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Review of *The Appearance of Impropriety: How the Ethics Wars Have Undermined American Government, Business, and Society*, by Peter W. Morgan and Glenn H. Reynolds.

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THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY. By *Peter W. Morgan* and *Glenn H. Reynolds*. New York: The Free Press. 1997. Pp. xiii, 272. \$25.

Rameshwar Sharma needed cash to continue his research on two proteins, α_{2A} and α_{2GC} , so he turned to the federal government.¹ At the time he submitted his grant application, Sharma had completed a good deal of work on α_{2A} but very little on α_{2GC} . At some point while typing his forty-six page grant application, Sharma realized that repeatedly typing α_{2A} and α_{2GC} was annoying. To ease his pain, he created macro keys that he could hit whenever he wished to type either protein. Big mistake. On page twenty-one he hit the wrong key, inserting α_{2GC} where α_{2A} should have been.

No one on the National Institute of Health (NIH) review panel was fooled — they all knew that if Sharma really had done the work on α_{2GC} that his typo seemed to indicate, he would have trumpeted his progress. In addition, the surrounding discussion concerned α_{2A} .

Quite apart from the typo, the NIH panel denied Sharma's grant application. Had this been all that had happened to Sharma, he would have considered himself lucky. Instead, an anonymous accuser forwarded his application to the Office of Science Integrity (later the Office of Research Integrity (ORI)). After investigation, the ORI determined that his typo constituted scientific misconduct. The gist of the ORI's position was that Sharma was attempting to fatten his chances by fabricating his work product.

Three years later an appeals panel vindicated Sharma, concluding that his typo "was the result of a careless error" (p. 130). In the interim, the federal investigation closed his lab, forcing him to take an unsalaried position at an optometry college in Pennsylvania. He lived in a dorm. He made so little money that he had to pull his two children out of college and he was unable to attend his father's funeral in India. As Sharma himself put it, the entire ordeal had a "devastating effect" on his reputation and his career (p. 129).

Some Orwellian nightmare? Orwellian maybe, nightmare no. In the *Appearance of Impropriety*, Peter W. Morgan² and Glenn H. Reynolds³ present Rameshwar Sharma's splintered reputation and career as what remain after one passes through the enormous buzz

1. This entire story appears in Morgan and Reynolds's book. See pp. 128-30.

2. Member, Dickstein, Shapiro, Morin, & Oshinsky LLP.

3. Professor of Law, University of Tennessee College of Law.

saw created by the conjunction of the Ethics Establishment — the bureaucracies that police behavior in several of the largest segments of American society⁴ — and the appearance of impropriety standard — the ethical standard those bureaucracies apply to individual behavior. Morgan and Reynolds argue that each component alone has its problems, but that together they are devastating. The potent combination has affected areas other than science, including government, business, and academia. Although the authors are not the first to decry the appearance of impropriety standard,⁵ they are the first to analyze it in relation to the institutional context in which it operates, noting how that context magnifies its imperfections.

Despite the book's ambitious sweep, perhaps it is not ambitious enough. For example, Morgan and Reynolds fail to provide any foundation for their discussion by defining what they mean by ethical behavior.⁶ More specifically, Morgan and Reynolds fail to supply any one ethical yardstick against which society should measure its members' behavior. The authors flirt with several ethical constructs — the Golden Rule (pp. 37, 109), what amounts to an agency-cost definition (pp. 46, 74), and finally a motivational model or a model that examines the actor's motives (p. 36) — but they stop short of choosing one.⁷ To be fair, the authors did not set out to answer the age-old conundrum of what constitutes ethical behavior. But because they fail to ground their discussion in some ex-

4. Morgan and Reynolds identify Ethics Establishments in several areas of contemporary society. For example, in government, there is the independent counsel (pp. 75-80); in business, there is the enormous business ethics industry (p. 100); and in the natural sciences, there is the Office of Research Integrity (p. 127).

5. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.4 (1986); Cynthia M. Jacob, *A Polemic Against R.P.C. 1.7(C)(2): The "Appearance of Impropriety" Rule*, N.J. LAW., June 1996, at 23; Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1226-27 (1997). But see ANN McBride, *Ethics in Congress: Agenda and Action*, 58 GEO. WASH. L. REV. 451, 466-67 (1990) (arguing in favor of the appearance of impropriety standard).

