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Caperton's Next Generation: Beyond the Bank

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CAPERTON'S NEXT GENERATION: BEYOND THE BANK

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INTRODUCTION BY ALESSANDRA BANIEL-STARK

Our moderator for the last panel of the day is Professor Jed Shugerman. Professor Shugerman is a legal historian, who is widely published in law journals in addition to publishing a book about the history of judicial elections.[1] He teaches at Fordham University School of Law, and he has graciously agreed to guide us through our last panel.

REMARKS OF JED SHUGERMAN

I am happy to state that this is the best panel of the day. I also might be a little bit biased, and this is a panel on the new frontiers of bias, so it's only appropriate to disclose my own bias in this case. I want to start with a note, before I introduce the panel, about one way to think about this topic in a broader sense. I wrote a book on the

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1. JED HANDELSMAN SHUGERMAN, THE PEOPLE'S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA (2012).

history of judicial elections to explain how America chose this very peculiar institution.[2] And the way to frame it is that judicial independence as a concept is actually historically contingent, and it changes—it's a very relative concept. The reason why judicial elections were adopted in the first place was *because* of a commitment to judicial independence; they were framed as a way not to make judges less independent, they were framed explicitly to make judges more independent.[3] How do we make sense of that?

Justice O'Connor mentioned earlier today that Ohio adopted judicial elections in 1850.[4] Ohio was part of a wave of states that decided to change over to judicial elections.[5] And the reason why they made that change was because it was the middle of an economic crisis in which half of the banks in the country folded and eight states went into bankruptcy. The blame was focused on the governors and the legislators who had misspent and mismanaged the states' funds.[6] But secondarily the judges were blamed for not being a check on the other branches.[7] So the argument was, in order to make judges more independent—from whom?—from governors and legislators and a corrupt appointment process, elections were necessary. It was framed explicitly that way. I just want to note here that judicial independence is a relative concept.

Today we have been focused on the question of how to make judges independent (from whom? from special interests, that's what

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2. *Id.*

3. *See, e.g.*, *id.* at 57–83 (discussing the rationale that drove the shift toward judicial elections).

4. OHIO CONST. of 1851, art. IV, § 6.

5. *See* SHUGERMAN, *supra* note 1, at 105 ("From 1846 to 1851, twelve states adopted partially elective systems. By 1860, out of thirty-one states in the Union, eighteen states elected all of their judges, and five more elected some of their judges."). *See generally* Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850–1920*, 1984 AM. B. FOUND. RES. J. 345 (discussing the change in Ohio in context of developments in other states related to judicial elections).

6. *See* SHUGERMAN, *supra* note 1, at 85 ("The reputations of the legislatures around the country took an enormous and long-lasting hit after they had banked so heavily on new banks and expensive internal improvements."); Jed Handlesman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1079 (2010) [hereinafter Shugerman, *Economic Crisis*] ("However, by the 1840s, 'the people began to see the legislature as the source of many, if not most, of the problems of government.' " (quoting STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 25 (2004))).

7. *See* SHUGERMAN, *supra* note 1, at 95 ("Delegates from both parties [to the 1846 New York Convention] argued that judicial elections would also strengthen the separation of powers and encourage the courts to check the legislature and strike down more statutes."). *See generally* Shugerman, *Economic Crisis*, *supra* note 6.

recusal addresses) when special interests spend money. But I think this panel is going to look more broadly when we ask about "judicial independence from whom," or about what kinds of bias will lead judges to be less independent. Some of these are internal, mental processes. One way to think about it is that judicial appointments themselves have their own biases and their own corruption, and so judicial selection is often a sense of relative judicial independence. From whom are we making judges independent?

One other way to think about it is: when do we have not relative but general or absolute judicial independence? There are a couple points that came up earlier today. Judge Clarke, for example, illustrated this, and this was also part of the debate in the Judicial Lunch among the judges,[8] that longer terms—not the selection of judges, but how long they serve—make judges more independent.[9] Even if more money is spent on the front end, they are then more independent from feeling like they have to serve those interests if they serve a life term. So ironically, West Virginia, with the *Caperton* case, had huge amounts of money but very long terms. Judge Benjamin actually served a twelve-year term,[10] and had less to worry about for the next election compared to, let's say, judges in New Jersey, which has appointed judges, not elections, but those judges are appointed initially to seven-year terms[11] so they face politics and the special interests of reappointment much more directly than Judge Benjamin having to think about special interest spending thereafter.

