many others are equally willing. Any of this is conceivable.<sup>183</sup>

But with little creative effort, we can envision a set of pressures on private parties and public officials that sends a political system spiraling downward, with ever greater levels of perceived quid pro quo corruption and ever greater levels of actual quid pro quo corruption. Catastrophic risks are worth taking into account even if those risks are small. Widespread corruption is no exception. As the World Bank puts it, “Unchecked, the creeping accumulation of seemingly minor infractions can slowly erode political legitimacy to the point where even non-corrupt officials and members of the public see little point in playing by the rules. . . . Over time corruption becomes entrenched.”<sup>184</sup>

*b. Causation challenges.* The foregoing is an image. The next question is whether it fits reality. On this score, the best available information falls short of what we should demand, given the possibility of severe political system degradation of a kind that has already occurred in some places. The hopeful note is that serious researchers have turned their attention to the fascinating and sometimes complex interrelationships between corrupt appearances, corruption experiences, confidence levels, other measures of government performance, legal design, and so on. Here I will mention leading research efforts, and highlight the challenges to achieving a comfortable level of certainty regarding law’s role in self-fulfilling corruption prophecies.

The logic of such prophecies indicates causal links that are, in principle, empirically testable. These include: (1) under what conditions a given law, such as a contribution limit of \$X, will likely influence perceptions about the frequency of quid pro quo corruption;<sup>185</sup> (2) under what conditions these perceptions increase the likelihood of corrupt offers, their acceptance, and adverse selection effects that increase the frequency of quid pro quo corruption; (3) under what conditions quid pro quo corruption is a net negative for society or otherwise wrongful. The answer to the third question is essentially uncontested in the United States,<sup>186</sup> and, although a productive analysis of the issue as possible, I will 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>187</sup> Among them are

<sup>183</sup> I thank Dan Kahan for helping me develop these thoughts.

<sup>184</sup> WORLD BANK, WORLD DEVELOPMENT REPORT: THE STATE IN A CHANGING WORLD 102–03 (1997); accord Cabelkova & Hanousek, *supra* note 181, at 203.

<sup>185</sup> A related question is whose perceptions are likely to be influenced, not just how many people’s.

<sup>186</sup> For the possibility that corrupt bargains can rightly circumvent misguided government policy, see Nathaniel H. Leff, *Economic Development through Bureaucratic Corruption*, 8 AMER. BEHAV’L SCIENTIST 8 (1964) (food price controls in Brazil); Daniel Levy, *Price Adjustment Under the Table: Evidence on Efficiency-Enhancing Corruption*, 23 EURO. J. POLITICAL ECON. 423 (2007) (black markets in the Republic of Georgia). That U.S. judges do not entertain this possibility is a further indication that they analyze campaign finance regulation as if the political regime were largely free of corruption.

<sup>187</sup> And here I am bracketing the question what should count as “corruption.” See, e.g., ADREI SHLEIFER & R.W. VISHNY, *THE GRABBING HAND: GOVERNMENT PATHOLOGIES AND THEIR CURES* 91 (1998) (using a loose version of “sale by government officials of government property for personal gain”); Daniel Treisman, *The Determinants of Corruption*, 76 J. PUB. ECON. 399 (2000) (using misuse of public office for private gain); Leff, *supra* note 195, at 8 (using extralegal influence on policy making or implementation). I concentrate on quid pro quo trades of cash in exchange for an official decision, partly because this makes the self-fulfilling prophecy theory more challenging to demonstrate and partly because the current Supreme Court has left

urbanization and income levels, government's scope and salary levels, competition for public office and access to information about government, tradition and path dependence.<sup>188</sup> Maybe Scandinavian ancestry plays a role.<sup>189</sup> Furthermore, a number of legal design choices might influence corruption perceptions and corruption frequency, aside from campaign finance regulation. These include term limits, citizen initiatives, redistricting procedures, and civil service protection.<sup>190</sup> And corruption perceptions might usually follow the observer's general disapproval of those in office, or the unemployment rate, or the even the community's "kvetch" quotient.<sup>191</sup> Anti-corruption regulation might even backfire.

We have already reviewed the emerging empirical evidence on the first question (the effect of law on corruption perceptions).<sup>192</sup> 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 of a political system spiraling downward. But they are only beginning.

Discomfiting illustrations do exist. Take reputationally challenged political jurisdictions in the United States—places where corruption is and has been taken as a fact of life, such as Louisiana, Rhode Island, and Illinois. The familiarity of former Illinois governors with the criminal justice system is plausibly explained in part by adverse selection effects and greater opportunities for corrupt conduct, which are facilitated by expectations that such conduct will happen.<sup>193</sup> It also seems that local governments that develop serious corruption problems tend to remain trapped in that bad equilibrium. It is not difficult to imagine that the reputation of New Orleans makes it difficult to alter real corruption levels.<sup>194</sup> The same thought applies to political systems beyond our national borders in which appearances, expectations, and the best indicators of actual corruption all drop together. Afghanistan is an inviting example. Reports are that a sizable fraction of public business from land titles to government jobs operates with transactions that violate formal law, and that the average person expects to persist.<sup>195</sup>

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room for campaign finance regulation that targets such deals.

<sup>188</sup> See, e.g., Alt & Lassen, *supra* note 158, at 342–44; Treisman, *supra* note 187, at 399.

<sup>189</sup> See Alt & Lassen, *supra* note 158, at 354 (tbl. 2).

<sup>190</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>191</sup> See Daniel Kaufmann & Shang-Jin Wei, *Does "Grease Money" Speed Up the Wheels of Commerce?* 16 (International Monetary Fund Working Paper, Mar. 2000).