6. For an example of an author struggling with this task in the appearance of impropriety context, see Robert F. Bauer, *Law and Ethics in Political Life: Considering the Cranston Case*, 9 J.L. & POL. 461 (1993) (dissecting the concept of self interest — essentially Morgan and Reynolds's agency-cost model below — in political ethics).

7. It may initially seem possible to shoehorn these three methods into one theory, and, in fact, many philosophers have attempted to do so. See generally JOHN HARSANYI, *Can the Maximin Principle Serve as a Basis for Morality?*, A CRITIQUE OF JOHN RAWL'S THEORY IN ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION 37 (Gerald Eberlein & Werner Leinfellner eds., 1976) (seeking to combine Rawls's "original position" with utilitarianism); HENRY SIDGWICK, *METHODS OF ETHICS* (photo. reprint 1980) (1874) (attempting to synthesize utilitarianism with other ethical methods). Most ethical philosophers, however, now believe that the methods, when developed in detail, lead to very different theories that can diverge sharply in some cases. See, e.g., J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 97-100 (1973) (giving examples of the clash between utilitarianism and Golden Rule-type ethics).

PLICIT definition of ethical behavior, their analysis at times feels superficial.⁸

In the end, the book's analysis inheres largely in its application of the adage "You get what you pay for" to present-day ethical discourse, in effect restating it to read "Ask for appearances, and appearances are what you will receive." It adorns that analysis with anecdotes ranging from the humorous to the outright scary.⁹ The book's general argument can be somewhat facile at times¹⁰ and might occasionally leave those desirous of more searching inquiry

8. For example, occasionally the authors seem to argue for an agency-cost model, *see infra* note 14 and accompanying text, by suggesting that inducing ethical behavior is merely a matter of aligning incentives. At one point they suggest that our legislators' incentives deviate from the collective good as a result of special-interest influence. P. 35. They further suggest that we should "engage in a meaningful debate as to which sorts of private influences are acceptable and which are not." *Id.* But even assuming that an agency-cost model is the correct basis for divining an ethical construct, it does not follow that "a meaningful debate" on special-interest influence is desirable or even possible. For in order to distinguish the good special-interest influence from the bad, one needs to define the "public good" — a very difficult task. What is the public good if not what emerges from a fight between special interests? One might argue that even in general a fight between special interests defines the public good, the process is distorted by the money they infuse into the system. But is this necessarily correct? If the special-interest groups raise their funds from individuals, maybe the dollars they dump into the system are representative of public support. Then again, maybe not. It is certainly possible that the current system is skewed toward the rich. Whatever is in fact the case, the point here is that the authors fail to discuss any of this.

9. The story with which I began this Notice, for example, certainly qualifies as scary. On the lighter side, Morgan and Reynolds recount William Safire's reaction to Senator Biden's "borrowing" some language from British Labour Party Leader Neil Kinnock in one of his speeches during the 1988 presidential race. Biden eventually had to withdraw from the race as a result. That's not the amusing part. What was funny was Safire's account of political plagiarism in general and his own small part in it. Speaking of Biden's speech, he said:

Maybe my familiarity with rhetorical borrowing has left me insensitive to the shock of recognition. I remember listening to John F. Kennedy's inaugural, with its stirring line "In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course." I had to admire the way Ted Sorensen evoked the rhythm of the line in the Lincoln first inaugural: "In your hands, my dissatisfied fellow-countrymen, and not in mine, is the momentous issue of civil war." (Kennedy subtly corrected Lincoln's redundancy of fellow-countrymen; that was especially astute.) What's wrong with such evocation? Winston Churchill, writing his ringing 1940 speech about defending his island by fighting on the beaches, in the streets, etc., recalled Georges Clemenceau's defiance in 1918: "I shall fight in front of Paris, within Paris, behind Paris." (Clemenceau, in turn, was paraphrasing marshal Ferdinand Foch on Amiens.) That sort of boosting — a less pejorative term than lifting and certainly far from plagiarizing, rooted in the Latin for "kidnaping" — is done all the time.

Pp. 145-46 (internal quotation marks omitted) (quoting William Safire, *No Heavy Lifting*, N.Y. TIMES, Sept. 27, 1987, § 6 (Magazine), at 12). Safire then told on himself. Evidently, when working as a speech writer for Richard Nixon, Safire "boosted" a phrase from Kennedy that he had taken from Adlai Stevenson that Stevenson had in turn lifted from Franklin D. Roosevelt. Safire started to feel a little guilty about it, so he called the author of FDR's speech to apologize. Instead of castigating Safire, the author confessed that he had in turn "boosted" it from a speech by Robert Ingersoll, nominating James Blaine for President in 1876. So much for originality in politics.

