Judicial Disqualification: Is Sexual Orientation Cause in California

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by

CHARLES MALARKEY*

The United States Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process."\(^1\) Central to the concept of a fair trial is the principle that a judge shall apply the law impartially. Common law has recognized the importance of a judge’s impartiality at least since the time of Sir Edward Coke, as reflected in the maxim that “no man shall be a judge in his own case.”\(^2\) Since then, a body of law has developed to govern the standards and procedures by which a judge is to be disqualified from cases in which he has an interest or bias.\(^3\) What constitutes a proper ground for judicial disqualification, however, remains a troublesome question facing both attorneys and judges.\(^4\)

An attorney’s decision whether to move for disqualification of a judge can have serious consequences on the subsequent handling of her case. As has been observed, “[i]f you are going to shoot at the judge it does no good to wound him.”\(^5\) For judges as well, the decision is one of considerable importance. Under current California law, a judge has a positive duty to decide any proceeding in which he is not disqualified.\(^6\) At the same time, both statutes and ethical standards impose a counter-

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1. In re Murchison, 349 U.S. 133, 136 (1955); see also Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950) (Constitution requires that hearings take place before an impartial tribunal); Tumey v. Ohio, 273 U.S. 510, 512 (1926) (“A trial before a tribunal financially interested in the decision... constitutes a denial of due process...”).


3. For an examination of the development of judicial disqualification law, see Frank, Disqualification of Judges, 56 YALE L.J. 605, 609-26 (1947).

4. For an extended discussion of the use and nonuse of judicial disqualification in a current federal case, see Brill, Government Goes Judge Shopping to Bag the Teamsters and Drexel, Recorder, Nov. 28, 1988, at 1, col. 2.


6. See CAL. CIV. PROC. CODE § 170 (Deering Supp. 1989). One commentator has suggested that ethical standards for disqualification can be used by a judge to avoid complex and protracted cases. See Levy, Judicial Recusals, 2 PACE L. REV. 35, 38 (1982). This may be the justification for the “duty to sit” concept.
vailing obligation on the judge to disqualify himself "in a proceeding in which his impartiality might reasonably be questioned." Moreover, the judgment of a disqualified judge is void and open to attack at any time.8

Although an attorney moving for judicial disqualification on the ground of bias risks alienating a judge before whom she must present her case should the motion be denied,9 bias continues to be one of the most common complaints leveled at judges.10 Bias is also perhaps the most problematical basis for judicial disqualification,11 with varying standards producing anomalous results at times.12

In 1984, the California Legislature passed a comprehensive bill aimed at clarifying and revising the law relating to the disqualification of judges.13 That legislation added section 170.2 to the Code of Civil Procedure. Section 170.2 states, in pertinent part, "It shall not be grounds for disqualification that the judge: (a) [i]s or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group."14 Thus, in California, a judge's membership in a minority group or certain other groups is not grounds for disqualification in a case involving the rights of the same group.

7. CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972). See also CAL. CODE CIV. PROC. § 170.1 (a)(6)(C) (Deering Supp. 1989) (a judge shall be disqualified if a person aware of the facts might reasonably doubt the judge's ability to be impartial).


11. Democracy must, indeed, fail unless our courts try cases fairly, and there can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will.

In re Linahan, 138 F. 2d 650, 651 (2d Cir. 1943).

12. For example, a minimal financial interest of a judge's spouse in a party mandates disqualification under 28 U.S.C. § 455(b), while at the same time another judge may continue to sit on a case despite lifetime involvement with its parties and subject matter. Nevels, Bias and Interest: Should They Lead to Dissimilar Results in Judicial Qualification Practice?, 27 ARIZ. L. REV. 171, 172-78 (1985). See also Note, Disqualification of a Judge on the Ground of Bias, 41 HARV. L. REV. 78, 79-80 (1927) (distinction between "interest" and "prejudice" creates a situation "in which certain facts will disqualify a judge merely because they raise a presumption of bias while an actual showing of bias will not").


This Note examines the question of whether section 170.2(a) applies to a judge's sexual orientation.\textsuperscript{15} For example, does a homosexual judge have a per se duty to disqualify himself from presiding over a case in which a homosexual litigant is alleging unlawful discrimination on the basis of sexual orientation? The purpose of this examination is twofold. First, it seeks to provide guidance to attorneys and judges who may find themselves involved in a situation such as the preceding hypothetical.\textsuperscript{16} The primary purpose, however, is to show that application of section 170.2(a) to a judge's sexual orientation is consistent with the principles of judicial disqualification law as manifested in the Code of Judicial Conduct as well as California and federal statutory and case law.

While to date no California court has examined this issue, the fact that there are judges of different sexual orientations in California\textsuperscript{17} suggests that the significance of this topic will increase as more homosexual persons seek judicial enforcement of their civil rights. In addition, the increase in AIDS-related litigation expected in years to come,\textsuperscript{18} much of which is examined within the context of discrimination on the basis of sexual orientation, will make the issue more visible. Thus, the growth in these types of actions increases the likelihood that homosexual judges will be deciding issues related, in part, to sexual orientation, which in turn may raise the issue of judicial impartiality.

Part I of this Note briefly examines section 170.2(a) and some general considerations whether legislative intent alone can compel application of the statute to situations involving a judge's sexual orientation. Part I concludes that the evidence of legislative intent behind section 170.2(a) provides little guidance regarding its application to sexual orientation. Consequently, Part II examines the principles of judicial disqualification law as manifested in ethical standards, statutes, and case law and evaluates the application of section 170.2(a) to a judge's sexual orientation in light of those standards. The principles of judicial disqualification

\textsuperscript{15} The term "sexual orientation" as opposed to "sexual preference" or "affectional preference" is used in this Note because it reflects the conclusions of a substantial amount of research to the effect that it is "a basic part of the individual's psyche, rather than something that is consciously chosen." See Paul & Weinrich, \textit{Whom and What We Study: Definition and Scope of Sexual Orientation}, in \textit{HOMOSEXUALrrY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGI-}

\textsuperscript{16} While the problem presented may appear theoretical because one wishing to disqualify the judge for bias in the hypothetical could do so by means of a peremptory challenge, see CAL. CIV. PROC. CODE § 170.6 (Deering Supp. 1989), each side in an action is limited to one peremptory challenge, see id. § 170.6(3). For that reason, it is possible that the option would not be available to an attorney. In addition, because a judge may disqualify himself sua sponte, the question remains relevant notwithstanding the availability of a peremptory challenge.


\textsuperscript{18} \textit{See AIDS AND THE LAW} ix-x (W. Dornette ed. 1987).
law include: actual bias; the appearance of bias; extrajudicial knowledge of disputed facts; the rule of necessity; and ethical standards discouraging certain extrajudicial activities. The Note concludes that the application of section 170.2(a) to prevent judicial disqualification solely on the basis of sexual orientation is rational and is consistent with the principles of judicial disqualification law.

I. Section 170.2(a) and Sexual Orientation

In 1981, the Committee on Administration of Justice of the State Bar of California began a project to revise the law on judicial disqualification. The ultimate result of that project was the 1984 legislation that included section 170.2(a). A memorandum prepared by staff counsel in January 1983 states that "[t]he proposed statute also contains a section setting forth some reasons which are not grounds for disqualification. The law on the latter is quite unclear if not non-existent; it is likely that this provision will be controversial." In spite of this prediction, there has been a dearth of judicial application and commentary addressing section 170.2(a).

Application of section 170.2(a) to sexual orientation based on legislative intent is complicated by the fact that explicit references to the section are sparse and reveal little upon which to base a conclusion. For example, a senate committee report stated that, "[m]otions have been made to disqualify judges for [membership in a minority group]. Such a motion is damaging to the public confidence in the judiciary and insulting to the judge involved." While it seems that this language would apply with equal force to a motion for disqualification based on a judge's sexual orientation.

19. Memorandum from Monroe Baer, Staff Counsel to the Board of Governors of the State Bar of California (Jan. 6, 1983) (discussing the Committee's proposed revision of the law of disqualification of judges) (copy on file at The Hastings Law Journal).

20. Id., Exhibit A. The original product of the Committee on the Administration of Justice was S.B. 598, which contained language similar to the current statute. S.B. 598, 1983-84 Regular Session. S.B. 598 failed passage on the Senate floor, however, due to opposition from the California Judges Association on matters such as a judge's power to proceed with a trial following filing of a statement of disqualification and automatic disqualification of a trial judge following reversal by an appellate court. See Ashby, Gay Rights Bills Advance, While Senate Kills Judges Proposal, Los Angeles Daily J., June 24, 1983, at 2, col. 1; Letter from Sue U. Malone, Executive Director, California Judges Association, to Senator Barry Keene (Apr. 29, 1983) (expressing the opposition of the Association to S.B. 598) (copy on file at The Hastings Law Journal).