So that's one aspect. General independence helps us think about a couple things. One is, when we think about judicial independence from special interests and public opinion, we can think about ways to address them more broadly. I think that's a different kind of question beyond recusal for special interests. And another point is to simply say that there are other selection methods. To throw out one proposal: it turns out that merit selection, when you study it closely, winds up not having the same amount of spending over the last twenty to thirty years.[12] Now, it's trending a little bit in the direction of more spend-

8. *See supra* pp. 577–79.

9. *See also* Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349 (2010) [hereinafter Shugerman, *The Twist of Long Terms*] (arguing that judicial elections with long terms have shaped more responsive benches).

10. W.V. CONST. art. VIII, § 2.

11. N.J. CONST. art. VI, § 6, para. 3.

12. SHUGERMAN, *supra* note 1, at 253 (citing state-specific judicial campaign finance reports collected in 2009 from the American Judicature Society and the National Institute of Money in State Politics).

ing, but it is so far behind the unopposed yes-or-no retention elections that there isn't even close to the same amount of spending, even today, in these retention elections.[13] But does merit selection really produce the best judges in terms of merit? You don't have to rely on that. That's not the explanation for this. There are two explanations for the lack of spending: if you don't know who you are going to be electing to replace that judge when you vote "no," you are less likely to invest in that judge. It might be someone very similar, so special interests have less incentive to get a "no" vote if they don't know who the new judge is going to be. Now, it's true that Don Blankenship in the *Caperton* case was maybe more focused on defeating Justice McGraw, but he at least knew that he had a supporter coming in. So that's one example I like to give as to why merit selection may be a solution to special-interest funding that is a little bit broader than the recusal suggestion.

There's another angle, too, in terms of being captured by special interests. Merit selection, whether or not it produces more meritorious judges, still has a more pluralist way of choosing judges. The commissions that nominate, that send a list to the governor—what happens is the governor gets a list of three names [for instance] from a commission; that commission is drawn from various members of the public. It has sitting judges, it has the state bar, it has representatives from the government, and it has representatives from the legislature.[14] Each of those groups can be a veto on the crony—such as Harriet Miers or Abe Fortas, to pick bipartisan examples[15]—who is really in the pocket of the governor or the executive branch. In the same way, the state bar can be a check on the other groups and the other groups can be a check on the state bar. So the person who winds up getting nominated or being sent to the governor doesn't have any *one* actor to thank for the job. To finish the big-picture point, there are other mechanisms beyond recusal to think about for promoting judicial independence—judicial independence from special interests, judicial independence from the other branches, and judicial independence from public opin-

13. *Id.* at 254–55 (discussing increased spending in merit-based judicial elections).

14. *Id*. at 258 (describing the historical makeup of judicial nomination commissions). *See generally* MALIA REDDICK & REBECCA LOVE KOURLIS, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., CHOOSING JUDGES: JUDICIAL NOMINATING COMMISSIONS AND THE SELECTION OF SUPREME COURT JUSTICES 7–8 (2014), http://iaals.du.edu/sites/default/files/documents/publications/choosing_judges_jnc_report.pdf (providing an overview of states' nominating commissions' compositions).

15. *See* A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 VA. L. REV. 231, 287, 306 (2015) (describing the objections raised against Supreme Court nominees Fortas and Miers).

ion; and that, I suggest, is merit selection with yes-or-no retention elections and, most importantly, longer terms.

Now we'll get other perspectives from *Caperton*'s next generation—beyond the bank or breaking the bank, breaking beyond the idea of the money here—to draw attention to other kinds of judicial bias and partiality, to look at bias, and to discuss recusal for reasons that go beyond campaign contributions, and maybe other perspectives on how to make courts more fair and more reliable.

So first we have Debra Lyn Bassett, the Justice Marshall F. McComb Professor of Law at Southwestern Law School. She focuses her scholarship on federal litigation and legal ethics, and her writing regularly employs insight from law and psychology. On her website she talks about how much she loves doing research that combines theory and practice, and I think this panel is a good example of making that synthesis between theory and practice.