10. For example, the authors suggest that one way to foster personal and governmental responsibility is to shrink the federal government's responsibilities, both practically and constitutionally. P. 194. While this may be true, given current debates, it does not appear to be a solution easy, or arguably even possible, to implement.

dissatisfied. Nevertheless, what the book lacks in academic rigor, it makes up for in readability and intrinsic interest, and it leaves the reader with a graphic understanding of the dangers of the combination of the Ethics Establishment and the appearance of impropriety standard.

Part I of this Notice discusses Morgan and Reynolds's views on the appearance of impropriety standard. Part II engages in a similar examination with respect to the Ethics Establishment. Part III outlines the problems the authors identify as springing from the combination of the two. Finally, Part IV discusses some of the solutions that Morgan and Reynolds propose.

I. THE APPEARANCE OF IMPROPRIETY STANDARD

A. *Subverting the Standard*

The appearance of impropriety standard is just what it sounds like — an ethical standard that focuses on whether behavior *appears* improper, not on whether it is. At the heart of Morgan and Reynolds's arguments rests the plausible proposition that “a preoccupation with mere appearances inevitably leads to the concealment of substantive abuses” (p. 15). The problem springs not from an appearance standard per se but from the misuse that it invites (p. 8). In particular, the authors argue that an appearance standard is vulnerable to two perversions — *Petty Blifil* (pronounced Bliff-full) and *Grand Blifil*¹¹ — both of which distract us from the underlying substantive behavior.

Morgan and Reynolds use *Petty Blifil* to “describe the ease with which unscrupulous individuals use our ethical standards to attack relatively innocent individuals with accusations of ‘impropriety’” (p. 21). According to the authors, one of the most noteworthy examples of *Petty Blifil* occurred during the Savings and Loan (S&L) scandal. Federal Home Loan Bank Board Chairman Edwin J. Gray opposed bank deregulation in direct contravention to the wishes of several S&L operators, including Charles Keating. In an attempt to drive Gray out, Keating systematically funneled information on Gray's expense practices to the *Wall Street Journal*, and the *Washington Post*. Despite the fact that Gray was following past Bank Board practices, the press accused Gray of “being too close to the savings and loans he was supposed to be regulating” (p. 22). Sure enough, Gray left office, dragging his tattered reputation behind him. Keating, on the other hand, gave large gifts to Mother

11. Morgan and Reynolds borrow the term “Blifil” from a novel by Henry Fielding. See HENRY FIELDING, *THE HISTORY OF TOM JONES, A FOUNDLING* 615 (Martin C. Battestin & Fredson Bowers eds., Oxford Univ. Press 1975) (1749). Fielding wrote the book as an attack on appearance ethics in England during his own time, the Augustan Age (1660-1750). Blifil, who was adept at manipulating ethical appearances for his own benefit, was Fielding's villain.

Teresa and waged an antipornography war, all of which won him high acclaim. After the S&L edifice collapsed and the dust cleared, however, Keating found himself in jail and the “questions about the appearance of Gray’s expenses [were] supplanted by questions about exactly how many hundreds of billions of dollars the American taxpayer lost in what has been called the ‘worst public scandal in American history.’”¹²

Because the appearance of impropriety standard opens the door to this type of duplicity, the standard is counterproductive. Rather than encouraging ethical behavior, it can drive those who are truly interested in the public welfare — the Grays of the world — from the process only to make room for those “who are *so* determined to acquire power, or adoration, or whatever, that they will endure just about anything to get it” (p. 24).

Grand Blifil represents the corruption of the appearance standard on a grand scale. Grand Blifil consists of the manipulation of appearances to create the illusion of *institutional* propriety (p. 27). It results in two phenomena. First, requiring proper appearances encourages proper appearances rather than proper substance (p. 28). Second, in an effort to supply the proper appearance, even the best-intentioned may succumb to hiding unsightly facts (p. 29).

As to the first type of Grand Blifil, the authors point to campaign finance reform as one of the better examples (p. 30). In particular, they recount the Illinois state legislature’s attempts to control its members’ receipt of campaign funding. In response to an episode in which riverboat-gambling lobbyists pulled state representatives off the House floor to give them campaign contributions, the legislature passed a law making it illegal to give contributions on state property. The reason? It looked bad. The result? Lobbyists could continue to contribute as before, just not on state property. The authors argue that this case illustrates Grand Blifil’s tendency to “treat[] symptoms instead of causes” (p. 35) and to leave the underlying problems unchanged.