<sup>192</sup> See *supra* Part IV.A.2; see also Natalia Melgar, Maximo Rossi & Tom W. Smith, *The Perception of Corruption*, 22 INT'L J. PUB. OPINION RES. 120 (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).

<sup>193</sup> See William Spain, *A Compendium of Corrupt Illinois Governors*, WALL ST. J., Dec. 8, 2008.

<sup>194</sup> For a suggestion that public tolerance for corruption in New Orleans diminished after Hurricane Katrina, see Mike Tolson, *New Orleans Rebuilding, But Katrina Scars Remain*, HOUSTON CHRON., Aug. 29, 2010. Shifts in general public expectations regarding corruption might shift in response to exogenous shocks, including exposure to other systems via the post-Katrina diaspora. I thank Clay Gillette for developing these points.

<sup>195</sup> See TRANSPARENCY INT'L, CORRUPTIONS PERCEPTIONS INDEX 2005 & 2009 (reporting aggregations of surveys on corruption perceptions, and showing Afghanistan falling from 117th out of 159 ranked countries in 2005 (2.5/10.0) to 179th out of 180 in 2009 (1.3/10.0)); Dexter Filkins, *Afghan Corruption: Everything for Sale*, N.Y. TIMES, Jan. 2, 2009 (providing anecdotes). 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 BULLETIN OF INDONESIAN ECON. STUDIES 179 (2009) (pointing out the advantages of a new, specialized, non-corrupt enforcement regime, along with threats of over-deterrence from vague and

These are case-study suggestions but broader investigations have been conducted.<sup>196</sup> Part of this research involves the propensity to make corrupt offers when corruption perceptions are high rather than low.<sup>197</sup> A pioneering study is Inna Cabelkova and Jan Hanousek's work on post-Soviet Ukraine.<sup>198</sup> Their basic finding was that people reported greater willingness to engage in bribery of officials when their perceptions of corruption were higher.<sup>199</sup> This 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.<sup>200</sup> In some ways, the Ukraine of the late 1990s is exceptional. Over 60% of the respondents indicated that they thought government did *nothing* to fight corruption, and 25% reported a personal experience with corruption.<sup>201</sup> Yet parts of the world today are similar or at risk of becoming so.

There is also ongoing, large-scale empirical investigation into the effects of corruption perceptions. One revealing study uses the 2008 Gallup World Survey to reach 78,000 people in 90 countries.<sup>202</sup> Among several intriguing 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>203</sup> This influence of perceptions is not as strong as reported corruption experiences, and the authors are rightly concerned that corruption perceptions are more vulnerable to reverse causation than are reported corruption experiences.<sup>204</sup> But the relationship between high corruption perceptions and attitudes towards violence and exit seems to hold independent of the effect on confidence in government (corruption perceptions are associated with low confidence, as well). This suggests one of many potentially negative consequences of widespread corruption perceptions.<sup>205</sup>

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overbroad anti-corruption norms).

<sup>196</sup> The empirical literature on government corruption is growing, with the recognition that corrupt political regimes face hurdles to economic development and present special complications for international aid organizations. *See, e.g.,* Toke S. Aidt, *Corruption, Institutions, and Economic Development*, 25 OXFORD REV. ECON. POL'Y 271, 271–72 (2009) (finding corruption experiences among business managers and general corruption perceptions negatively correlated with per capita wealth, while only the corruption perception measure correlated with per capita GDP increases). Case studies from abroad along with suggested anti-corruption strategies can be found in ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988); *see also* F. Varese, *The Transition to the Market and Corruption in Post-Socialist Russia*, 45 POLITICAL STUDIES 579 (1997). A leading account of corruption from an economic and political perspective is SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM* (1999); *see also* SHLEIFER & VISHNY, *supra* note 187, at 11–12, 91–108.

<sup>197</sup> *See* Cabelkova & Hanousek, *supra* note 181; Susan Rose-Ackerman, *Trust and Honesty in Post-Socialist Societies*, 54 KYKLOS 415, 420–24 (2001) (reviewing studies on corruption perceptions and attitudes toward government, and noting a result in which respondents' predicted happiness with achieving success through bribery depended on the perception that others were engaged in similar transactions); *see also* Alvaro S. Gonzalez, et al., *The Incidence of Graft on Developing-Country Firms* (World Bank Policy Research Working Paper No. 4394, Nov. 2007) (studying the experience of firms with bribery solicitations from officials in Africa and Latin America, and concluding that firms' corruption perceptions adjust slowly to experiences), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1029854](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1029854).

<sup>198</sup> *See* Cabelkova & Hanousek, *supra* note 181, at 387–90.

<sup>199</sup> *See id.* at 390, 396.

<sup>200</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>201</sup> *See id.* at 384.

<sup>202</sup> *See* Bianca Clausen, Aart Kraay & Zsolt Nyiri, *Corruption and Confidence in Public Institutions 2* (World Bank Policy Research Working Paper No. 5157, Dec. 2009), available at <http://ssrn.com/abstract=1527367>.

<sup>203</sup> *See id.* at 24. Even controlling for kvetch proxies. *See id.* at 14–16.

<sup>204</sup> A respondent's reported corruption perceptions might be essentially a function of that person's disapproval of the policies of the incumbent administration. There is somewhat less reason to think that a respondent is more likely to report actual corruption experiences based on such other variables, although it is possible, especially in ambiguous situations.