Then we'll have her frequent co-author Rex Perschbacher, who is the Daniel J. Dykstra Chair at U.C. Davis. He was dean of that school for ten years. He teaches in the areas of civil procedure, professional responsibility, and clinical teaching.

Then we'll have Gregory Parks, who has a J.D. and Ph.D. in psychology. He teaches at Wake Forest University School of Law. He didn't put this in the official biography, maybe he didn't want to show all of his accomplishments, but he's about my age and he's already edited or authored ten books, so that's amazing. Professor Parks is currently working on a book about unconscious race bias and law.

And finally Dmitry Bam will speak. He is an associate professor at the University of Maine Law School, and he has also published prolifically. He is a scholar and commentator on judicial ethics, judicial selection, and constitutional interpretation, and he has written a lot about *Caperton* and these issues. So I am very happy to serve as a moderator on this panel because I think they have a lot more to say than I do right now. So without further ado, Debra.

Remarks of Debra Lyn Bassett

Good afternoon, everyone. Many thanks to the *Journal of Legislation and Public Policy* for organizing this symposium and to NYU, the ABA Center for Professional Responsibility, and the Brennan Center for Justice for sponsoring this symposium.

One of the recurring problems in judicial recusal and disqualification is that a judge's belief in his or her own impartiality misses the point. Public confidence in the judiciary doesn't result from the judici-

ary's perspective of impartiality—it results from the parties' and the public's perception of impartiality. Perhaps unfortunately, it is a very human tendency to have what's called egocentric bias: the ability to see bias in other people, but not so much in ourselves.[16] This is one of the problems with having motions for judicial disqualification heard by the very judge whose impartiality is being challenged. And, in addition to egocentric bias, judges' perceptions of their own impartiality also suffer from unconscious—truly unconscious—motivations.

Until the 1980s, most psychologists believed that attitudes, including prejudices, operated consciously—that individuals were consciously aware of their own biases and stereotypes.[17] Therefore, psychologists relied on self-reporting to measure bias and prejudice.[18] However, it turns out that we are not consciously aware of all of our biases and prejudices. The human brain is continually bombarded with stimuli, and in order for the brain to function efficiently, it employs largely *unconscious* methods of organizing information, and it creates shortcuts for the processing of information.[19] And that's generally a good thing, or the brain would be completely overwhelmed.

One of the brain's shortcuts involves distinguishing various objects based on features of the objects that then coalesce into patterns.[20] That way, rather than having to stop and figure out each time what a

16. *See, e.g.*, Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 811–13 (2001) ("People tend to make judgments about themselves and their abilities that are 'egocentric' or 'self-serving.' People routinely estimate, for example, that they are above average on a variety of desirable characteristics, including health, driving, professional skills, and likelihood of having a successful marriage. . . . Egocentric biases could lead judges to believe that they are better decision makers than is really the case."); *see also* Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) (suggesting that "judges might be overconfident about their abilities to control their own biases" in light of a survey conducted of judges attending a conference who were asked to rate their ability to "avoid racial prejudice in decisionmaking" compared to other judges at the same conference and in which ninety-seven percent of the judges placed themselves in the top half).

17. *See* Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4, 4 (1995).

18. *Id.*

19. These organizational frameworks and mental shortcuts include schemas and heuristics. *See* DAVID G. MYERS, PSYCHOLOGY 143 (7th ed. 2004) (describing schemas); RICHARD C. WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY 52 (2003) (describing heuristics as "a mental shortcut"); Richard E. Nisbett et al., *The Use of Statistical Heuristics in Everyday Inductive Reasoning* (describing heuristics as "rapid and more or less automatic judgmental rules of thumb"), *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 510 (Thomas Gilovich et al. eds., 2002).

20. Pamela M. Casey et al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 64 (2012), http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf.

desk, a lamp, or a refrigerator is every time we see one, we come to recognize the general characteristics of those objects, such that we know what they are—even when the style or the materials vary.