21. This statement is based on an examination of documents compiled by the Legislative Intent Service, a commercial service providing documents relating to the origin of California statutes. For an example of its use by the California Supreme Court, see Commodore Home Systems, Inc. v. Superior Court (Brown), 32 Cal. 3d 211, 218-19, 649 P.2d 912, 916-17, 185 Cal. Rptr. 270, 274-75 (1982).

sexual orientation, it does not provide a firm foundation for the present inquiry. In addition, while section 170.2(a) obviously invites its application to groups that are "similar" to racial, ethnic, sexual, and religious groups, the legislature left unanswered the question of how similarity is to be determined. Possible factors include moral relevance of the characteristic, whether it has been subject to a history of discrimination and resulting legal protection, and whether it impairs a judge's ability to be impartial. Furthermore, application of the statute to a judge's sexual orientation may, in some sense, be tied to whether homosexual and bisexual persons are accorded minority status in society. While an extended examination of sexual orientation and its similarities to race, sex, ethnicity, and religion is outside the scope of this Note, a brief examination of the legal status of sexual orientation is in order.

Unlike race, sex, ethnicity, and religion, sexual orientation has not been recognized historically as a characteristic meriting special legal protection. Sexual orientation receives no mention in the Federal Civil Rights Act of 1964, and courts have been unwilling to extend the Act's prohibition of sex discrimination to apply to discrimination on the basis of sexual orientation. As of this writing, only one state, Wisconsin, has enacted comprehensive legislation to prohibit employment discrimination on the basis of sexual orientation.

23. See Watkins v. Real Estate Comm'r, 182 Cal. App. 2d 397, 400, 6 Cal. Rptr. 191, 193 (1960) ("every word in a statute is presumably intended to have some meaning and . . . a construction making some words surplusage is to be avoided").

24. "[The Supreme Court] has moved still further . . . by broadening the category of groups protected by equal protection, distilling from the principle of the moral irrelevance of race the more general principle of the moral irrelevance of any trait that reveals nothing about the moral worth or desert of a person." Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 Colum. L. Rev. 1023, 1065 (1979). This Note recognizes that the moral nature of sexual orientation is a subject of current debate. In order to limit examination of ethics to those directly concerning the issues presented, this Note makes the assumption that sexual orientation is morally neutral and represents a variable of which homosexuality, heterosexuality, and bisexuality constitute values of equal worth.

25. For an examination of the similarities between homosexuals and racial and ethnic minorities, see Paul, Minority Status for Gay People: Majority Reaction and Social Context, in Homosexuality: Social, Psychological, and Biological Issues 351 (1982).

26. See, e.g., Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .").


28. "It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination be-
half the states have criminalized same-sex consensual sexual conduct suggests that discrimination on the basis of sexual orientation is "condoned through law, permitted by law, and sometimes required by law." On the other hand, recent developments indicate a willingness to recognize and remedy discrimination suffered on the basis of sexual orientation. For example, the California Supreme Court has held that arbitrary discrimination in employment on the basis of sexual orientation violates the equal protection clause of the State constitution. Furthermore, ordinances banning discrimination on the basis of sexual orientation are currently in force in a number of municipalities including Berkeley, Los Angeles, and San Francisco. In addition, the American Bar Association recently passed a resolution urging the adoption of laws prohibiting discrimination on the basis of sexual orientation. Finally, commentators have argued for the use of the equal protection clause of the fourteenth amendment of the United States Constitution to prohibit cause of age, race, creed, color, . . . sex, national origin, ancestry [or] sexual orientation . . . ." Wis. Stat. Ann. § 111.31(2) (West 1988). "Employment discrimination because of sex includes . . . [discrimination] against an individual in promotion, compensation or in terms, conditions or privileges of employment because of the individual's sexual orientation . . . ." Id. § 111.36(1).


32. See, e.g., BERKELEY, CAL., MUNICIPAL CODE § 13.28.030 (1978) (unlawful practice to discriminate in employment on basis of sexual orientation); Id. § 13.28.040 (unlawful to discriminate on basis of sexual orientation in certain real estate transactions); Id. § 13.28.050 (1985) (unlawful for business establishments to discriminate on basis of sexual orientation); LOS ANGELES, CAL., MUNICIPAL CODE §§ 49.72-49.74 (1979) (unlawful to discriminate on basis of sexual orientation in employment, certain real estate transactions, and in business establishments); SAN FRANCISCO, CAL., POLICE CODE §§ 3303-3305 (1985) (unlawful to discriminate on basis of sexual orientation in employment, certain real estate transactions, and public accommodations). See also Meeker, Dombrink & Geis, State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation, 10 U. DAYTON L. REV. 745, 756-63 (1985).

33. See San Francisco Banner Daily J., Feb. 7, 1989, at 1, col. 5. The resolution reads: "Be it resolved, that the American Bar Association urges the federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations. Sexual orientation means heterosexuality, bisexuality and homosexuality." Id.
discrimination based upon sexual orientation, and a recent, but overruled, federal decision indicates that plaintiffs charging discrimination on the basis of sexual orientation may present a constitutional claim based on the equal protection clause.

Arguably, civil rights are distinguishable from a judge's "right" to sit on a given case. An argument has been made to the contrary, however, drawing upon the United States Constitution and civil rights considerations, in response to an attempt to disqualify the judge in a federal case. In *Idaho v. Freeman*, the United States Department of Justice, as counsel for the defendant, unsuccessfully moved to disqualify the trial court judge from a case challenging the Idaho Legislature's rescission of its prior ratification of the proposed Equal Rights Amendment. The basis for the motion was the judge's position as Regional Representative in the Church of Jesus Christ of Latter-day Saints, which publicly opposed ratification of the Equal Rights Amendment. The Department of Justice attempted to distinguish the motion from one based on a judge's religious membership and moved on the relatively narrow ground that due to the judge's position in the church, his impartiality might reasonably be questioned.

Two commentators criticized and refused to accept the distinction between the judge's church membership and his church position in their examination of the issue and argued against disqualification based on article VI and the first amendment of the Constitution. The authors asserted that disqualification of a judge on the basis of his religion amounted to an unlawful infringement of the free exercise of religion and


37. Id. at 35. Subsequently a similar motion was made by defendant-intervenors, the National Organization of Women, which also was denied in *Idaho v. Freeman*, 507 F. Supp. 706 (D. Idaho 1981).

38. "The government did not allege and would not allege that the fact of being a Mormon (or a Catholic or a Baptist) would be sufficient grounds for questioning a judge's ability to be impartial." Letter from Benjamin R. Civiletti to Senator Orrin Hatch (Oct. 9, 1979). It should be noted that section 170.2(a) would presumably have no application to either situation in California because the statute appears to apply only when the litigation involves the rights of a minority group to which the judge belongs. *Freeman* did not involve the rights of Mormons, but rather involved the Equal Rights Amendment, an issue upon which the Church had taken a stand.

a violation of the prohibition against a religious test as a qualification for public office.40

One might reasonably question, however, whether application of civil rights law to the issue of judicial disqualification is even appropriate. Applying constitutional law and legal theory from the context of civil rights legislation and litigation to the question of the scope of section 170.2(a) is of little value because the latter involves an inquiry into the proper grounds for judicial disqualification, not the right to equal treatment in the area of employment, housing, and public accommodations.41 Ethics impose burdens upon judges that curtail the constitutional freedoms that other persons enjoy without restriction.42 Furthermore, the injection of civil rights considerations into an examination of the proper bases for judicial disqualification may lead the analysis away from the goals of judicial disqualification law—the existence and appearance of an impartial judiciary.43

For these reasons, an inquiry based upon the principles of judicial disqualification law is preferable to one drawing upon scant evidence of legislative intent. Therefore, the focus of this Note turns to the principles of judicial disqualification law to address the issue of the scope of section 170.2(a) with regard to a judge's sexual orientation.

II. The Principles of Judicial Disqualification Law

While different statutes govern disqualification of federal judges and the judges of each state, several principles render this body of law a consistent whole. Most of these principles are reflected in the Code of Judicial Conduct, which, while without the force of law, was intended to guide the drafters of the statutes and the judges applying them.44

A. Actual Bias and Prejudice

"A judge should perform the duties of his office impartially and diligently."45 This strong interest in an impartial judiciary is reflected in ethical standards and statutes that require a judge to disqualify himself in cases in which he is actually biased or prejudiced with regard to the par-


42. See infra note 171 and accompanying text.

43. The issue of a judge's first amendment rights is discussed infra notes 168-75 and accompanying text.

44. "It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement." CODE OF JUDICIAL CONDUCT, Preface (1972).