As an example of the second type, Morgan and Reynolds offer seasoned government bureaucrats’ desire to operate government orally rather than in writing (p. 29). Why do they refuse to write things down? It allows them to protect appearances by ensuring that no “less-than-rosy assessments of how things are going” show up later to splinter the illusion (p. 29). The problem with this practice “is that we cannot fix what we cannot see” (p. 29).

In short, the authors argue, albeit indirectly, that the appearance standard serves society poorly. Rather than triggering more searching inquiry, the authors contend that the appearance standard shifts

12. P. 23 (quoting MARTIN MAYER, *THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY* 1 (1990)).

our focus away from our underlying substantive problems as we each expend our time and energy trying to appear ethical and attempting to show that others do not. Consequently, it leaves those underlying problems unsolved. Finally, as in the case of Edwin Gray, it has a tendency to drive the truly ethical from the process because it can provide such a powerful tool to the unscrupulous.

B. *So Why Do We Have It?*

If the appearance standard is so counterproductive, why do we use it? Morgan and Reynolds provide several explanations for our love of form over substance (pp. 41-46). First, looking at form is easier than looking at substance.¹³ Deciding whether some behavior truly comports with our ethical standards is very difficult. One must know or learn about the intricacies of the arena in which the behavior occurred — say, business — to analyze whether what happened was in fact unethical. It is much easier to say: “Hmmm . . . that looks bad” and be done with it.

Second, it is safer (p. 43). As argued above, determining whether behavior is ethical is often complicated. One must analyze the behavior for its substance rather than its appearance. That substance provides others with a foundation from which to attack one’s determination. Appearances are like beauty, however — they are in the eye of the beholder. I can say that behavior *appears* improper without fear of someone else substantively proving me wrong. After all, my determination is nothing more than a statement of how the behavior appears to *me*.

Third, the relative nature of the standard rests well within the comfort zone of many Americans (p. 43). Since World War II, America’s professional and managerial classes have expanded. Much of the work these individuals do revolves around intangibles — legal concepts, public relations campaigns, and the like. This work makes them comfortable with the ephemeral appearance standard. In addition, even those who are not professionals live in today’s entertainment-oriented world — one that focuses heavily on appearance rather than substance. “It is hardly surprising that appearance ethics thrives amid such a culture” (p. 44).

Fourth, it can befriend the truly unethical (p. 44). The appearance standard is double-edged. Not only does it permit an accuser to magnify minor transgressions into major appearance problems,

13. P. 41. In saying that the appearance standard is easier, the authors do not mean to suggest that it is any easier for people to agree on what appears improper. Rather, they mean that it is easier for the critic to form an opinion; in other words, it takes less work and expertise to decide whether behavior looks improper than it does to determine whether behavior *is* improper.

but it also allows the unethical to reduce ethical offenses to mere appearance problems.

Finally, it's comforting (p. 45). Appearance ethics "gives the illusion of control and precision" (p. 45). Substantive analysis is more complex and therefore more uncertain. Whether one has committed a *true* ethical infraction can be difficult to ascertain, leaving the one doing the analyzing uneasy about her decision. The analysis — if one may call it that — of whether something *looks* bad seldom suffers from the same infirmity. In this sense, the fact that the appearance of impropriety standard is easier to administer, as argued above, makes it more comforting to those doing the administering.

C. *Problems with the Analysis*

While Morgan and Reynolds's account is powerful, it has its shortcomings. First, the authors fail to provide a foundational definition of ethical conduct. The absence of such a definition glosses over one of the main reasons why we may have settled for an appearance standard: necessity. We may need a simple, easy-to-understand, but somewhat superficial theory because we cannot agree entirely on what behavior is unethical.

Two examples of the authors' own passing dalliance with various standards illustrate the "necessity" explanation. At one stage in the book, the authors indicate that they define ethical conduct as that which comports with the Golden Rule (p. 109), while in another they define it as that which is consistent with a utilitarian-like¹⁴ agency-cost model¹⁵ (p. 46). The Golden Rule standard is straightforward: "Always treat others as you would like them to treat you."¹⁶ The agency-cost model requires a bit more explanation. It rests on the Millian view that ethical behavior is that which maximizes overall social welfare. Under this view, the individual is entrusted with the task of behaving in ways that maximize societal welfare. In effect, each individual serves as society's agent. Consequently, when an individual behaves in a way designed to increase personal welfare at the expense of societal welfare — creates an agency cost — he acts unethically.