The thing is that we have these organizational shortcuts not just for objects, but also for human beings.[21] Over time, the brain learns to sort people into certain groups based on combinations of characteristics such as age, and gender, and race, and role. The brain's sorting process includes the use of stereotypes, meaning traits that we associate with a category and which develop from our experiences with others.[22] Some of these experiences are direct, but most of them are vicarious, such as from books, movies, media, and culture.[23]

Although the brain's automatic sorting processes are necessary, they can also lead to discrimination. The problem occurs when the brain automatically associates certain characteristics with specific groups, and it turns out that those characteristics are not accurate for all of the individuals within that group—for example, "Elderly individuals are frail." These implicit attitudes—attitudes of which we are not consciously aware, and which operate automatically—include both stereotypes and an affective component, meaning an association between a group and an attitude.[24] That attitude can be positive, or it can be negative.

Through a test called the Implicit Association Test, psychologists have found that *most* people harbor unconscious biases in a variety of areas, including race, gender, age, and disability[25]—even people who believe themselves to be unbiased may nevertheless have unconscious biases and prejudices. The significance of this psychological research is what prompted the recent development of programs by the ABA Section on Litigation and the National Center for State Courts for

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21. *Id.*

22. JERRY KANG, NAT'L CAMPAIGN TO ENSURE THE RACIAL & ETHNIC FAIRNESS OF AM.'S STATE COURTS, IMPLICIT BIAS: A PRIMER FOR COURTS 1 (2009), http://www.courts.ca.gov/documents/BTB_XXII_WEDF_3.pdf.

23. *Id.*; *see also, e.g.*, Sherryl Browne Graves, *Television and Prejudice Reduction: When Does Television as a Vicarious Experience Make a Difference?*, 55 J. SOC. ISSUES 707, 707, 714–17 (1999) (exploring the effects of diverse television characters on children's racial attitudes in light of television's role as "a key socializing agent" in the lives of children).

24. *See generally* Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464 (1998) (describing how the Implicit Association Test measures differential associations between concepts and attributes); Greenwald & Banaji, *supra* note 17.

25. *See* Brian Nosek et al., *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes*, 18 EUR. REV. SOC. PSYCHOL. 1, 36–37 (2007).

judges to educate them about this phenomenon of unconscious bias.[26] Unfortunately, however, the psychological literature has also consistently shown that at this point in time, in our current understanding of psychological principles, the ability to override unconscious bias is only temporary: at some point after the conclusion of the program or the workshop, the brain's automatic, unconscious processes will kick back in.[27] So self-awareness is a crucial, very important first step, but just one workshop isn't going to eliminate unconscious biases. And this supports the need—the absolute need—for additional or alternative decision-makers when reviewing motions for judicial disqualification, rather than leaving the decision only to the challenged judge. Thank you.

REMARKS OF REX R. PERSCHBACHER

Thank you, thank you Jed, thank you to the *Journal of Legislation and Public Policy*, thank you to the Brennan Center, and thank you to the ABA Center for Professional Responsibility—I hope I got everyone more or less right. I wanted to talk about bias in a breezy, international style if I could today.

If we take a look at judicial recusal and disqualification issues internationally, we find the exact same issues as we have here in the United States, as illustrated in the *Caperton* case. For example—and I have three-plus examples—bias issues are reviewed generally from the perspective of the judge, not an outsider, even when using as a guide the appearance of impartiality, which is one of the ABA's stan-

26. *See* Mark A. Drummond, *Section of Litigation Tackles Implicit Bias*, 36 LITIG. NEWS 20, 20–21 (2011) (reporting on the ABA's creation of a program addressing implicit bias in the judiciary); *see also* PAMELA M. CASEY ET AL., NAT'L CTR. FOR STATE COURTS, HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION 6 (2012), http://www.ncsc.org/IBReport.