<sup>205</sup> *See also* Lavallée, Razafindrakoto & Roubaud, *supra* note 175, at 16 (finding that corruption perceptions and

Furthermore, scholars are trying to pin down the relationship between corrupt appearances and corruption levels. An important recent attempt by Wonbin Cho and Matthew Kirwin concentrates on seventeen countries in Africa.<sup>206</sup> The authors spell out a vicious circle involving corruption experiences and perceptions feeding off each other;<sup>207</sup> and they test the theory with survey data, homing in on particular government services (access to healthcare and education). As we have seen, isolating the various causal pathways is a major challenge for this field. And the authors had only cross-sectional data. But Cho and Kirwin's results are consistent with a self-fulfilling prophecy role for corruption expectations, albeit a role built on reported corruption experiences. "[T]he experience of corruption decreases popular satisfaction with government service delivery in basic healthcare and education sectors," the authors conclude, "and perceptions of an unjust government service delivered by corrupt officials motivate citizens to pay a bribe or give a gift to obtain public services."<sup>208</sup>

More valuable work in this area can be done—including work on the United States where political campaigns are relatively expensive yet corruption levels seem far lower than in Afghanistan. Appearances of corruption can do only so much damage. In fact, a lesson we can draw from the Clausen study involves the power of actual corruption experiences. Their data show that public perceptions of corruption tend to vary widely across 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>209</sup> In other words, a country with widespread corruption experiences among its citizenry will probably have a difficult time controlling corruption appearances, 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. Absence of the bank model in most campaign finance debates is, all told, a troubling omission. Those debates are right to include the problem of appearances but wrong in the way that the issue is analyzed.

## *B. Broken Windows Policing*

### *1. Policy debates and prophetic theories*

Debates over broken windows policing have been remarkably different. Aside from attracting little direct judicial attention, this policing strategy has been tightly connected with a bank model of appearance/reality relationships. 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 terribly concrete but many versions do indicate that neighborhood appearances drive the reality of neighborhood safety. A critical question for this field is whether policy makers 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.

To better understand these ideas, we can separate broken windows theories of *misconduct*

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experiences are associated with lower trust in political institutions in the African countries studied, although a negative effect of perceptions weakens as access to services degrades while the negative effect of experiences rises).

<sup>206</sup> See Wonbin Cho & Matthew Kirwin, *A Vicious Circle of Corruption and Mistrust in Institutions in Sub-Saharan Africa: A Micro-Level Analysis* (Afrobarometer Working Paper No. 71, Sept. 2007).

<sup>207</sup> See *id.* at 10.

<sup>208</sup> *Id.* at 16.

<sup>209</sup> See Clausen *et al.*, *supra* note 202, at 30 (fig. 1).

from broken windows theories of *policing*.<sup>210</sup> In general terms, the former assert that the appearance of disorder is causally related to the amount of disorderly behavior.<sup>211</sup> “[I]f a window in a building is broken and is left unrepaired,” James Q. Wilson and George Kelling hypothesized, “all the rest of the windows will soon be broken.”<sup>212</sup> A community might then attend to the visible remnants of fairly low-level misconduct and other forms of disorder so as to prevent more of the same—or worse. There is no simple and stable definition of disorder for purposes of broken windows theorizing, but the notion is invariably connected to neighborhood appearances. 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. What these conditions have in common is that they signal a breakdown of the local social order.<sup>213</sup>

Broken windows theory was popularized before it was specified,<sup>214</sup> and there is more than one conceivable version of the idea. Different versions of the theory can suggest different hypotheses regarding the rate of misconduct, the seriousness of misconduct, and the mechanism by which either is influenced by the appearance of disorder. Thus one might hypothesize 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, as well. Much scholarship concentrates on the implications for serious crimes such as homicide or robbery.<sup>215</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, signaling, herding, social meaning, or something else.<sup>216</sup> Not every possible mechanism implicates a self-fulfilling prophecy.

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<sup>210</sup> A concise history of both types of theory and associated empirical testing is 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>211</sup> See GEORGE L. KELLING & CATHARINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 16, 19–20 (1996).

<sup>212</sup> James Q. Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29, 31.

<sup>213</sup> WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS* 2 (1990).

<sup>214</sup> See *id.* at 29–32 (explaining the idea based on observations, logic, and a few analogous studies).

<sup>215</sup> Compare, e.g., SKOGAN, *supra* note 213, at 51, 72–75 (finding a statistically significant relationship between resident perception of physical/social disorder and robbery victimization, controlling for race, poverty, and neighborhood-stability indicators), with, e.g., BERNARD E. HARCOURT, *ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING* 60–61, 78 (2001) (finding that the same data set shows no statistically significant relationship between such perceptions and rape, burglary, assault, or purse-snatching, and noting missing data on robbery and disorder, as well as failure to query respondents on the location of victimization). Harcourt also points out that five Newark neighborhoods account for the positive finding on robbery in the Skogan study, which covered only thirty neighborhoods in the first place, see *id.* at 72–74, although one might think that this fact is as intriguing as it is discrediting.

<sup>216</sup> See, e.g., KELLING & COLES, *supra* note 211, at 19–20 (focusing on signals to law-abiding people and potential law-violators); Harcourt & Ludwig, *supra* note 210, at 281–82 (noting the possibility of herding and information cascades); Kahan, *supra* note 112, at 369 (concentrating on social meaning).