45. Id. at Canon 3.
ties involved or the subject matter of the proceedings. Before examining the concept of bias more closely, a distinction should be made between bias as a result of a judge's interest in the proceedings and other types of bias.

Canon 3C(1)(c) of the Code of Judicial Conduct advises a judge to disqualify himself when he knows that he or a member of his family has a financial interest "or any other interest that could be substantially affected by the outcome" of the proceedings before him. Section 170.1 of the California Code of Civil Procedure establishes this standard by mandating disqualification in a number of instances in which a judge has an interest in the proceeding. These situations include: a financial interest in the subject matter or in a party, certain relationships to a party, and certain relationships to a party's attorney.

In addition to specific instances of interest requiring disqualification, California law also provides that a judge shall be disqualified if "the judge believes his or her recusal would further the interests of justice," or "the judge believes there is a substantial doubt as to his or her capacity to be impartial." More difficult issues surround the question of a judge's bias on the basis of factors that do not lend themselves to investigation as readily as, for example, a judge's family relationships or finances. These situations include bias directed toward a party, or a

46. See, e.g., 28 U.S.C. § 144 (1982) (authorizing a challenge based on bias or prejudice of judge). Neither "bias" nor "prejudice" is defined in the statute and "[i]ndeed, the entire case law may amount to no more than an effort to define these slippery concepts." Note, Meeting the Challenge: Rethinking Judicial Disqualification, 69 CALIF. L. REV. 1445, 1456 n.58 (1981) (authored by Edward G. Burg). For the purposes of this Note, "bias" and "prejudice" are treated as equivalent terms and both are encompassed in the term "bias."

47. CODE OF JUDICIAL CONDUCT Canon 3C(1)(c) (1972).

48. A judge shall be disqualified if any one or more of the following is true:

(3) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.


49. Id. § 170.1(a)(6)(A).
50. Id. § 170.1(a)(6)(B).

51. In her article examining appellate review of judicial disqualification decisions in the federal context, Professor Moore classifies situations meriting disqualification into two categories. The first concerns certain proscribed relationships with the matter in controversy, corresponding with what this Note terms "interest." The second encompasses both actual bias or prejudice concerning a party and the appearance of bias standard. See Moore, Appellate Review of Judicial Disqualification Decisions in the Federal Courts, 35 HASTINGS L.J. 829, 835-36
class of which a party is a member, and prejudice regarding the subject matter or merits of a given case.

Certainly a judge's impartiality may be compromised impermissibly in a case, even in the absence of some obvious relationship to the subject matter or parties. Nevertheless, use of this type of bias as a basis for judicial disqualification has been criticized on the ground that it "affords too great an opportunity for unmerited attacks on judges," and that charges "not founded on some established relationship may easily be fabricated." Perhaps for this reason, standards for disqualification in this area have been drawn narrowly.

(1) Bias Toward a Party

In Baskin v. Brown, the defendants moved for disqualification of the trial judge on the ground of bias in a case brought to protect the rights of blacks to vote in Democratic primaries. On appeal, no error was found in the judge's refusal to disqualify himself in the face of an affidavit showing "at most, zeal for upholding the rights of Negroes under the Constitution and indignation that attempt [sic] should be made to deny them their rights." The court made clear that "[a] judge cannot be disqualified merely because he believes in upholding the law," and that "[p]ersonal bias against a party must be shown."

This basic limitation on the use of bias as grounds for judicial disqualification is present in both the Code of Judicial Conduct and California case law. For example, the court of appeal in In re Marriage of

(1984). According to Moore, the second type of case "differ[s] fundamentally" from the first "in the amount of discretion involved in determining the necessity of disqualification." Id. at 850.

52. In 1865, the Queen's Bench indicated in dicta that judicial disqualification should take place "[w]herever [sic] there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties," The Queen v. Rand, L.R.-Q.B. 230, 232-33 (1866). This statement appears to be the first suggestion of bias itself, as opposed to circumstances creating a presumption of bias, as grounds for judicial disqualification. Note, Disqualification of Judges for Bias in the Federal Courts, 79 HARV. L. REV. 1435, 1435 (1966).

53. Note, supra note 12, at 81. The author rebuts the attack by noting that the threat of prosecution for perjury appears to check fabricated charges of bias and that a potential for abuse is not an adequate reason to reject a desirable rule. See id. at 81-82.

54. 174 F.2d 391 (4th Cir. 1949).

55. Id. at 394.

56. Id.

57. "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party . . . ." CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972).

Fenton stated that "[t]o show bias or prejudice under [the disqualification statute], there must be declarations showing indications of personal bias or the existence of some fixed anticipatory prejudgment." While Fenton involved application of the predecessor of the present-day disqualification statute, the requirement that bias be personally directed toward a party most likely remains the standard under California disqualification law.

With this limitation in mind, the standard appears consistent with section 170.2(a), which contemplates charges of bias on the basis of common membership in a minority group rather than personal bias toward a party. Commentators have noted, however, some concerns that bias toward a class of which a party is a member may translate into actual bias toward that party and that bias of that type has been found a proper basis for judicial disqualification. For example, in Berger v. United States, the United States Supreme Court held that an affidavit filed by German-American defendants and stating facts that showed a clear bias on the part of the trial judge against Germans and German-Americans was sufficient to invoke operation of the federal disqualification statute. Significantly, the court found that "[t]he facts and reasons [the affidavit] states are not frivolous or fanciful but... they have a relation to the attitude of Judge Landis' mind toward defendants."
California's recognition of this type of bias is evident in Adoption of Richardson, which held that the trial judge should have disqualified himself on the basis of bias as revealed in a letter written by him concerning petitioners' fitness as adoptive parents. As the Richardson court noted:

Bias here equates with partiality. Here the judge had a fixed opinion of the unfitness of petitioners solely because they were deaf-mutes. He was under some influence which so swayed his mind in one direction as to prevent his deciding the case according to the evidence. This leaning or inclination against all deaf-mutes without regard to their character, abilities and demonstrated fine qualities is inconsistent with a state of mind fully open to conviction which the evidence might produce.

It is important to note that, in both Berger and Richardson, the bias found against a party was inferred on the basis of the judges' conduct, specifically, statements made by the judges themselves indicating a bias against the classes to which the parties belonged. This situation contrasts sharply with a charge of bias that is inferred, not from a judge's conduct, but from a judge's race, sex, ethnicity, or religion. Thus, the disqualification standard requiring actual bias toward a party, or a group of which a party is a member, is consistent with section 170.2(a), which precludes use of charges of bias based solely upon a judge's common membership in a minority group as a proper ground for disqualification.

The same consideration ought to apply to a judge's sexual orientation, which, in the absence of conduct or other circumstances to indicate bias toward a party, similarly should not be a ground for disqualification.

(2) Bias Toward the Subject Matter

In addition to bias directed toward a party, bias as to the subject matter of a case can compromise the impartiality of a judge and therefore may serve as a basis for disqualification. The concept of bias toward subject matter, as used here, poses difficult questions regarding the types

\[\text{id. at 28-29.}\]
\[67. \text{251 Cal. App. 2d 222, 59 Cal. Rptr. 323 (1967).}\]
\[68. \text{The letter stated in pertinent part:}\]
\[\text{Again we are confronted with a problem of deaf-mutes wanting to adopt a child. ...}\]
\[\text{I believe that this should be done immediately, and this adoption should be nipped in the bud before these unfortunate people get too attached to the child, as in my opinion, we are not doing right by the youngster in signing and approving an adoption to deaf-mutes.}\]
\[\text{id. at 229, 59 Cal. Rptr. at 327-28.}\]
\[69. \text{id. at 232, 59 Cal. Rptr. at 330.}\]
\[70. \text{See Berger, 255 U.S. at 28-29 (trial judge's statements referring to German-Americans); Richardson, 251 Cal. App. 2d at 227-29, 59 Cal. Rptr. at 326-28 (trial judge's statements and letter written by him to director of adoption bureau).}\]
of preconceptions that are permissible in the mind of the trial judge, and those that are not.

In In re Linahan, Judge Jerome Frank distinguished between what he termed "social value judgments" and idiosyncratic personal prejudices, finding that only the latter can preclude the level of impartiality required for a fair trial. He admitted, however, that even social value judgments are open to different interpretations by different judges in a given time period. Indeed, the "distinction between acceptable beliefs and forbidden personal considerations is hard to delineate." The drafters of the Code of Judicial Conduct, however, provide some guidance in this respect:

[Canon 3C(1)(a)] has gone through several formulations in drafting. At one time the language provided for disqualification if a judge "had a fixed belief concerning the merits." It was intended that a judge disqualify himself if he had made up his mind on the merits before he heard the case. The Committee was confronted, however, by the interpretation of many able judges and law professors that would require a judge to disqualify himself if he had a fixed belief about the law applicable to a given case. This interpretation was not intended; indeed, the Committee recognized the necessity and the value of judges' having fixed beliefs about constitutional principles and many other facets of the law. As a result of the apparent ambiguity of the proposed language, the Committee adopted instead the standard of "personal bias or prejudice."