27. *See* Justin D. Levinson, *Corporations Law: Biased Corporate Decision-Making?* [hereinafter Levinson, *Biased Corporate Decision-Making?*] (noting that the "temporary nature of de-biasing underscores the continuing need to focus on longer term remedies to implicit bias"), *in* IMPLICIT RACIAL BIAS ACROSS THE LAW 146, 162 n.46 (Justin D. Levinson & Robert J. Smith eds., 2012); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 411 (2007) [hereinafter Levinson, *Forgotten Racial Equality*] ("A significant amount of research has focused on whether implicit biases can be temporarily eliminated or modified. These efforts have achieved mixed levels of success, and indicate that exposure to diversity or viewing minority exemplars, for example, can sometimes temporarily reduce people's implicit biases."); *see also* Levinson, *Forgotten Racial Equality*, *supra* at 417 ("Implicit racial biases are elicited quickly and easily, and can only be temporarily reduced through interventional approaches.").

dards.[28] Second, the first level of review of judicial disqualifications nearly always resides, internationally, with the very judge whose bias is being challenged, with the unfortunate consequence that the challenged litigant is asking the accused to acknowledge his or her own bias. The next level of review goes to a court of which, at best, the challenged judge is either a member or with which he or she is familiar as an additional party, which is therefore a problem. And I apologize to the judges here—I realize I'm going to insult everyone at some point here, so I am apologizing in advance in the hopes but not the expectation that you'll forgive me. Third, no courts appear to take seriously the need to avoid the appearance of bias; instead, in the United States and throughout the world, courts require using the perspective of a reasonable observer,[29] or even the perspective of someone in the judge's shoes who is evaluating the claim using criteria of what a fully informed, reasonable judge would understand.[30]

So throughout the world the standards appear to be remarkably similar, requiring an unbiased judge—often with "in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially" as the only standard for showing bias.[31] So, for example, the United Nations International Covenant on Civil and Political Rights several generations ago said that "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal."[32] And the United Nations Judicial Integrity group in 2002 adopted what are called the *Bangalore Principles of Judicial Conduct*.[33] They provide that "[i]mpartiality is essential to the proper

28. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (AM. BAR ASS'N, amended 2011) (emphasizing that judges should conduct themselves in ways that will "promote[ ] public confidence in the . . . impartiality of the judiciary").

29. *See, e.g.*, CHARLES GARDNER GEYH, FED. JUDICIAL CTR., JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 17–22 (2d ed. 2010), http://www.fjc.gov/public/pdf.nsf/lookup/judicialdq.pdf/$file/judicialdq.pdf (providing an overview of the framework under which disqualification claims are analyzed, including the "reasonable observer" standard).

30. *See, e.g.*, Boros v. Baxley, 621 So. 2d 240, 243 (Ala. 1993) (applying a standard that looked to a hypothetical "reasonable person in the judge's shoes" (citing Henderson v. G&G Corp., 582 So. 2d 529, 530 (Ala. 1991))).

31. JUDICIAL GRP. ON STRENGTHENING JUDICIAL INTEGRITY, THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002) [hereinafter BANGALORE PRINCIPLES], *reprinted in* Dato' Param Cumaraswamy (Special Rapporteur on the Independence of Judges and Lawyers), *Civil and Political Rights, Including Questions of Independence of the Judiciary, Administration of Justice, Impunity*, U.N. Doc. E/CN.4/2003/65, annex (Jan. 10, 2003), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G03/101/53/PDF/G0310153.pdf?OpenElement.

32. International Covenant on Civil and Political Rights art. 14, para. 1, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

33. BANGALORE PRINCIPLES, *supra* note 31, at para. 2.5.

discharge of the judicial office"[34] and that "a judge shall perform his or her judicial duties without favour, bias, or prejudice,"[35] and ensure that [a] judge shall disqualify himself or herself from participating in any proceeding in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable"[36] to proceed in an unbiased fashion.

Taking a quick look at some common-law jurisdictions where it's relatively easier to do the research: in England, Canada, Australia, and South Africa, the experiences are roughly the same. In Canada, "the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons,"[37] who are informed members of the community, and who approach the question with a complex and contextualized understanding of the issues in the case[38]—in other words, like the judge. The United Kingdom similarly adopted a "real possibility" of judicial bias as opposed to the "reasonable suspicion" standard, and the House of Lords ultimately required that the person adopt a balanced approach to bias.[39] Australia requires greater emphasis on the perception of a hypothetical, reasonable person in the apprehension of bias as perceived by the parties.[40] In South Africa, which provides some distinction, there is a reasonable suspicion standard adopted—that is, the perspective of the reasonable, suspicious observer—but presumes that judges will approach the controversies impartially, and the inquiry is whether a reasonable, objective, and informed person with the correct facts would reasonably apprehend that the judge would not be impartial.[41]