Hypotheses about disorder and misconduct are not just academic affairs. They made their way into public 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>217</sup> Following the arguments of George Kelling, in 1990 the 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>218</sup>

In 1994, the strategy moved above ground. The plan was for city police to boost arrests for fairly minor, if quite visible, misdemeanors—such as littering, panhandling, public drunkenness, public urination, and prostitution.<sup>219</sup> The police department announced that such enforcement measures would be “the linchpin” of its efforts “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>220</sup> Between 1994 and 1998, adult misdemeanor arrests increased by at least 40,000 per year.<sup>221</sup> And, during the 1990s as a whole, the violent crime rate plunged. For example, the total number of homicides in New York City dropped more than 70% between 1990 and 1998 (from 2,245 homicides to 633).<sup>222</sup>

The implementation of new law enforcement strategies and favorable changes in crime rates lent credibility to broken windows theories of misconduct and of policing. It was at least possible that broken windows policing had improved the orderly appearance of affected neighborhoods, that an orderly appearance generated beliefs that order would be maintained, and that these beliefs resulted in conduct that pulled reality toward those beliefs over time. Perhaps more law-abiding people became confident that looking out for each other and collaborating with the 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. These self-fulfilling prophecies were not the only basis on which the broken windows policing policies were defended, of course. But there was a success story involving serious crime in New York City, along with a story to explain the success.

## *2. Causation problems for the bank model*

On the other hand, many large cities in the United States experienced significant drops in their recorded crime rates. Not all of them implemented broken windows policing. Nor was this policing strategy the only potentially relevant event in New York City.<sup>223</sup> Economic news was

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<sup>217</sup> See HARCOURT, *supra* note 215, at 1, 46–51; GEORGE L. KELLING & WILLIAM H. SOUSA, DO POLICE MATTER? AN ANALYSIS OF THE IMPACT OF NEW YORK CITY’S POLICE REFORMS 2 (2001). The overall strategy was referred to as the quality-of-life initiative. This and similar strategies go by many names, including broken-windows and order-maintenance policing.

<sup>218</sup> See KELLING & COLES, *supra* note 211, at 131–33 & figs. 4.1–4.2 (showing ejection and misdemeanor arrest numbers increasing after mid-1990); WILLIAM BRATTON WITH PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 154–56 (1998) (describing the strategy).

<sup>219</sup> See POLICE DEP’T, CITY OF NEW YORK, POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK 6–12, 39–50 (1994).

<sup>220</sup> *Id.* at 7.

<sup>221</sup> See HARCOURT, *supra* note 215, at 2 (noting that reported stop-and-frisk activity increased even more).

<sup>222</sup> See ANDREW KARMEN, NEW YORK MURDER MYSTERY: THE TRUE STORY BEHIND THE CRIME CRASH OF THE 1990S 25 tbl. 1.2 (2000).

<sup>223</sup> See, e.g., KELLING & SOUSA, *supra* note 217, at 5, 11–12 (stating that police initiatives other than broken windows policing are difficult to track with measurable proxy variables, and describing decentralization and Compstat use in New York);

good, for instance. And so there were hypotheses competing with broken windows theories.<sup>224</sup> Perhaps atypically large drops in crime followed atypically large increases as a matter of simple reversion to the mean, not because 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>225</sup>

No scholarly consensus has emerged on either broken windows theories of misconduct or their affiliated policing strategies. These ideas attract vocal support and determined criticism, both within and outside academia, without anything approaching conclusive evidence on causation. The relevant empirical issues have, however, received serious and constructive attention. Although a careful student of these questions will hesitate before defending much of any confident conclusion, existing research at least presents a foundation for intelligent analysis. On the causal effect of broken windows policing on serious crime, we can break out three different positions: (1) the effect is impressive, (2) the effect is close to zero or undemonstrated, and (3) the effect is modest and/or selective.

On the optimistic side is George Kelling and William Sousa's report, published by the Manhattan Institute in 2001.<sup>226</sup> The authors investigated police precincts in New York City during the 1990s and they found a statistically significant and large relationship between misdemeanor arrests and violent crime (a combined measure of homicide, rape, robbery and felony assault).<sup>227</sup> Equally notable, Kelling and Sousa could not find a significant positive relationship between the violent crime rate and proxies for cocaine use, the young male population, and poor economic conditions.<sup>228</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>229</sup> and perhaps an omitted variable is driving violent crime rates down. That said, the numbers in this study are striking. The authors claim that precincts "could expect to suffer one less violent crime for approximately every 28 additional misdemeanor arrests," and that "[o]ver 60,000 violent crimes were prevented from 1989 to 1998 because of 'broken windows' policing."<sup>230</sup> From this, one might be impressed by at least part of the police department's misdemeanor arrest strategy and less confident that the root causes of violent crime are beyond policymaker control.

On the pessimistic side, the standout response is a 2006 law review article by Bernard Harcourt and Jens Ludwig. They gathered data to match Kelling and Sousa's. But Kelling and

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David L. Weisburd et al., *Reforming to Preserve: Compstat and Strategic Problem Solving in American Policing*, 2 CRIMINOLOGY & PUB. POL'Y 421, 423–24 (2003) (studying Compstat-like programs and their national diffusion).

<sup>224</sup> See, e.g., *id.* at 2–3 (emphasizing a divide between root-cause theories and police-impact theories); Magdalena Cerdá et al., *Misdemeanor Policing, Physical Disorder, and Gun-Related Homicide: A Spatial Analytic Test of "Broken-Windows" Theory*, 20 EPIDEMIOLOGY 533, 533 (2009) (collecting alternative theories).

<sup>225</sup> See, e.g., Cerdá et al., *supra* note 224, at 533.

<sup>226</sup> KELLING & SOUSA, *supra* note 217, at i–ii.

<sup>227</sup> See *id.* at 5, 8–10.

<sup>228</sup> See *id.* at 4–5, 8 (indicating 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>229</sup> See *id.* at 18 (emphasizing quality, not just quantity, of enforcement).

<sup>230</sup> *Id.* at i (executive summary) & 9 (emphasis omitted); see also Hope Corman & Naci Mocan, *Carrots, Sticks and Broken Windows*, 48 J.L. & ECON. 235 (2005) (studying New York City-wide data on monthly misdemeanor arrests and finding an association with declines in car theft and robbery but not other crimes).