14. Utilitarianism is "the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole." SIDGWICK, *supra* note 7, at 411.

15. Agency costs result from a divergence in incentives between an agent and a principal. In their simplest form, they result when a principal engages an agent to perform some task for him, but the agent acts with his own interests in mind instead. From the principal's perspective, the agent's failure to perform the task exactly as the principal would have wished results in costs to the principal. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 608 (3d ed. 1995) (discussing the "principal-agent problem").

16. *Matthew* 7:12.

These two standards are not necessarily coextensive. Consider wealth redistribution. The Golden Rule perhaps supports redistribution: if I were poor, I would prefer for a wealthy individual to share his wealth with me; therefore, if I am wealthy, I should share my wealth with someone less fortunate. The agency-cost method, on the other hand, may counsel against redistribution. If I value my wealth more than a less fortunate individual, even though he may value wealth as well, redistribution reduces overall social welfare and is unethical.¹⁷

It is not at all clear that society has chosen one theory of ethical conduct over the other.¹⁸ Without a unitary definition, there is no shared substance on which Morgan and Reynolds can center the reader's attention. Without that substance, we may be relegated to concerning ourselves with whether something looks bad.

Second, Morgan and Reynolds's analysis fails to respond to some of the reasons why society might desire an appearance standard. One may think of the appearance standard as a prophylactic rule.¹⁹ At least in the area of governmental ethics, such a rule might prove useful for several reasons. As an initial matter, unethical conduct is often hidden from view. As the President's Commission on Federal Ethics Law Reform put it with reference to honoraria:

17. Indeed, matters are still more complex than this discussion would suggest. Some defenders of views similar to the Golden Rule have sharply criticized redistribution. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Meanwhile, some advocates of utilitarianism and its relatives have supported very extensive redistributive measures. See, e.g., PETER UNGER, *LIVING HIGH AND LETTING DIE* (1996).

18. In fact, there exist several possible candidates; we have been able to settle on none of them as the definitive formulation of ethical conduct. One possibility is Mill's utilitarianism. See *supra* note 14. Another is Kant's theory, which considers motives as they relate to the action an individual takes. His view asks, of that action, whether the rule that the action embodies could be a universal law; if so, the action is morally right. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (Lewis White Beck trans., Robert Paul Wolff ed., Bobbs-Merrill 1969) (1785). Finally, John Rawls's theory of justice as fairness, which employs the maximin criterion, is based on certain aspects of Kant's views. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); John Rawls, *Kantian Constructivism in Moral Theory*, in *MORAL DISCOURSE AND PRACTICE* 247 (Stephen Darwall et al. eds., 1997). Indeed, given this uncertainty, there exists great debate in the legal community concerning the relationship of the law and morality. Compare Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9, 14-19 (1969) (arguing for adoption of the Rawlsian approach in the Fourteenth Amendment context) with Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 699-700 ("The violent disagreements among the legal philosophers alone demonstrate that there is no single path down which philosophical reasoning must lead. . . . Under these impossible circumstances, courts — perhaps philosophers, also — will reason toward conclusions that appeal to them for reasons other than those expressed. . . . The consequence of this philosophical approach to constitutional law almost certainly would be the destruction of the idea of law.").

19. See, e.g., George D. Brown, *The Constitution as an Obstacle to Government Ethics — Reformist Legislation After National Treasury Employees Union*, 37 WM. & MARY L. REV. 979, 1006 (1996).

Honoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor. The companies that pay honoraria and related travel expenses frequently deem these payments to be normal business expenses and likely believe that these payments enhance their access to the public officials who receive them.²⁰

As Morgan and Reynolds themselves argue, the appearance of impropriety is much easier to see than is the impropriety itself.

In addition, a prophylactic rule may dampen the temptation to act unethically.²¹ The Supreme Court utilized this rationale in vacating a government contract because of the apparent improprieties of one of the contract's chief negotiators.²² In discussing whether the negotiator's conduct violated 18 U.S.C. § 434,²³ the Court noted:

[T]he statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. . . . To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.²⁴

Prophylactic rules recognize that the wrong circumstances can tempt even the most well-intentioned individual to engage in unethical behavior. Such standards respond to this reality by limiting the opportunities for individuals to put themselves in those circumstances.