What these standards tend to do is read out the ABA Model Rules' standard requiring recusal when necessary to avoid an *appearance* of impropriety or when a jurist's impartiality might reasonably be questioned. We have to ask ourselves, if we are going to protect against what Chief Judge Lippman was telling us about just recently,[42] we need to worry about how the outsiders, the litigants in most cases, will apprehend the potential for bias—not the judges. So, supposedly

34. *Id.* at para. 2.
35. *Id.* at para. 2.1.
36. *Id.* at para. 2.5.
37. Comm. for Justice & Liberty v. Nat'l Energy Bd., [1978] 1 S.C.R. 369, 394 (Can.), http://canlii.ca/t/1mk9k.
38. R. v. S. (R.D.), [1997] 3 S.C.R. 484, 486–87 (Can.), http://canlii.ca/t/1fr05.
39. Lawal v. N. Spirit Ltd. [2003] UKHL 35, [2004] 1 All ER 187, 193 (appeal taken from Eng.).
40. *Webb v The Queen* [1994] 181 CLR 41 ¶ 2 (Austl.).
41. *President of the Republic of S. Afr. v. S. Afr. Rugby Football Union* 1999 (7) BCLR 725 (CC) at para. 32 (S. Afr.).
42. *See supra* pp. 552–56.

these standards are adopted to protect against excessive disqualifications by devaluing the fear of bias by a litigant. Any evidence of a crisis anywhere in the world that I know of is absent so far, but if you know of one you can raise it with me. Possibly there is somehow a crisis of disqualification occurring somewhere in our world.

REMARKS OF GREGORY S. PARKS

Good afternoon. You all alright? Alright. I want to make sure everybody's awake. Thank you to the Brennan Center, and to the *NYU Journal of Legislation and Public Policy*, especially to Sacha, Eddie, and Matthew, for your hard work in putting together this symposium on *Caperton* and judicial recusal. It is indeed an honor and a privilege to be here with such distinguished jurists, academics, practitioners, journalists, and most of all—most importantly—law students. In some ways I will piggyback on what my co-panelists had to say.

The 1980s synth-pop new wave group The Human League—and as recently as a few years ago, the biggest boss thus far, rapper Rick Ross—told us in song, "I'm only human."[43] Such a concept is not striking. Most certainly these individuals are. But when it comes to talking and thinking about others in our society, judges in particular, some may suspect (including some judges themselves) that they are not mere humans—at least not in their professional capacity. In his book *The Common Law*, published in 1881, Justice Oliver Wendell Holmes, Jr. noted, "The life of the law has not been logic: it has been experience."[44] Some decades later in his work, *Law and the Modern Mind*, in 1930, legal realist Jerome Frank carried this concept a bit further when he observed that some judicial decisions might reflect such mundane influences as what a judge had to eat for breakfast.[45] This notion seems laughable. But over the past several decades, research in the areas of social and cognitive psychology suggests that Professor Frank may have been onto something. People are complex. One's stated attitudes and beliefs often fail to align with one's actual thoughts and feelings. In experimental settings, for example, social desirability—the tendency of research study participants to reply in a manner that they believe will be viewed favorably by the experimenter—may serve as a motivational factor behind a participant's

43. THE HUMAN LEAGUE, *Human*, *on* CRASH (Virgin Records 1986); RICK ROSS, *I'm Only Human*, *on* TRILLA (Def Jam Records 2008).

44. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).

45. *See* Michael J. Klarman, Brown *and* Lawrence *(and* Goodridge*)*, 104 MICH. L. REV. 431, 432 (2005) (describing the perhaps apocryphal quote generally attributed to Frank (citing JEROME FRANK, LAW AND THE MODERN MIND (1930))).

lack of candor in a study.[46] In social settings, impression management—particularly saving face—may be a driving force for individuals. Indeed, people do lie.