Clearly, the type of bias addressed by the Code of Judicial Conduct does not include beliefs about the proper construction or application of a statute. The California Supreme Court recognized a similar interpretation of the standard in Andrews v. Agricultural Labor Relations Board. The Andrews court held that "the right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." Explaining the meaning of bias toward subject matter that would warrant disqualification, the court stated:

In an administrative context, Professor Davis has written that "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." This long established, practical rule is merely a recognition of the fact that anyone acting in a judicial role will have attitudes and preconceptions toward some of the legal and social issues that may come before him.

71. 138 F.2d 650 (2d Cir. 1943).
72. See id. at 652-53.
73. Id. at 652 n.8.
74. Leubsdorf, supra note 41, at 285-86.
75. E. THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 61 (1973).
77. Id. at 790, 623 P.2d at 155, 171 Cal. Rptr. at 594.
78. Id. (citations omitted).
While *Andrews* concerned disqualification of an administrative law officer, there is nothing in the opinion to suggest that these statements do not apply with equal validity to the disqualification of a judge. Additional support for this view of bias toward subject matter may be found in California Code of Civil Procedure section 170.2(c), which states that a judge's prior participation in the drafting or enactment of laws, the application or meaning of which is at issue in a given case, is not a ground for disqualification unless the judge believes that his prior involvement would raise a reasonable doubt in the public mind as to his ability to be impartial.79

In short, ideas regarding application or construction of a law are not the type of bias with which the standard is concerned.80 Rather, the definition of a "fixed anticipatory judgment"81 indicates a bias regarding the disposition of a given case that precludes an impartial decision based upon the presentation of evidence at trial. Such bias therefore includes a fixed belief regarding the facts of a given case.

Under this definition, the standard remains consistent with section 170.2(a) because common membership in a minority group ought not, in itself, indicate any greater likelihood to find certain facts, or decide cases a certain way, without a fair evaluation of the evidence offered at trial. Judges are expected to, and are, for the most part, successful at, laying aside their private views while sitting in an official capacity.82 Indeed, the public's confidence in the judiciary depends upon its expectation that judges will carry out their duties in an impartial manner.83 For the same

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79. The California Code of Civil Procedure provides:

It shall not be grounds for disqualification that the judge:

. . . .

(c) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.

CAL. CIV. PROC. CODE § 170.2(c) (Deering Supp. 1989).

80. See Laird v. Tatum, 409 U.S. 824, 835 (1972) (Rehnquist, J., mem., denying motion to recuse) ("proof that a Justice's mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias"); *Andrews*, 28 Cal. 3d at 791, 623 P.2d at 156, 171 Cal. Rptr. at 595 (1981) ("Not only would it be extraordinary to find a judicial officer who is totally without a thought on all issues, the discovery of such a rare intellectual eunuch would suggest an adverse reflection on his qualifications.").

81. "Prejudice imports the formation of a fixed anticipatory judgment as contradistinguished from those opinions which may yield to substantial evidence." Adoption of Richardson, 251 Cal. App. 2d 222, 232-33, 59 Cal. Rptr. 323, 330 (1967).

82. See infra note 124 and accompanying text.

83. This notion that public confidence in the judiciary requires a public perception of judges as willing and able to perform their judicial functions independent of their personal circumstances is one to which this Note makes reference more than once. See infra notes 124, 152-53 and accompanying text. While one might argue that if the public really did perceive
reason, a homosexual judge must be given the same presumption of competence and professionalism extended to judges in general. Therefore, the standard against actual bias toward the subject matter of a case does not preclude application of section 170.2(a) to a judge's sexual orientation.

In summary, both ethical standards and statutes recognize that actual bias can compromise the impartiality of a trial judge. In the absence of a pre-existing relationship to a party, an attorney, or the subject matter of a given case, however, the standards for disqualification are narrowly drawn. Bias must be directed personally toward a party or present a likelihood that facts will be found in a manner independent of the evidence offered at trial. Since membership in a minority group is not a sufficient indication of either type of bias, the standard is consistent with section 170.2(a) and is consistent with the statute's application to a judge's sexual orientation.

Notwithstanding section 170.2(a), actual bias may exist independent of a judge's membership in a minority group, in which case the judge is obligated to disqualify himself under California Code of Civil Procedure sections 170.1(a)(6)(A) and 170.1(a)(6)(B). Indeed, the California Senate Committee on Judiciary Report on Disqualification of Judges states that, in reference to section 170.2(a), "If a judge did feel himself so emotionally committed as to be incapable of detached judgement, he could disqualify himself for that reason." Nevertheless, a judge's race, sex, ethnicity, religion, or sexual orientation is not, in itself, a sufficient basis to infer actual bias to warrant disqualification. An attorney wishing to disqualify a judge because of his sexual orientation should be required to show specific examples of the judge's conduct or other circumstances to support her charge.

B. The Appearance of Bias

In addition to avoiding participation in any case in which a judge is actually biased, ethical standards and statutory law obligate him to avoid even the appearance of bias. For example, section 170.1(a)(6)(C) of the California Code of Civil Procedure requires that a judge be disqualified in this way, and judges could be expected to conduct themselves in an impartial manner, all of judicial disqualification law would be unnecessary, this Note takes the position that in certain circumstances judicial disqualification is warranted, but that membership in a minority group alone, including a sexual minority group, is not one of them.

84. See supra text accompanying notes 49-50.
85. SENATE COMM. ON JUDICIARY, REPORT ON DISQUALIFICATION OF JUDGES, supra note 22, at 5.
86. "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (1982); see also CODE OF JUDICIAL CONDUCT Canon 3C(1) (1972) ("a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned").
if, for any reason, "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." This concern with the appearance of bias arises from the observation that "[t]he effectiveness of the administration of justice depends in a large measure on public confidence" in the judicial system. To maintain public confidence in the judicial system, judges must appear to apply the law impartially.

In *United Farm Workers v. Superior Court*, the court of appeal held that the standard expressed in section 170.1(a)(6)(C) was an objective one, with the issue not limited to the existence of actual bias. The court also stated that the disqualification decision is to be based neither on the judge's view of his impartiality nor on the litigants' views, but that the judge in such a case "'ought to consider how his participation in a given case looks to the average person on the street.'"

Notwithstanding its emphasis on objective examination, application of the appearance of bias standard requires essentially subjective determinations. Because "[a]ppearance, after all, is generally in the eye of the beholder," disqualification decisions under this standard present the difficult task of deciding what facts reasonable people would view as indicative of bias. The reasonableness of doubts regarding a judge's impartiality will change with the moral and political attitudes of a given period, and the vagueness inherent in a concept of reasonableness al-

88. ABA SUBCOMM. ON UNJUST CRITICISM OF THE BENCH, AM. BAR ASS'N UNJUST CRITICISM OF JUDGES 1 (1986); see also S. LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES 5 (1984) ("Judges are customarily assisted only by bailiffs; like the Pope, they have no regiments. Consequently, in a democracy the enforcement of judicial decrees and orders ultimately depends on public cooperation.").
89. One commentator has stated that "in order to maintain public confidence the judiciary must not only appear to be impartial, but also to be, at least in a certain sense, moral." S. LUBET, supra note 88, at 7. See supra note 24 for the approach of this Note to the issue of the moral nature of sexual orientation.
91. *Id.* at 104, 216 Cal. Rptr. at 9.
92. *Id.* (quoting Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820 (1980)).
93. "[T]he finding of bias or its appearance is necessarily based on a subjective evaluation of the facts." Moore, supra note 51, at 850.
95. See Moore, supra note 51, at 837.
96. "The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." O.W. HOLMES, THE COMMON LAW 1 (1881).
allows for discretion in its application. In addition, the visibility of the case itself may affect application of the standard. One commentator even has suggested that the connection between judicial disqualification and public confidence in the judiciary actually may not be in "the appearance of justice being done, but rather in whether the public likes or dislikes disqualification outcomes."

For this inquiry, it should be understood that the appearance of bias standard theoretically would apply to a judge's sexual orientation regardless of whether it was a matter of public knowledge, notwithstanding the emphasis on public perceptions supporting the standard. This conclusion follows from both the words of the statute ("a person aware of the facts") as well as its judicial application. For example, in Stanford University v. Superior Court, defendants asserted that the assigned judge relied on inaccurate facts in disqualifying the trial judge in the case. The court stated that, "[i]n these circumstances we could properly remand the question of . . . disqualification for further inquiry into and consideration of the true facts." Thus, section 170.1(a)(6)(C) imputes knowledge of all relevant facts to the hypothetical observer contemplated by the statute. As undisclosed facts may at any time come into view, consideration of facts of which the public may be unaware is proper under a standard emphasizing appearance.