Finally, and most important, some have argued that the appearance standard — and prophylactic rules like it — do no less than ensure the sanctity of our democracy.²⁵ As Professor Dennis Thompson explained:

[I]n the more impersonal world of politics, reality and appearance blend together so that we cannot often tell the difference. Not only can most citizens judge politicians and political institutions only by what they appear to do, but also for many citizens what they appear to do is what they actually do. . . . Citizens have no way of finding out what the reality is, and therefore every reason to assume the

20. PRESIDENT'S COMM. ON FED. ETHICS LAW REFORM, TO SERVE WITH HONOR 35 (1989).

21. See, e.g., Brown, *supra* note 19, at 1006.

22. See *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961).

23. 18 U.S.C. § 434 (1948) (repealed 1962).

24. *Mississippi Valley Generating Co.*, 364 U.S. at 549-50.

25. See *Mississippi Valley Generating Co.*, 364 U.S. at 561-62; Brown, *supra* note 19, at 1006.

worst. . . . There is an ethical obligation to protect the appearance of propriety almost as great as to produce its reality.²⁶

The Supreme Court has agreed. The Court cautioned that the appearance of impropriety is “an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern”²⁷

II. THE ETHICS ESTABLISHMENT

In Chapters Four through Nine, Morgan and Reynolds chronicle the explosion of the Ethics Establishment; these bureaucracies operationalize the appearance standard and give it wide application. The authors trace the origins of the Ethics Establishment to August 5, 1974 — the day the Nixon White House released the “smoking gun” audio tape.²⁸ With the tape’s release, Americans’ distaste for public institutions reached an all-time high. Within months a concerted effort was underway to cleanse them of all unethical conduct (p. 47).

Given its origins, it is not surprising that the Ethics Establishment has most pervasively invaded our governmental institutions. According to the authors, nowhere is this invasion more apparent than with the Independent Counsel (p. 75). In response to Nixon’s “Saturday Night Massacre,”²⁹ Congress created the Independent Counsel. The Counsel, largely free from political control, and enjoying an almost unlimited budget, is appointed by the U.S. Court of Appeals for the District of Columbia Circuit. This combination of political unaccountability and fiscal freedom creates a prosecutor without an off-switch. The Independent Counsel remains free to dig for the most minor infractions — infractions of which almost anyone would be guilty.

26. *Congressional Ethics Rules: Hearings Before the House Bipartisan Task Force on Ethics*, 101st Cong. 1 (1989) (statement of Professor Dennis F. Thompson, Harvard Univ.).

27. *Mississippi Valley Generating Co.*, 364 U.S. at 562.

28. P. 47. Morgan and Reynolds track a steadily declining trend in Americans’ confidence in their public institutions beginning in 1960. P. 49. They mark as the starting point of this trend the U-2 spy plane incident over the Soviet Union. Eisenhower initially lied, claiming the U-2 was a weather plane — a story he later recanted. Nevertheless, they place the birth of the Ethics Establishment with Nixon’s release of the “smoking gun” tape — the tape on which Nixon is heard directing one of his aides to push the CIA to pressure the FBI to curtail its Watergate investigation.

29. The “Saturday Night Massacre” occurred when President Nixon, in an attempt to thwart any investigation of the Watergate break-in, fired Special Prosecutor Archibald Cox and every member of his team. See G. Gordon Liddy, *Character, Conscience, and Destiny*, 96 MICH. L. REV. 1975, 1979 (1998) (reviewing KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997)) (discussing the Massacre).

The Ethics Establishment has also created its own "Iron Triangle,"³⁰ consisting of government officials, interest groups, and the press. As calls for additional ethics regulations mounted, the government enlisted the help of its bureaucrats to create and operate new agencies like the Office of Government Ethics and new positions such as Designated Agency Ethics Officials (p. 81). Similarly, congressional staffers can now support or oppose policies and potential appointees by manipulating alleged ethical violations (p. 96). In addition, a network of interest groups, such as the Center for Public Integrity, Common Cause, and Public Citizen, champion ethics in government (p. 90). Finally, after America lionized Woodward and Bernstein, the press quickly learned that exposing ethical improprieties paved the way to fame and fortune (pp. 92-93). Together, these players constitute a self-perpetuating system:

The relationship between ethics bureaucrats . . . and the Congress and interest groups is marked by constant interaction and trading of favors. Congressional staffers get "dirt" from interest groups who, for example, oppose the confirmation of a particular judge or the implementation of a particular policy. Then they leak the information to journalists, and hold hearings that generate more news and that allow interest groups an opportunity to testify and otherwise get their message out. Journalists investigating the scandals get still more leaks from government officials close to the scandal, often in exchange for not linking those officials to what went wrong — or even occasionally in exchange for defending those officials in columns or on political talk shows. [p. 96]

The end result is an Ethics Establishment that runs on a renewable resource — political opportunism.