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>231</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 precinct totals for 1989 to 1998.<sup>232</sup> With the controls for mean reversion, more than two thirds of the association between misdemeanor arrests and violent crime disappeared.<sup>233</sup> With several more precinct-level control variables, including changes in poverty and vacant housing, the association shrank further and lost statistical significance.<sup>234</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>235</sup> This leaves mean reversion as a plausible alternative explanation for drops in violent crime. “[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>236</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 additional assistance.<sup>237</sup> This program design could not fully isolate the effect of neighborhood disorder by itself, considering that movers usually experienced changes in neighborhood affluence and they were conceivably subject to more attentive neighbors or police officers; moreover, use of the vouchers did not yield much racial integration as measured by census tract.<sup>238</sup> But the results are suggestive nonetheless. Based on self-reporting and arrest records, the voucher recipients seemed to have more favorable opinions of their neighborhoods compared to the control group, but they did not show significantly different offending rates.<sup>239</sup> By reassessing the New York City precinct-level data and by adding a randomized experiment involving people subject to broken windows dynamics, Harcourt and Ludwig’s evaluation made it far more difficult to accept broken windows theories of disorder or of policing—at least in the form of more misdemeanor arrests to drive down violent crime.

Since then, serious empirical work on broken windows policing has become, in some

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<sup>231</sup> See Harcourt & Ludwig, *supra* note 210, at 289–93.

<sup>232</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>233</sup> See *id.* at 294 tbl. 2, 295. According to the table, adding the 1989 variable or both the 1989 and 1984–1989 change variable had this effect; the 1984–change variable had less impact on its own.

<sup>234</sup> See *id.* at 294 tbl. 2, 295–96; see also *id.* at 318 (explaining that census-tract data was translated into precincts).

<sup>235</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 2–5). In no model for Table 3 is there a negative and statistically significant association between misdemeanor arrest changes and violent crime changes.

<sup>236</sup> Harcourt & Ludwig, *supra* note 210, at 276.

<sup>237</sup> See *id.* at 276–77, 300–07 (noting that the program operated in Baltimore, Boston, Chicago, Los Angeles, and New York City).

<sup>238</sup> See *id.* at 304 & 305 tbl. 5 (indicating that voucher users tended to move into higher income and lower crime census tracts, but not racially mixed census tracts); *id.* at 310 n. 90, 313–14 (explaining the possible difference in police monitoring).

<sup>239</sup> See *id.* at 306–14 (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, Jens Ludwig & Lawrence F. Katz, *Neighborhood Effects on Crime for Female and Male Youth: Evidence from a Randomized Housing Voucher Experiment*, 120 Q.J. ECON. 87 (2005).

respects, more modest and more targeted. First, several studies conclude that the effect of broken windows policing is small compared to other measurable variables.<sup>240</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. That said, policing strategies are unlikely to account for anything approaching the whole story. Consider the recent contribution from Richard Rosenfeld and his coauthors. Taking seriously the warnings of Harcourt and Ludwig, the Rosenfeld team controlled for mean reversion by using 1984 and 1988 precinct-level data on robbery and homicide rates.<sup>241</sup> They nevertheless found a statistically significant relationship between higher misdemeanor arrests and certain violent crimes in New York City from 1988 to 2001.<sup>242</sup> On the other hand—and at least equally important—these authors were able to credit misdemeanor arrests with only 7–12% of the homicide decline and 1–5% of the robbery decline.<sup>243</sup> Perhaps this finding should not have been surprising to students of the academic debate over broken windows policing. Even broken windows enthusiast George Kelling estimated, in a less-publicized part of his work with Sousa, that misdemeanor arrests accounted for only 5% of the violent crime decline in the City.<sup>244</sup>

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>245</sup> And these arrests seem to protect only certain segments of the population from homicide, to the extent that homicides are decreased at all.<sup>246</sup> In addition, the mechanism of any influence remains unclear. Misdemeanor policing might not be getting at serious crimes rates through improved physical appearance of neighborhoods,<sup>247</sup> but rather, if anything, through ordinary deterrence or incidental police contact

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<sup>240</sup> See Richard Rosenfeld, Robert Fornango & Andres F. Rengifo, *The Impact of Order-Maintenance Policing on New York City Homicide and Robbery Rates: 1988-2001*, 45 CRIMINOLOGY 355, 369, 373–74, 377–78 (2007) (controlling for mean reversion and finding a statistically significant but “modest” effect of misdemeanor arrests on homicides between 1988 and 2001); Steven F. Messner et al., *Policing, Drugs, and the Homicide Decline in New York City in the 1990s*, 45 CRIMINOLOGY 385, 401, 405 (2007) (similar for gun-related homicides and for robberies between 1990 and 1999, and also finding a relationship between a proxy for cocaine use (cocaine-related accidental deaths as recorded in hospital records) and lower homicide rates); Cerdá et al., *supra* note 224, at 539 (characterizing the effect of misdemeanor arrests on gun-related homicides between 1990 and 1999 as “small”); 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. PERSPECTIVES 163, 177, 184 (2004) (crediting increased imprisonment, increased numbers of police officers, deflated crack markets, and legalized abortion for widespread crime rate declines during the 1990s).

<sup>241</sup> See Rosenfeld et al., *supra* note 240, at 362, 369, 374, \_\_\_\_.

<sup>242</sup> See *id.* at 374, 377–78.

<sup>243</sup> See *id.* at 377–78.