In deciding how to apply the standard under California law, federal experience in this area merits examination. Prior to the amendment of the federal judicial disqualification statute in 1974, federal judges were

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100. "Clearly the goal of [28 U.S.C. § 455(a)] is to foster the appearance of impartiality. This overriding concern with appearances . . . stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence." Potashnick v. Port City Const. Co., 609 F.2d 1101, 1111 (5th Cir. 1980), cert denied, 449 U.S. 820 (1980) (citation omitted).

The issue of a judge's public acknowledgment of his sexual orientation is examined more closely in the section on extrajudicial activities. See infra text accompanying notes 165-81.


102. Id. at 407, 219 Cal. Rptr. at 43 (emphasis added).

103. See also E. THODE, supra note 75, at 60 ("Any conduct that would lead a reasonable man knowing all the circumstances to the conclusion that the judge's 'impartiality might reasonably be questioned' is a basis for the judge's disqualification") (emphasis added).

104. See Note, supra note 63, at 745.

under a duty to sit on cases in which they were not disqualified.\textsuperscript{106} In amending the statute, Congress intentionally eliminated the "duty to sit" concept from existing judicial disqualification law, but emphasized that the basis for disqualification under the appearance of bias standard must still be reasonable.\textsuperscript{107} Furthermore, the statute was not to be read "to warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial."\textsuperscript{108} Accordingly, in \textit{Idaho v. Freeman},\textsuperscript{109} the court applied the statute by way of a balancing test including, on the one side, the litigant's right to an impartial tribunal and, on the other, a "presumption of qualification and the policy against allowing litigants to engage in judge-shopping."\textsuperscript{110}

Like Congress, courts in California have recognized the potential for abuse in judicial disqualification procedures by holding that they were not intended to be a device to delay judicial proceedings\textsuperscript{111} or to assist reluctant litigants in avoiding "a day of reckoning."\textsuperscript{112} Unlike the federal scheme, however, section 170 of the California Code of Civil Procedure imposes on a judge a positive duty to decide any proceeding in which he is not disqualified.\textsuperscript{113} For these reasons, a balancing approach seems especially warranted in passing upon a motion for disqualification brought under section 170.1(a)(6)(C).\textsuperscript{114}

\textsuperscript{106} "It is a judge's duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusation." Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964), \textit{cert. denied}, 379 U.S. 1000 (1965) (citation omitted).

\textsuperscript{107} While the proposed legislation removed the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. The present test, however, should not be used by judges to avoid sitting on difficult or controversial cases. At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to the possibility that those who would question his impartiality in fact are seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a \textit{reasonable} basis. \textit{See H.R. REP. NO. 1453, 93d Cong., 2d Sess., reprinted in} 1974 \textit{U.S. CODE CONG. & ADMIN. NEWS} 6351, 6355.

\textsuperscript{108} \textit{Id.}


\textsuperscript{110} \textit{Id.} at 35-36. In ruling on a similar motion filed subsequently by defendant-intervenors, which was also denied, the court stated that "if a judge disqualifies himself upon mere . . . allegation that his appearance of impartiality might be questioned, it would make the nonperemptive statute in effect peremptive and encourage judge-shopping." \textit{Idaho v. Freeman}, 507 F. Supp. 706, 733 (D. Idaho 1981).


\textsuperscript{112} People \textit{ex rel.} Air Resources Bd. v. Superior Court, 125 Cal. App. 3d 10, 17, 177 Cal. Rptr. 816, 819 (1981).

\textsuperscript{113} \textit{See CAL. CIV. PROC. CODE} § 170 (Deering Supp. 1989).

\textsuperscript{114} Chief Justice William Rehnquist of the United States Supreme Court has spoken of a judge who was "so sensitive to the appearance of impropriety that if he had so much as shaken hands at a large political gathering with one of the litigants who appeared before him,
Viewed in this light, section 170.2(a) is consistent with and clarifies the appearance of bias standard in section 170.1(a)(6)(C). Thus, a reasonable interpretation of the former statute is that any doubts as to a judge's impartiality that arise in a proceeding involving the rights of a racial, ethnic, religious, or sexual group solely by virtue of the judge's membership in the same group are not the "reasonable" doubts contemplated in section 170.1(a)(6)(C) mandating disqualification.

Because the purpose of the appearance of bias standard is to maintain public confidence in the judiciary, one could argue that section 170.2(a) should not apply to a judge's sexual orientation. The argument would contend that the doubts regarding a homosexual judge's impartiality are reasonable and would be widely held by members of the public of which homosexuals comprise a decided minority. While the reasonableness of such doubts requires a subjective determination, the idea that a majority of people would harbor them is supported by the observation that homosexuality prompts a "high degree of fear and contempt from society at large." This argument becomes even stronger if one accepts the idea of a connection between public confidence and public approval of disqualification outcomes.

While a quick reading of United Farm Workers might lead one to conclude that the appearance of bias is to be measured through the eyes of "the average person on the street," the more reasonable interpretation is that the court used the phrase not to characterize the quality of the viewpoint, but to emphasize that neither the viewpoint of the judge nor that of the parties is to be considered. In fact, the enactment of section 170.2(a) argues strongly that the reasonable doubts comprehended by the appearance of bias standard do not include those resulting from the ignorance and prejudices of the person on the street.

A California Senate Committee on Judiciary Report on the bill that included section 170.2(a) states that motions for judicial disqualification...
based upon a judge’s membership in a minority group are "damaging to the public confidence in the judiciary." 121 Because the judiciary includes members of various minorities, questioning a judge’s ability to be impartial on the basis of such membership damages the public’s confidence in the judicial system as a whole. 122 As the judiciary also includes both homosexual and heterosexual judges, 123 this consideration applies with equal force to a judge’s sexual orientation.

United States Supreme Court Justice Felix Frankfurter stated that "on the whole judges do lay aside private views in discharging their judicial functions. This is achieved through training, professional habits, self-discipline and that fortunate alchemy by which men [and women] are loyal to the obligation with which they are entrusted." 124 As long as the judiciary continues to be made up of men and women of different sexual orientations, the suggestion that a judge’s sexual orientation is likely to affect his impartiality damages the public’s confidence in the judicial system and places little faith in a judge’s ability to perform his duties in an impartial manner independent of personal considerations.

C. Extrajudicial Knowledge of Facts

The Code of Judicial Conduct gives several examples of situations in which a judge is obligated to disqualify himself, including instances in which he has "personal knowledge of disputed evidentiary facts concerning the proceeding." 125 The obvious purpose of such a standard is to avoid the risk of prejudging cases on the basis of facts that the judge knows rather than on facts presented at trial.

California has codified this standard in essentially the same terms in section 170.1(a)(1). 126 One should note that sections 170.2(a) and 170.1(a)(1) operate independently of each other. This fact means that, for example, a female judge need not disqualify herself from sitting on a sex discrimination case on the basis of her sex, but has a duty to do so if she personally witnessed any activity that will be testified to at trial. In other words, while a judge who is a member of a minority group need not disqualify himself for that reason alone, disqualification is nevertheless

121. Id.
122. "[T]he increased frequency of disqualification or suggested disqualification . . . might arguably tend to undermine public confidence in the judiciary by disparaging the general impartiality of judges." Note, supra note 63, at 747.
123. See supra note 17 and accompanying text.
125. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1972).
126. "A judge shall be disqualified if any one or more of the following is true: (1) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding." CAL. CIV. PROC. CODE § 170.1(a)(1) (Deering Supp. 1989).
warranted by reason of extrajudicial knowledge, as mandated by section 170.1(a)(1).127

For this analysis, a question that merits consideration is whether the principle mandating disqualification for extrajudicial knowledge of disputed facts precludes the application of section 170.2(a) to protect against disqualification solely on the ground of sexual orientation. Does a proceeding alleging sexual orientation discrimination necessarily mean that a judge who shares his sexual orientation with that of the plaintiff would possess extrajudicial knowledge of facts in a way in which, for example, a black judge presiding over a case involving racial discrimination does not?

While sexual orientation has been the subject of extensive study, no generally accepted explanation of its nature and origins exists.128 For this reason, one might defend the disqualification of a homosexual judge in the hypothetical case on the ground that he possesses extrajudicial knowledge from his own experience of what are likely to be disputed factual issues at trial, namely, the characteristics of, and cause of the plaintiff’s sexual orientation. Upon close examination, however, the argument does not withstand attack.