However, the assumption that human thoughts are entirely accessible to conscious awareness, and that human behavior is largely governed by conscious agency, has been severely undermined in recent years.[47] People's expressed reports of their cognitive processes are often inconsistent with their actual judgments.[48] Hence shared cultural logics and psychological influences on judgment seem to operate wholly outside of people's heads and conscious awareness, so much so that social psychologists now contend that people rely on two distinct systems of judgment.[49] One system is rapid, intuitive, subconscious, and error-prone.[50] Another is slow, deductive, and deliberative, but much more accurate.[51] The two systems may operate simultaneously, but produce contradictory responses.[52] Moreover, the intuitive system can often dictate choice, while the deductive system may fall behind to search for rationales that align with accessible memories and understandings that the individual has about himself.[53] As a result, individuals may be unaware of: (1) the existence of a significant stimulus that could influence a response, (2) the existence of the actual response, or (3) that the stimulus affected the response.[54]

Putting this dual system to a test, social psychologists Timothy Wilson and Richard Nisbett conducted a study in which they required

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46. Douglas P. Crowne & David Marlowe, *A New Scale of Social Desirability Independent of Psychopathology*, 24 J. CONSULTING PSYCHOL. 349 (1960); Maryon F. King & Gordon C. Bruner, *Social Desirability Bias: A Neglected Aspect of Validity Testing*, 17 PSYCHOL. & MARKETING 79 (2000).

47. *See, e.g.*, Greenwald & Banaji, *supra* note 17, at 4.

48. *See* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 947, 951 (2006).

49. *See* Greenwald & Banaji, *supra* note 17, at 5; Anthony G. Greenwald et al., *A Unified Theory of Implicit Attitudes, Stereotypes, Self-Esteem, and Self-Concept*, 109 PSYCHOL. REV. 3, 4 (2002).

50. *See* Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 19, at 49.

51. *See id.*

52. *See* Steven A. Sloman, *Two Systems of Reasoning*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 19, at 380.

53. *See* Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231 (1977) (noting that people's "reports are based on a priori, implicit causal theories, or judgments about the extent to which a particular stimulus is a plausible cause of a given response").

54. *Id.*

participants to rate four identical pairs of stockings.[55] Forty percent selected the stocking in the right-most display position, while thirty-one percent selected the stocking just to the left of the most-selected stocking.[56] In essence, there was a position effect. Out of the fifty-two participants, eighty spontaneous responses were given for why they made their selection; none mentioned the position of the stocking as the reason for that selection.[57] When the subjects were directly asked whether the order of the stockings might have influenced their decision, only one indicated that as a possibility.[58]

More recently, and specific to the topic at hand, Andrew Wistrich—a federal magistrate judge in California—and his colleagues conducted a study in which they found that the initial amount offered by plaintiffs' lawyers in a pretrial settlement conference, whether it be high or low, created an anchor for how much trial judges would award in compensatory damages.[59]

Much of my personal work focuses on issues of race. Given that race remains such a contentious social issue, it serves as a catalyst for impression management, with individuals seeking self- and others' perceptions that they are racial egalitarians. The problem is that anywhere from seventy-five to ninety percent of whites, approximately sixty percent of Latino and Asian Americans, and anywhere from thirty-five to sixty percent of African Americans harbor automatic, subconscious, anti-black/pro-white biases, as measured by the Implicit Association Test.[60] These findings are based on small, experimental studies, as well as large, national data sets.[61] More importantly, subconscious biases are predictive of a range of behaviors, including the use of racially divisive language, judgments of perceived threat and hostility, guilt, and innocence; and they are predictive of judicial decision-making, especially where race is not a salient factor in the case.[62]

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55. *See id.* at 243.

56. *Id.*

57. *See id.* at 243–44.

58. *See id.* at 244.

59. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 19–21 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–94 (2001).

60. Greenwald & Krieger, *supra* note 48, at 958.

61. *Id.* at 957.

62. *See, e.g.*, John T. Jost et al., *The Existence of Implicit Bias Is Beyond Reasonable Doubt: A Refutation of Ideological and Methodological Objections and Executive Summary of Ten Studies that No Manager Should Ignore*, 29 RES. ORGANIZATIONAL BEHAV. 39, 47–48 (2009) (summarizing ten studies and concluding that subconscious bias influences a wide range of behaviors).

The point being that for the most part, when a judge makes racially insensitive comments, tells a racial joke, shares a racial email, or states a policy position that negatively implicates race, they should recuse themselves from cases where race can be implicated. It is not that they are racists, per se, but rather that they are likely to be influenced by automatic racial attitudes that they hold, or at the very least, give the impression that they cannot be impartial decision makers. I'll end on that note.