<sup>244</sup> See KELLING & SOUSA, *supra* note 217, at 10 (using 1989–1998 precinct-level data). Kelling and Sousa also report that about 45% of the variance in violent crime was not explained by the four independent variables in their model, leaving only speculation about that fraction of the variation across precincts. See *id.* at 24 n. 43.

<sup>245</sup> See Messner et al., *supra* note 240, at 405; 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 violence or drug offenses and the ensuing homicide victimization rate for Hispanics).

<sup>246</sup> See *infra* text accompanying notes 248–254.

<sup>247</sup> See Cerdá et al., *supra* note 224, 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 data); see also 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, 629–30, 637 (1999) (finding that researcher-coded levels of disorder in Chicago neighborhoods generally does 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 SOCIOLOG. Q. 185, 199–200 (2004) (reporting results from a cross-sectional study that physical disorder does mediate the effect on violence and

with arrestees who commit both minor and serious offenses.

On the theme of limited and selective impact, consider the intriguing 2010 study conducted by Magdalena Cerdá and six colleagues.<sup>248</sup> This team of empiricists had given up on broken windows policing affecting non-gun-related homicides, and they had failed to find evidence that visual disorder was the mechanism by which misdemeanor arrests might influence more serious crime.<sup>249</sup> So they decided to break down New York City gun homicides into three victim age groups at the precinct level.<sup>250</sup> When examined from this angle, higher misdemeanor arrest rates did have a statistically significant inverse relationship with gun homicide between 1990 and 1998—but only for adult victims aged 35 or older.<sup>251</sup> Other variables mattered for this older cohort, as well. Lower rates of gun homicide victimization were also associated with lower levels of cocaine use and higher levels of public assistance receipt.<sup>252</sup> Depending on relative costs and feasibility problems, reducing cocaine consumption and spreading the economic safety net might well 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 statistical support for misdemeanor policing. Instead, the study points to policies that reduce cocaine use, increase public assistance availability, and reduce alcohol consumption.<sup>253</sup> These three variables were linked to falling homicide rates for victims under age 35, not misdemeanor arrests. And recall that the first two of those three variables were also associated with lower homicide rates for adults aged 35 or older. Changes in cocaine use and public assistance seem to do double duty. To take one comparison: An increase of one standard deviation in the misdemeanor arrest rate was associated with a drop of 7.4 homicides for 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 per 100,000 people plus 2.9 fewer homicides among adults.<sup>254</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 attempted to control for mean reversion. But creative takes on the available data like the Cerdá group’s open wide the possibility that policing strategies are one modest part of the successful management of one slice of the violent crime problem in the United States.

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burglary from business-oriented public spaces, but that not from schools or playgrounds).

<sup>248</sup> See 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>249</sup> See *id.* at 1108; Cerdá et al., *supra* note 224, at 536, 538–39.

<sup>250</sup> See Cerdá et al., *supra* note 248, at 1107–08 (excluding only Central Park from the precincts studied and relying on Medical Examiner records for location of injury and cause of death).

<sup>251</sup> See *id.* at 1110, 1113 tbl. 4. Misdemeanor policing was measured by misdemeanor plus ordinance arrests, see *id.* at 1108, which is not the same as “broken windows policing” insofar as this set does not capture only and all illegal conduct that contributes to perceptions of disorder. The study does, however, control for citizen complaint rates by precinct as well as the ratio of felony arrests to felony complaints and the number of officers assigned to each precinct. See *id.*

<sup>252</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, again according to Medical Examiner records. See *id.* at 1108.

<sup>253</sup> See *id.* at 1109, 1111 tbl. 2, 1112 tbl. 3 (finding that the homicide rate for youths aged 15–24 fell with declining cocaine consumption, and that the homicide rate for young adults aged 25–34 years fell with declining alcohol consumption and increasing receipt of public assistance); see also *id.* at 1108 (noting that the proxy for alcohol consumption was similar to the proxy for cocaine use); *id.* at 1109 (stating that increasing incarceration rates were associated with increasing homicide rates for youths aged 15–24).

<sup>254</sup> See *id.* at 1109–10, 1111–13 tbls 2–4 (stating that a standard deviation increase for misdemeanor arrests was 737 per 10,000 population, and for public assistance was 10.1%).

Finally, to the extent that broken windows theories of misconduct deserve respect, crude versions of broken windows policing are not responsive. The fit between misdemeanor arrests and neighborhood aesthetics is rather poor, after all. A randomized policy experiment in Lowell, Massachusetts speaks to this point. Anthony Braga and Brenda Bond chose thirty-four high-crime areas in the town, divided them into seventeen matched pairs, and randomly selected one of each pair for experimental treatment.<sup>255</sup> The experimental areas received a variety of interventions that are not easily summarized.<sup>256</sup> These areas 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>257</sup> This semi-randomized experimental research design helps sidestep the issue of mean reversion.

After a year, the experimental areas had nearly 20% fewer emergency calls than the controls, including greater than 30% advantages in robbery, burglary, and nondomestic assault calls.<sup>258</sup> Situational strategies showed the strongest statistical association with fewer calls; the effect of misdemeanor arrests was less clear yet still plausible, and social service strategies failed to achieve conventional levels of statistical significance.<sup>259</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>260</sup> Braga and Bond therefore oppose a simplistic “zero tolerance policing model” focused on arrests.<sup>261</sup>

### 3. *Transparency problems and aesthetics*

Given the available evidence, a sensible conclusion is that the probability of generating a beneficial self-fulfilling prophecy with broken windows policing is either uncertain, low, or confined in important ways. Even if some observers are somewhat more optimistic, the difficulty in proving that a bank model dominates here should lead us to consider other models. One alternative is a bank model, in which the appearance of order places little or no downward pressure on serious crime rates. And if the bank model is the applicable model, then broken windows policing becomes vulnerable to a serious transparency objection.