The nature and origins of sexual orientation are unlikely to be disputed factual issues in cases alleging sexual orientation discrimination brought in California courts. This conclusion follows from an examination of recent litigation on the subject of such discrimination. For example, in Gay Law Students Association v. Pacific Telephone & Telegraph, the California Supreme Court held that the equal protection clause of the California Constitution bars the state and quasi-governmental entities from arbitrarily discriminating against homosexuals in employment decisions without a showing that an individual’s homosexuality renders him unfit for the job.130 Subsequently, the court in Hubert v. Williams131 held that homosexuals are protected by the Unruh Civil Rights Act,132 which prohibits discrimination by any business establishment in California.133 Examination of these opinions and others in more recent cases in

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127. The California Senate Committee on the Judiciary has recognized that a judge to whom section 170.2(a) applies still may have to disqualify himself under other provisions. SENATE COMM. ON JUDICIARY, REPORT ON DISQUALIFICATION OF JUDGES, supra note 22, at 5.

128. See Note, supra note 29, at 817 & nn.134-35.


130. Id. at 467, 595 P.2d at 597; 156 Cal. Rptr. at 19.


132. “No business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, refuse to buy from, sell to, or trade with any person in this state because of the race, creed, religion, color, national origin, sex, or blindness or other physical disability of the person. . . .” CAL. CIV. CODE § 51.5 (Deering Supp. 1989).

133. Hubert, 133 Cal. App. 3d at Supp. 5, 184 Cal. Rptr. at 163.
which sexual orientation discrimination has been alleged, reveals that an inquiry into the nature of homosexuality in general, or plaintiff's sexual orientation in particular, played no part in finding whether the plaintiff in each case was entitled to relief from the court. Thus, it is unlikely that such an inquiry would be undertaken in litigation of this type brought in California courts.

Even if one posits a case in which the nature of the plaintiff's sexual orientation is put at issue by a defendant claiming that it renders her unfit for the job under the standard set in Gay Law Students, a homosexual judge should not be disqualified on the basis of extrajudicial knowledge of facts for two reasons.

First, depending on the nature of the evidence offered at trial, an application of the legal standard in Gay Law Students could be subject to appellate review, which is not bound by the trial court's determination, thus decreasing the need for disqualification of the trial judge. Second, the fact that sexual orientation is experienced differently by different people makes it reasonable to assume that a homosexual judge has no special insight into the sexual orientation of the homosexual plaintiff. In this respect, it is significant that section 170.1(a)(1) states that


135. "In theory, a determination is one of ultimate fact if it can be reached by logical reasoning from the evidence, but one of law if it can be reached only by the application of legal principles." Board of Educ. v. Jack M., 19 Cal. 3d 691, 698 n.3, 566 P.2d 602, 606 n.3, 139 Cal. Rptr. 700, 704 n.3 (1977). While a finding of the type discussed may rest to a large extent on purely factual matters, it is also possible that the facts in such a case may not be in dispute. For example, plaintiff's sexual orientation and sexual activities may be admitted and disagreement may revolve around the question of whether they render him unfit to teach. In such a case, the reviewing court may decide that it is not bound by the lower court's determinations. See Leslie Salt Co. v. San Francisco Bay Conservation and Dev. Comm'n, 153 Cal. App. 3d 605, 611, 200 Cal. Rptr. 575, 578 (1984) (where facts are not in significant dispute, reviewing court is not bound by trial court's conclusions of law). At any rate, "the line between fact and law is impossible to draw with precision," and "a court may, in the guise of examining questions of law, interfere with the fact-finding power of the trial judge." 9 B. WITTEN, CALIFORNIA PROFESSIONALS § 241 (3d ed. 1985).

136. "[T]he need for disqualification decreases by the extent to which the judge's rulings in the case are limited to purely legal matters." United Farm Workers of Am. v. Superior Court, 170 Cal. App. 3d 97, 104, 216 Cal. Rptr. 4, 10 (1985).

137. For example, people vary widely in terms of the age at which they become aware of their sexual orientation. See Note, supra note 29, at 818 n.138.

138. Results of a research project involving approximately 5000 homosexual respondents led authors Bell and Weinberg to conclude that "[t]here are 'homosexualities' and there are 'heterosexualities,' each involving a variety of interrelated dimensions," and that "[b]efore one can say very much about a person on the basis of his or her sexual orientation, one must make a comprehensive appraisal of the relationships among a host of features pertaining to the person's life." A. BELL & M. WEINBERG, HOMOSEXUALITIES 219 (1978).
"[a] judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge [is] likely to be a material witness in the proceeding.\textsuperscript{139} It stretches reason to think that the homosexual judge could be called as a material witness in such a case simply because his sexual orientation is the same as that of one of the parties.

In short, the inquiry undertaken by the trial court in the hypothetical case alleging sexual orientation discrimination is unlikely to include an examination of the nature of plaintiff's sexual orientation. Even if it does, it may be subject to a plenary standard of review, weakening the need for disqualification of the trial judge. Furthermore, it is illogical to suggest that a homosexual judge of a given sexual orientation has special knowledge of a homosexual plaintiff's sexual orientation such that the judge would be qualified to testify to those facts as a material witness. For these reasons, application of section 170.2(a) to sexual orientation is not threatened by the standard mandating disqualification when the judge has extrajudicial knowledge of disputed evidentiary facts.

D. The Rule of Necessity

The rule of necessity arises from the obvious requirement that, in a legal proceeding, some judge must sit. A classic example of the rule's operation is in a hypothetical suit seeking to increase judicial pay, since, "all judges have a financial interest in the result, so none need withdraw, whatever the disqualification statutes may say to the contrary."\textsuperscript{140} Parliament recognized the rule in 1743 by providing that justices of the peace were not to be disqualified from certain cases on the basis of their status as taxpayers.\textsuperscript{141} The rule has been applied in both state and federal courts,\textsuperscript{142} and the United States Supreme Court has referred to its

\textsuperscript{139} CAL. CIV. PROC. CODE § 170.1(a)(1) (Deering Supp. 1989). It is highly unlikely that a homosexual judge would have knowledge of a litigant's sexual orientation such that he would be qualified to testify as a material witness. Indeed, any judge can reflect upon his sexual orientation in an effort to gain insight into the sexual orientation of another, but there is no guarantee that such an exercise will give the judge actual insight.

\textsuperscript{140} Leubsdorf, supra note 41, at 241.

\textsuperscript{141} Whereas Doubts have arisen whether, according to the Laws and Statutes now in Force, his Majesty's Justices of the Peace may lawfully act in any Case relating to the Parishes or Places to the Rates and Taxes of which such Justices respectively are rated or chargeable . . . be it enacted . . . That it shall and may be lawful to and for all and every Justice or Justices of the Peace . . . to make, do and execute all . . . Things appertaining to their Office . . . notwithstanding that any such Justice or Justices . . . is or are rated to or chargeable with the Taxes, Levies, or Rates within any such . . . Place affected . . .

16 Geo. 2, ch. 18, § 1 (1743).

\textsuperscript{142} See, e.g., Pilla v. American Bar Ass'n, 542 F.2d 56, 58-59 (8th Cir. 1976) (concerns with judges' bias as members of the legal profession in a suit claiming a right to be represented by lay counsel must yield to necessity); Atkins v. United States, 556 F.2d 1028, 1035-40 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) (judges' indirect interest in action brought by federal judges to recover compensation due them did not operate to disqualify them from
continuing validity in holding that the federal judicial disqualification statute "was not intended by Congress to alter the time-honored rule."\textsuperscript{143}

California has recognized the rule in holding that the state supreme court was qualified to hear and determine the issues arising from a case challenging the constitutionality of legislation that limited cost-of-living increases for judicial salaries, notwithstanding the judges' financial interest in the outcome:

The rule of necessity provides that a judge is not disqualified from adjudicating a cause because of personal financial interest if there is no other judge or court available to hear or resolve the cause. It is immediately apparent that all California judges have at least an involuntary financial interest in this case. To disqualify one would disqualify all, depriving them and their surviving spouses of opportunity to litigate their case.\textsuperscript{144}

In \textit{Blank v. Sullivan & Cromwell},\textsuperscript{145} the defendant in a sex discrimination case moved for disqualification of the trial judge on the basis of, among other factors, the judge's race, sex, and activities prior to taking the bench including her work as an attorney on behalf of blacks who suffered racial discrimination.\textsuperscript{146} In denying the motion, the federal district judge stated that "if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds."\textsuperscript{147}

It is perhaps in the context of a sex discrimination suit that the operation of the rule of necessity to preclude a judge's disqualification on the basis of a personal characteristic is most obvious. A judge is either male or female and, if one is prepared to accept the notion that a female judge is likely to be biased toward a female plaintiff,\textsuperscript{148} it can be argued with equal force that a male judge is likely to be biased against the plaintiff. In

\textsuperscript{143} United States v. Will, 449 U.S. 200, 213-17 (1980).
\textsuperscript{144} Olsen v. Cory, 27 Cal. 3d 532, 537, 636 P.2d 532, 535, 178 Cal. Rptr. 568, 571 (1980) (citation omitted).
\textsuperscript{146} \textit{Id.} at 4.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} A recent article examining San Francisco Superior Court Judge Ollie Marie-Victoire's experience with judicial disqualification states that some of the attorneys who have filed motions for peremptory disqualification against her said that "Marie-Victoire sides with women and often comes out on the side of women plaintiffs in sexual harassment suits." \textit{S.F. Judge Repeatedly Disqualified}, San Francisco Banner Daily J., Feb. 3, 1989, at 6, col. 5. This
short, no judge is available whose impartiality cannot be questioned on the basis of his or her sex.