The Ethics Establishment did not limit itself to the governmental arena. Rather, it laid down roots in myriad other sectors of society. Beginning with the insider trading scandals of the 1980s, business spawned its own ethics cottage industry (p. 100). Generally, the ethics-in-business movement manifested itself in company ethics codes (p. 101). Currently, roughly ninety percent of America's largest companies have ethics codes.³¹

Similarly, as Rameshwar Sharma's story suggests, the scientific community has embroiled itself in its own Ethics Establishment (p. 127). The criminal justice system, on the other hand, has less created its own Ethics Establishment than been co-opted by it. As the ethics movement has gained steam, we increasingly have criminal-

30. P. 96. The term "Iron Triangle" was first coined to explain the relationship between the Pentagon, Congress, and defense contractors. See GORDON ADAMS, *THE IRON TRIANGLE* (COUNCIL ON ECONOMIC PRIORITIES) (1981).

31. P. 103 (citing Patrick E. Murphy, *Corporate Ethics Statements: Current Status and Future Prospects*, 14 J. BUS. ETHICS 727 (1995)).

ized ethical infractions.³² Those who just recently would have been subject only to social opprobrium now face jail time.³³

III. THE CONJUNCTION OF THE APPEARANCE OF IMPROPRIETY STANDARD AND THE ETHICS ESTABLISHMENT

Morgan and Reynolds argue that the combination of the Ethics Establishment and the appearance standard results in predictably problematic outcomes. The Ethics Establishment has injected into large segments of American society the relentless search for ethical misconduct. The appearance standard has focused that search on the ephemeral and insubstantial. This combination has gutted those segments in which it operates, kicking up appearance firestorms while leaving the underlying substantive problems largely untouched. Two examples make the authors' point.

First, as noted above, many of America's largest companies are adopting ethics and corporate culture codes. While installing these codes may lead to more ethical companies, the standard practice of purchasing "off-the-shelf" codes in order to create the appearance of having improved the ethical culture may have the opposite effect as these companies spend more precious time and resources on appearing ethical than on being ethical (p. 104). Texaco, for example, produced a booklet entitled *Texaco's Vision and Values* in which it stated "Our employees are our most important resource" and "Each person deserves to be treated with respect and dignity in appropriate work environments, without regard to race, religion, sex, age, national origin, disability or position in the company" (p. 105). Despite these public declarations, Texaco found itself mired in a discrimination suit for the private statements its executives made concerning African Americans and other minorities (p. 105). As Morgan and Reynolds point out, "[i]t's not the code; it's the culture" (p. 105). In other words, it is not the appearance, but the substance.

Second, the Independent Counsel is particularly troublesome when combined with the appearance standard. Unlike the normal prosecutor who is summoned to prosecute a specific crime and who must exercise prosecutorial discretion as a result of his budgetary and temporal constraints, the Independent Counsel prosecutes an

32. Pp. 159-60 (citing John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117, 119-26 (1981)).

33. For a good example of the results of this trend to criminalize ethics, see David Grann, *Prosecutorial Indiscretion: Espy and the Criminalization of Politics*, NEW REPUBLIC, Feb. 2, 1998, at 18 ("Espy could be facing more than 100 years in prison for the appearance of impropriety, for simply taking gifts. . . . The irony is that, before [the independent prosecutor] stepped in, the democratic system had exacted its own eloquent justice without the blunt instrument of the independent counsel or the new ethics laws.").

individual and has almost unlimited resources in trying to *uncover* criminal conduct that until recently was simply unethical (p. 171). Most important, the increasing criminalization of ethical standards and use of the Independent Counsel appear to have confused the American public, as individuals increasingly run ethical and legal imperatives together (pp. 173-74). Instead of strengthening society's ethics, it has led to the widespread belief that whatever is legal must be ethical (p. 174). As a result, one may successfully defend oneself against allegations of impropriety with the claim that one's behavior was not illegal, and our ethical standards erode as people begin to equate ethical standards with arguably more lenient legal standards (p. 174).