This policing strategy came with an asserted hypothesis when it was initiated. The

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<sup>255</sup> See Anthony A. Braga & Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 CRIMINOLOGY 577, 582–85 & n.5 (2008) (explaining that hot spots were identified partly by clustering of emergency calls in 2004, that the selected areas covered 2.7% of the town’s acreage, and that the matching was “primarily . . . qualitative”). The study also tested for displacement or diffusion effects of the experimental interventions in two-block adjoining areas. See *id.* at 591–92, 596–97 (finding no statistically significant effect on emergency calls).

<sup>256</sup> See *id.* at 584–85 (describing the Compstat-like process for captains in treatment areas). The study did not measure the impact of the data-driven oversight process, to the extent it was meaningfully different from the control areas.

<sup>257</sup> See *id.* at 585–86, 594 (calculating the misdemeanor arrest increase in experimental areas as approximately 29% compared to the control areas, and noting that only 12 of 17 experimental areas received social service strategies).

<sup>258</sup> See *id.* at 587–88, 592–93 & tbl. 1 (noting that social disorder was measured by researcher counts during 5 minute periods, and that physical disorder was based on researcher coding of photographs of the blocks in question).

<sup>259</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>260</sup> See *id.* at 586–87, 595 & tbl. 2.

<sup>261</sup> *Id.* at 600.

strategy was advertised as an effective technique for reducing serious and violent crime, not just urinating in public. At the inception of the policy in New York City, for example, officials indicated that aggressive misdemeanor enforcement could reduce the rate of more serious crimes. *Police Strategy Number 5*, which announced the police 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 "an increase in the signs of disorder."<sup>262</sup> The document goes on to note the broken windows work of Wilson, Kelling, and Skogan, stating that the latter "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>263</sup>

And, when statistics on serious crime looked 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>264</sup> The former head of the transit police and police department wrote in the same year, "We were proving the Broken Windows theory."<sup>265</sup> Indeed the Kelling and Sousa study discussed above attracted media attention.<sup>266</sup> Such promotion and credit attribution indicates a transparency problem, to the extent that ordinary people became overly persuaded that serious crime rates were reduced because of broken windows policing.

The extent of the transparency problem is debatable but there are reasons to believe that it is significant. Many New York City residents seem to have held high regard for broken windows policing. An opinion poll conducted for the Citizens Commission of New York City in 2000–2001 is on point.<sup>267</sup> It found over 70% support for a broken windows theory of crime.<sup>268</sup> Similarly, the police department's overall quality-of-life enforcement strategy garnered a 66% approval rating,<sup>269</sup> with similar levels of support across racial lines.<sup>270</sup> Part of this popular

<sup>262</sup> POLICE STRATEGY NO. 5, *supra* note 219, at 5.

<sup>263</sup> *Id.* at 6–7.

<sup>264</sup> Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City* (Feb. 24, 1998), available at <http://www.nyc.gov/html/rwg/html/98a/quality.html>.

<sup>265</sup> BRATTON, *supra* note 218, at 156 (discussing transit authority policy); *see also id.* at 152, 228–29, 294–96 (discussing crime declines and *Strategy No. 5* but emphasizing that it was only one of many NYPD strategies).

<sup>266</sup> *See* Harcourt & Ludwig, *supra* note 210, at 274–75 (collecting media reports); *see also* KARMEN, *supra* note 222, at xii (asserting that "the politically correct answer" to the crime-decline causation question "was 'All praise belongs to the NYPD'").

<sup>267</sup> *See* Harold Takooshian & Richard H. Tashjian, *Citizen Attitudes Toward Police and Crime, 2001*, in CRIME, POLICE, AND THE COMMUNITY 4, ii–iii (2001) (indicating that the survey was conducted before 9/11).

<sup>268</sup> *See id.* at 6; *id.* appx. B tbl. 1 (showing 50% responding "definitely" and only 8% "not at all"); *id.* at 8 (indicating support across racial categories). The survey question reads, "Some people feel that if fairly minor street problems are tolerated—such as disorderly teens, boom box radios, small-time drug dealing, buildings not kept fixed and clean—that this leads to more breakdowns since it looks like nobody cares. Would you say such minor breakdowns in the neighborhood contribute to more crime: [ ] 1-not at all 2-slightly 3-maybe 4-probably 5-definitely." *Id.* appx. A (question 11).

<sup>269</sup> *See id.* at 6 (combining those who indicated probable approval with those who indicated definite approval). Respondents were also asked about ten specific quality-of-life matters. Respondents tended to support enforcement efforts against littering, marijuana smoking, squeegees, speeding, loitering, loud radios, bad taxi driving, and graffiti; overall, they opposed enforcement regarding street vendors and also jaywalking, albeit slightly. *See id.* appx. B tbl. 4.

<sup>270</sup> *See id.* at 8; *id.* appx. B tbl. 3 (breaking out numbers for White, Black, Hispanic, and Asian respondents); *see also*

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, “There 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, the report observed, “[r]esearch does not provide strong support for this proposition.”<sup>271</sup> More recent empirical research adds nuance to the picture, as discussed above, but a gap remains between broken windows policing as advertised and as tested.

No clean excuse pardons this appearance/reality gap. The situation involves public policy as advertised to ordinary citizens, not just enemies of the state. Justifications for broken windows policing do not include fooling potential lawbreakers into believing that misdemeanor arrests cause lower serious crime rates. To achieve that effect, potential lawbreakers might have to know about the policy of increasing misdemeanor arrests, but they do not need to be aware of any causal claim. The theory behind broken windows policing, however vague, turns on the response to neighborhood appearances not the response to assertions that those appearances cause changes. So we are left with a situation in which the link between this 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.