While a judge's sex, as a variable that admits of two values more or less evenly distributed in the population, seems particularly well-suited to such an analysis, the same consideration may apply in other contexts. If a black judge's impartiality is questioned on the basis of race in a suit brought by a black plaintiff charging racial discrimination, one could argue on the same basis that a white judge is likely to be biased against the plaintiff. Similarly, it cannot be said with certainty that a heterosexual judge is more likely to be impartial than a homosexual judge in a case in which a homosexual plaintiff is charging discrimination on the basis of sexual orientation.

The purpose of this discussion is not to imply that "being Jewish implies being anti-Catholic, or being Catholic implies being anti-Protestant," but rather to illustrate the impracticalities of disqualifying judges on the basis of personal characteristics like race, sex, ethnicity, and religion. Characterization of parties along, for example, racial lines, in order to cast a case in racial terms may be possible only by turning a blind eye to the actual facts. In addition, a presumption of bias on the basis of these personal characteristics argues for a classification of both judges and cases and for an elaborate system to assign cases to only those judges who are devoid of any characteristic deemed to indicate a likelihood of bias. Not only is the suggestion impractical, but it damages public confidence by presuming that judges are unable to set aside their private views in deciding cases.

In this way, the rule of necessity supports section 170.2(a) and its extension to a judge's sexual orientation. As every judge has a race, a sex, an ethnicity, and a sexual orientation, to doubt the impartiality of any judge on the basis of such characteristics is to question the impartiality of all. Therefore, "necessity" requires that facts supporting judicial disqualification exist independently of such personal characteristics.

One may argue that the rule of necessity does not operate to preclude motions for disqualification based on a personal characteristic of a judge in certain situations where it is possible to find a judge without the "suspect" characteristic to hear the case. For example, an Irish-American judge could be found to sit on a case in which discrimination on the basis of the plaintiff's Armenian ancestry is alleged. In the strictest sense, the rule seems to support this conclusion. "Necessity," however,

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Note takes no position as to whether such motions are made on the basis of Judge Marie-Victoire's sex, or whether such is an element in the attorneys' perceptions of bias.


150. See id. at 163 n.7.

151. See supra note 122 and accompanying text.

152. While one may not be able to say that every judge has a religion, it could fairly be said that every judge has "a view of religion." See Leubsdorf, supra note 41, at 241.
may preclude such motions in order to prevent a burden upon the judiciary of the type discussed and to preserve the public’s perception of the judiciary as made up of men and women willing and able to preside over cases in an impartial manner.\textsuperscript{153}

E. Extrajudicial Activities

Judges may be subject to more restrictions on their extrajudicial activities than any other class of government officers.\textsuperscript{154} Some of the special duties imposed on members of the judiciary by the Code of Judicial Conduct include avoiding the appearance of impropriety in a judge’s activities,\textsuperscript{155} regulating extrajudicial activities to minimize a risk of conflict with a judge’s judicial duties,\textsuperscript{156} and refraining from political activity inappropriate to the judicial office.\textsuperscript{157} On the other hand, “[a] judge may engage in activities to improve the law, the legal system, and the administration of justice.”\textsuperscript{158}

Case law suggests that, while a judge’s race or sex, for example, would not be grounds for disqualification in itself, under section 170.2(a), extrajudicial activity in combination with the personal characteristic presents a different consideration.\textsuperscript{159} One question that should be addressed is whether public acknowledgment of one’s sexual orientation constitutes activity sufficiently political to defeat application of section 170.2(a) to, for example, a self-acknowledged homosexual judge on the ground that the inquiry is no longer limited to sexual orientation alone, but now includes consideration of the political nature of public acknowledgment and the media visibility of a public official who has “come out of the closet.”

Advocates of equal rights for homosexuals have invoked the first amendment rights to speech, expression, and association to protect “a gay person’s public acknowledgment of her homosexuality, the advocacy of a gay lifestyle or of gay rights, the public assembly of groups of gay

\textsuperscript{153} What may appear to be a loose interpretation of the rule finds some support in the observation that “[n]ecessity may . . . be the reason why judges are rarely disqualified for preappointment activities and views not involving the same case before the court,” and that, in such cases, “the ‘necessity’ principle is likely a determination that it is good to have judges who have known action and passion.” \textit{Id.}


\textsuperscript{155} \textbf{CODE OF JUDICIAL CONDUCT} Canon 2 (1972).

\textsuperscript{156} \textit{Id.} at Canon 5.

\textsuperscript{157} \textit{Id.} at Canon 7.

\textsuperscript{158} \textit{Id.} at Canon 4.

people, and gay political activity."160 The California Supreme Court recognized in *Gay Law Students Association v. Pacific Telephone and Telegraph*161 that an "important aspect of the struggle for equal rights is to induce homosexual individuals to 'come out of the closet,' acknowledge their sexual preferences, and to associate with others in working for equal rights."162 It is significant that the court found that charges that the defendant discriminated in particular against persons who identified themselves as homosexual alleged a violation of sections 1101 and 1102 of the California Labor Code, which prohibits an employer from directing or influencing an employee's political activities.163 While not dispositive, the decision does lend strong support to the characterization of coming out as political activity.164

Rather than seeking a definitive answer to the question of whether coming out is political activity, it seems more useful to ask whether it is the type of extrajudicial activity that is discouraged by the Code of Judicial Conduct. One commentator has classified policy justifications for restrictions on judges' extrajudicial activities into four broad categories: avoiding the appearance of bias; maintaining public confidence in the judiciary; ensuring that judges are not distracted from their duties; and maintaining the separation of powers.165 As a judge's public acknowledgment of his sexual orientation poses no threat to the maintenance of the separation of powers or to the concern that the judge's time and energy may be compromised, only the justifications of avoiding the appearance of bias and maintaining public confidence in the judiciary need to be examined.

Notwithstanding the political character of "coming out," a distinction must be made between public acknowledgment of one's sexual orientation and active involvement in a political cause.166 While the latter

160. Note, supra note 34, at 1292-93.
162. Id. at 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32-33 (1979).
163. Id. at 488, 595 P.2d at 611, 156 Cal. Rptr. at 33. The California Labor Code states that "[n]o employer shall make, adopt, or enforce any rule, regulation, or policy . . . controlling or directing, or tending to control or direct the political activities or affiliations of employees," and that "[n]o employer shall coerce or influence or attempt to coerce or influence his employees . . . to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity." CAL. LAB. CODE §§ 1101(b), 1102 (Deering 1976).
164. As one commentator has observed:
   Going public . . . was seen as a way both of strengthening one's own sense of being gay and of inspiring others to 'come out' (a term the liberationists used to mean not only acknowledging one's homosexuality, becoming familiar with the gay subculture, and presenting oneself as gay to other homosexuals, but also being proud and open about one's homosexuality and identifiably involved in the gay community).

165. See S. LUBET, supra note 88, at 5.
166. See supra note 159 and accompanying text.
may demand the judge's time and energy so as to distract him from his duties, coming out may consist of no more than a declaration of one's sexual orientation, or even the absence of a denial of another's assertion, or the open forming of attachments indicative of a particular sexual orientation. If a proper goal of a system of judicial ethics is to distinguish between extrajudicial activity that is harmless to the judiciary and that which actually interferes with a judge's duties,\textsuperscript{167} the distinction merits consideration.