IV. THE SOLUTIONS

In the last chapter of *The Appearance of Impropriety*, Morgan and Reynolds suggest seven rules for righting America's ethics ship. The authors admit that their suggestions are no quick fix (p. 199); indeed, they deride the quick-fix mentality as what brought us appearance ethics in the first place (p. 199). Nevertheless, their proposals are somewhat simplistic. In the end, they amount to little more than: "Quit using the appearance standard." While correct, the advice fails to provide the reader with much more than broad-brush-stroke guidance.

First, Morgan and Reynolds argue that we should "accentuate the negative" (p. 201). In short, "seek out and encourage the reporting of bad news. Not scandal, or improper appearances, but truly bad news about things that aren't working" (p. 201). This way, those who must make decisions will know whether something needs additional attention. Second, keep things "crunchy" (p. 202). Create systems where substantive performance is easy to monitor. "[O]rganizational structures in which someone has to take responsibility for results, and in which results are obvious, produce better behavior than those in which responsibility is diffused, and results are difficult to measure" (p. 202).

Third, "keep your eye on the ball" (p. 203). Relegate the appearance standard to those areas in which its application is beneficial. For example, apply it to groups consisting of specialized individuals who should make nonpolitical decisions, like judges.³⁴ Fourth, "responsibility is for everyone" (p. 205). A strong ethical

34. For an opinion that the appearance standard may impose costs in the judicial arena as well, see Kozinski, *supra* note 5, at 1226-27 ("I think there is also a converse danger, and that is having a judiciary too far removed from contemporary life, too shielded from the everyday experiences and problems of the community in which they live. Consistent with current notions that judges should avoid even the appearance of impropriety, many of my judicial colleagues tend to cut themselves off from substantial contact with the world around them once they ascend to the bench. While avoiding conflicts of interest is certainly a good thing, it is

system should demand as much from accusers as it does from the accused. Unlike the current system, which is soft on both sides, the new system should focus a critical eye on the behavior at issue and its motivations as well as the motivations of the accuser. In this way, the authors argue, we may be able to avoid stories like Rameshwar Sharma's.

Fifth, "do [not] call virtuous people chumps" (p. 205). Currently, American society seems to believe that it is better to be tricky than virtuous. We constantly reinforce in one another the idea that the way to get ahead is to focus on appearances. In the end, we are left with only appearances. Instead, we should reinforce the belief that virtuous conduct is our touchstone.

Sixth, "if you focus on appearances, you will fail even at that" (p. 206). As you concentrate on appearances to the detriment of substance, the substance erodes, making it impossible to maintain even the appearance of propriety.³⁵ Finally, "cultivate virtues, rather than appearances" (p. 207). "Cultivating virtue does not simply mean trying to do the right thing. It means trying to be the kind of person who does the right thing" (p. 207). In effect, Morgan and Reynolds argue that if we are successful in this, the need for having ethical standards at all simply will fade away.

CONCLUSION

If the contemporary world of ethics is as Morgan and Reynolds suggest, we all should be more diligent in watching our backsides lest we run the risk of ending up like Rameshwar Sharma. One typo and one enemy could end a career. But while the authors perform admirably in prompting visceral terror in the reader by recounting disturbing anecdote after disturbing anecdote, they are less successful in satisfying the reader's intellectual demands. The authors need to attempt to build their arguments on a coherent definition of ethical behavior. They need to address frontally some of the more legitimate rationales for an appearance standard. Finally, they should devote more time and effort to their proposed solutions. Altering institutional culture is a daunting task, one which they afford too little attention and respect. In the end, the book's shortcomings lie not in what it does, but in what it does not do. Nevertheless, while Morgan and Reynolds may leave some doubt in

also important to encourage judges to continue living in the real world, rather than sequestering themselves in their chambers.").

35. For instance, during the Watergate investigations President Nixon spent large portions of his time devising plans to ensure that his administration appeared proper. Nixon advised his chief of staff H.R. Haldeman to "stay close to the p.r." P. 61. Of course, Nixon failed even at that and his reputation was destroyed as a result.

the reader's mind about the dangers of the Ethics Establishment and its sword the appearance standard, they leave no doubt in the reader's heart.

— *Jordan B. Hansell*