On the other hand, the magnitude of the problem is not great. Far uglier transparency gaps exist in the world. In the first place, the problem under consideration is overclaiming on the effects of a policing strategy, rather than false reporting about misdemeanor arrests or fabricating comfortably low violent crime rates. Perhaps no one has been tricked into a false sense of security or a failure to take reasonable precautions as a result of broken windows policing. In addition, the disparity between information insiders and information outsiders is small in some respects. The policy was publicly announced and its effects are subject to testing. Although officials probably have special access to valuable information concerning the effect of broken windows policing, professional empiricists have acquired data on which the impact of the policy has been subject to critical evaluation. Ordinary citizens are not expert statisticians but, under these circumstances, perhaps they 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 question. That 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 of appearance/reality relationships. The above discussion is meant to illustrate the significance of those relationships to sensible normative evaluation. At the same time, broken windows policing was not promoted only in terms of predicted effects 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 and an arguable transparency problem should direct attention toward a model that is simpler, albeit not free from disagreement.

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*id.* at 9 (stating that support did not vary with respondent evaluation of either police performance or police brutality).

<sup>271</sup> NATIONAL RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 229 (Wesley Skogan & Kathleen Frydl eds. 2004); *see also* Braga & Bond, *supra* note 255, at 579 (stating, in 2008, that, “given the strong influence of broken windows on the policing field, remarkably little solid research evidence is found on the crime-control benefits of policing disorder”). The NRC report does not cite research for its conclusion on public perception, however, and the conclusion might well be an overstatement.

Striking out the complications of bank models and bridge models returns us to the aesthetics of clock models, and there is a case for a brand of broken windows policing that is no deeper than this. 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 does change local visuals in the intended direction, gains in social welfare 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 discomfiting, and public urination obnoxious. If it effectively targets these problems, perhaps broken windows policing is 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 that change does not require lower 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 disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, the mentally disturbed.”<sup>272</sup> They did make bolder causal claims regarding crime rates, and some people are not queasy about panhandlers. A notable lack of tolerance unites popular desires to sweep up the trash on account of ugliness and sweep out less-valued people on account of anxiety. But surely 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 of us doubt that law enforcement can have some effect on the rate of window breaking and, if officials also take time to fix the windows that are broken, the aesthetic gain becomes uncontroversial. Equally obvious, a direct response to neighborhood aesthetics is 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 essentially 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,” 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>273</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, some 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 visible signs of disorder. “[A]rrest strategies do not deal directly with physical conditions,” Braga and Bond observe.<sup>274</sup> Something like a real estate policy might 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 captured in one-dimensional

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<sup>272</sup> Wilson & Kelling, *supra* note 212, at \_\_\_\_.

<sup>273</sup> Skogan, *supra* note 213, at 5, 9.

<sup>274</sup> Braga & Bond, *supra* note 255, at 600.

misdemeanor arrest measures.”<sup>275</sup> Indeed, arrests can worsen the aesthetic. Arrests themselves tend to be disorderly. While arrests indicate that police officers care, arrests also indicate that there is something troubling for the officers to care about. And, 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.<sup>276</sup>

All of this is a reminder that aesthetic justifications are not uncontroversial justifications. 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 in practice 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 in the neighborhood 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

Debates over campaign finance regulation often migrate to the courts in the form of constitutional litigation, while broken windows policing remains a policy debate with virtually no judicial review, constitutional or otherwise. The former debate proceeds largely on theory as relevant evidence develops, while the latter features a large body of empirical work already. And although the analysis of both issues 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. [More to follow . . .]

### CONCLUSION

This Article suggests a way to distinguish the elusive concepts of appearance and reality, along with ways in which the two can be causally related. Often we think that appearances are driven by reality, but sometimes appearances dictate reality over time, and sometimes the concepts essentially collapse in the first place. Grasping these potential relationships is important to reaching sensible normative judgments about appearance management. The evaluative issues are comparatively simple when appearance and reality are essentially the same thing, even though the right decision might be contested. As always, we will want to know about the costs and efficacy of attempts to generate desirable appearances. Other questions arise when

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<sup>275</sup> *Id.* at 597; see also RALPH B. TAYLOR, *BREAKING AWAY FROM BROKEN WINDOWS: BALTIMORE NEIGHBORHOODS AND THE NATIONWIDE FIGHT AGAINST CRIME, GUNS, FEAR, AND DECLINE* 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 210, at 282 (“From a policy perspective, the broken windows hypothesis [of misconduct] is, in principle, consistent with a variety of potential policy levers, ranging from changes in policing to community organizing.”); *id.* at 306 (explaining that housing voucher recipients ended up in neighborhoods with lower misdemeanor arrest rates and reported lower levels of disorder); Sampson & Raudenbush, *supra* note 247, 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 . . .”).

<sup>276</sup> See, e.g., Ralph B. Taylor, *Incivilities Reduction Policing, Zero Tolerance, and the Retreat from Coproduction*, in *POLICE INNOVATION: CONTRASTING PERSPECTIVES* \_\_ (David L. Weisburd & Anthony A. Braga eds. 2006); 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, 1267 (2000) (“One might infer that minority communities tend to lose confidence in police fairness as order-maintenance policies become more stringent.”).

appearance and reality might separate. Thus if reality is largely insulated from appearance, then 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 government officials. If instead reality might be a function of appearance, then the transparency issue becomes subordinate to a 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 appearance 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. Thoughtful observers ought to have a sensible set of questions to ask about those appearances, any underlying reality, and the connection between the two.