California Supreme Court Justice Stanley Mosk has stated that judges, as a class, are not excluded from the basic constitutional free speech protections that Californians enjoy generally.\textsuperscript{168} In In re Stevens,\textsuperscript{169} the California Supreme Court upheld the decision of the Commission on Judicial Performance and ordered the public censure of Judge Stevens for the persistent use of derogatory racial and ethnic epithets, notwithstanding the Commission's findings that most of the remarks occurred in chambers and that Judge Stevens at all times performed his judicial duties free from actual racial, ethnic, or sexual bias. In his sole dissent, Justice Mosk criticized the Commission for "seeking to impose on Judge Stevens its self-determined standard of appropriate taste and style in language," and, in so doing, "reveal[ing] an imperious disregard for constitutional guarantees."\textsuperscript{170}

While such reliance on the first amendment may be misplaced in view of the restrictions on a judge's speech imposed by the Code of Judicial Conduct,\textsuperscript{171} the first amendment does have some application to members of the judiciary and perhaps "a judge's right to freedom of expression and association must be balanced against the public's right to an impartial judiciary."\textsuperscript{172} In Stevens the interest in preventing prejudice to the judicial system that would result from the public's perception of racial bias\textsuperscript{173} may have outweighed the judge's freedom to use racially derogatory language. There are, however, "other cases where a judge's right to freedom of expression and association outweighs the need to regulate the conduct in question,"\textsuperscript{174} when, for example, the appearance of impartiality is not threatened. Certainly, a restriction on a judge's ability

\textsuperscript{167} S. LUBET, supra note 88, at 9.

\textsuperscript{168} Mosk, Judges Have First Amendment Rights, CAL. LAW, Oct. 1982, at 30, 76.

\textsuperscript{169} 31 Cal. 3d 403, 645 P.2d 99, 183 Cal. Rptr. 48 (1982).

\textsuperscript{170} Id. at 407, 645 P.2d at 101, 183 Cal. Rptr. at 50 (Mosk, J., dissenting).

\textsuperscript{171} See, e.g., CODE OF JUDICIAL CONDUCT Canon 7A(1)(b) (1972) (public endorsement of political candidates); Id. at Canon 5B(2) (solicitation of charitable contributions); Id. at Canon 3A(6) (public comment on pending or impending proceedings).

\textsuperscript{172} S. LUBET, supra note 88, at 42.

\textsuperscript{173} Stevens, 31 Cal. 3d at 405, 645 P.2d at 100, 183 Cal. Rptr. at 49 (Kaus, J., concurring).

\textsuperscript{174} S. LUBET, supra note 88, at 43.
to express himself regarding so personal a matter as sexual orientation raises serious first amendment concerns.\textsuperscript{175}

In \textit{Pennsylvania v. Local Union 542},\textsuperscript{176} defendants moved for disqualification of the district court judge from a case involving allegations of racial discrimination on the basis of his attendance and remarks made during a speech at a meeting of the Association for the Study of Afro-American Life and History. In an opinion denying the motion, Judge Higginbotham stated that the "thrust of [defendants'] rationale would amount to . . . a \textit{double standard} within the federal judiciary" with black judges being held to a stricter standard in discussing matters of human rights and race relations.\textsuperscript{177} Similarly, to hold that coming out is an extrajudicial activity precluding the protections afforded by section 170.2(a) to a publicly acknowledged homosexual judge would create a double standard in the judiciary by expecting homosexual judges to be more discreet in their personal lives than other judges.

Certainly judges are less free than other persons in forming social relationships and some "hard choices" may be required in doing so.\textsuperscript{178} It is unlikely, however, that even a strict interpretation of the standard would require that a judge cut himself off from family and friends without a strong showing that the suspect association seriously threatens public confidence in the judiciary or the judge's ability to perform his duties impartially. To hold that a homosexual judge's public acknowledgment of his sexual orientation is the type of activity discouraged by the Code of Judicial Conduct would, in effect, impose a requirement of secrecy on the judge, potentially far more damaging to public confidence in the integrity of the judiciary than the open admission of one's sexual orientation.

While maintaining public confidence in a fair and impartial judiciary may require that a judge "accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen,"\textsuperscript{179} the undesirability of isolating a judge from the society in which he lives\textsuperscript{180} supports the assertion that "[a] judge, like other people, is entitled to a normal social and private life."\textsuperscript{181} This right ought to include the freedom to form intimate relationships and, certainly, the freedom to express oneself openly regarding one's personal situation to the extent of publicly acknowledging one's sexual orientation.

\textsuperscript{175} See \textit{id.} at 48 ("interplay between the First Amendment and restrictions on judge's private lives ought to be subject to much continued examination").


\textsuperscript{177} \textit{id.} at 165.

\textsuperscript{178} Cribbet, \textit{The Public Activities of a Judge}, 51 CHI. B. REC. 78, 84 (1969).

\textsuperscript{179} \textit{CODE OF JUDICIAL CONDUCT} Canon 2 commentary, at 8 (1972).

\textsuperscript{180} See \textit{id.} at Canon 5A commentary; S. LUBET, \textit{supra} note 88, at 8.

\textsuperscript{181} H. LUMMUS, \textit{THE TRIAL JUDGE} 16 (1937).
Conclusion

Disqualification of a judge for bias continues to present problems in application and section 170.2(a) sheds welcome light on the question of what constitutes the type of bias that merits disqualification. In addition, section 170.2(a) limits the use of disqualification by stating that a judge's membership in a minority group, in the context of a case involving the rights of the same group, is not grounds for disqualification. While an examination of the legislative intent of the statute may not provide a definitive answer to the question of whether it properly applies to a judge's sexual orientation, such application is consistent with and supported by the principles of judicial disqualification law.

Actual bias remains a legitimate ground for judicial disqualification, but its proper use has been narrowly defined in the absence of certain preexisting relationships indicative of bias. For example, bias must be directed personally toward a party. This rule remains true even in the case of bias directed toward a class of which a party is a member. In addition, the type of bias toward the subject matter of a case that compromises a judge's impartiality does not include beliefs about a given construction or application of a law, but pertains to a likelihood to find certain facts independent of the evidence offered at trial. Given these definitions, the standard mandating disqualification in the case of actual bias or prejudice is consistent with section 170.2(a) and its application to sexual orientation. In short, neither a judge's race, sex, ethnicity, religion, nor sexual orientation is a sufficient basis upon which to allege actual bias.

Similar considerations apply to the appearance of bias standard. Doubts as to a judge's ability to be impartial must be reasonable for the standard to require disqualification. In addition, California judges are under a statutory duty to sit on cases in which they are not disqualified. While such a duty may or may not be equivalent to a presumption against disqualification, it certainly exists as a countervailing consideration, in view of the availability of a peremptory challenge. Because section 170.2(a) and section 170.1(a)(6)(C) were enacted as part of the same legislative package, it appears that doubts as to a judge's impartiality based solely on the judge's race, sex, ethnicity, or religion are not the reasonable doubts with which the standard is concerned. The importance of the public's confidence in an impartial judiciary demands that the same hold true for doubts based solely on a judge's sexual orientation.

182. "All jurisdictions have some disqualifications and all draw a line where they believe the privilege of disqualification may be abused." Frank, supra note 3, at 609.

183. CAL. CIV. PROC. CODE § 170.6 (Deering Supp. 1989). For an insightful critique of California's peremptory challenge system, see Note, supra, note 46, at 1469-80.
While a judge is obligated to disqualify himself in a proceeding in which he has extrajudicial knowledge of disputed facts, this standard does not become operative by virtue of a judge’s sexual orientation alone. The sexual orientation of any judge may or may not give him insight into the sexual orientation of a party, but it is highly unlikely that a judge could serve as a material witness solely by virtue of sharing his sexual orientation with a plaintiff alleging discrimination on that basis. Also, in a hypothetical case in which the nature of a plaintiff’s sexual orientation is disputed, an appellate court could review the lower court’s determination in a plenary manner and, consequently, the need for disqualification of the trial judge is decreased. Based on these considerations, this standard ought not preclude application of section 170.2(a) to a judge’s sexual orientation.

The rule of necessity, in its strict application, may require that a judge sit on a case notwithstanding an interest in the subject matter. It may be asserted that “necessity” also supports a statute precluding disqualification of a judge on the basis of personal characteristics like race, sex, ethnicity, religion, and sexual orientation. Finally, a judge’s public disclosure of his sexual orientation must be distinguished from active involvement in a political cause when determining whether it is the type of extrajudicial activity that is discouraged by the Code of Judicial Conduct. For several reasons, including a judge’s right to freedom of expression and association, it is reasonable to conclude that it is not.

“[D]isqualification is an issue to be decided by rational application of the governing standard to the facts of the case in a lawyer-like way,”184 and the same considerations that lead one to conclude that a judge’s race, sex, ethnicity, or religion is not a sufficient basis, in itself, to infer bias, apply with equal validity to a judge’s sexual orientation. The application of section 170.2(a) to a judge’s sexual orientation is consistent with and supported by the principles of judicial disqualification law.

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184. Rehnquist, supra note 114, at 713.