Remarks of Dmitry Bam

I usually tell my students not to try to make two big points in five minutes, but they're not here, so I'm going to try to make two big points. The first point I want to make is—and this really builds off what Greg and Debra said—is that we're all biased. We all have biases. If legal realism has taught us anything, it's that. The way we perceive the world depends in large part on our family, our experiences, our race, and our gender, on what we believe when we encounter new information.[63] And as somebody who writes about judicial elections, I'm going to focus mostly on elected judges, but I'll talk about other kinds of biases that are out there.

We've talked a lot about money today, and money is an easy target. It's an easy target because it's quantifiable; it's easier to find a solution when it comes to money, you can try to draw bright-line rules about recusal depending on how much money you receive in a campaign or how much money is spent on you. But money is just one problem. I want to argue that there are at least two other problems. One is at least as important, as big as money, and the other is much bigger.

The former is the problem of judges promising, committing themselves, to certain positions in the course of their campaigns. This was the issue in the *Republican Party of Minnesota v. White* case, when I was a law student in 2002, where the court said judges have the right to announce their views, perhaps even promising to make certain holdings.[64] Clearly there's not much of a difference between saying, my view is that abortion is illegal under state law and I'm going to do everything I can to stop it, versus actually promising to stop abortion. Right? So judges, oftentimes if you look at current campaigns, they make announcements, expose their views, make commit-

63. *See generally, e.g.*, Claude M. Steele, Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do (2010) (addressing the role of stereotypes in concepts of social identity).

64. 536 U.S. 765, 787–88 (2002).

ments to rule a certain way,[65] and once you've made those promises, you better be careful about keeping them, because the voters are going to hold you accountable next time. So that's one big problem.

The other, the biggest problem, really, is the fact that judges facing election have to keep the electorate happy to keep their jobs. We have lots of studies these days—for a long time we speculated that judges might be biased in these cases, biased in favor of in-state interests, biased in favor of the political party that's in power at the time the election is coming up—and now we have the numbers to back it up.[66] I feel like every month there's a new study showing judges are biased in favor of in-state parties;[67] and as Chief Justice Cobb mentioned last panel, judges impose harsher sentences as elections get nearer—they impose more death penalties.[68] So now we have those numbers, and so we know that judges are biased. Those are big, important biases that we haven't talked much about, that I think are just as important as money.

Of course, elected judges are subject to the same biases—all of the other biases—that every judge is subject to. And don't forget, in *Caperton* we had two other recusals, which we touched on earlier.[69] One was based on friendship; if I had PowerPoint, you would see a justice on the state supreme court on the Riviera with one of the parties to the case. Justice Maynard eventually recused.[70] But that's a big issue, and that's a harder one to regulate. We saw something similar at the U.S. Supreme Court, with Justice Scalia and Dick Cheney going duck hunting together.[71] How do you address that, those kinds of biases? So those are other, additional biases.

Of course personal characteristics matter as well. That's the other big piece. In one of my favorite recent studies, a couple of Harvard

65. In fact, special-interest groups often send questionnaires to judicial candidates asking them to express their views on controversial issues. *See, e.g.*, Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342, 347–48 (describing questionnaires special-interest groups use in the endorsement process).

66. *See, e.g.*, Joanna M. Shepherd, *The Influence of Retention Politics on Judges' Voting*, 38 J. LEGAL STUD. 169, 172 (2009).

67. *See, e.g.*, Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 601 (2005) ("We use more sophisticated empirical tests, as well as more data, to show that, in fact, judges are significantly biased in favor of their home states when that state appears as a party.").

68. *See supra* pp. 579–80.

69. *See supra* p. 490.

70. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 874 (2009).

71. *See, e.g.*, Steve Twomey, *Scalia Angrily Defends His Duck Hunt with Cheney*, N.Y. TIMES (Mar. 18, 2004), http://www.nytimes.com/2004/03/18/politics/18CND-SCAL.html.

professors looked at judges with daughters, and how they decide cases involving women's rights.[72] If you have a daughter or two daughters, you decide sexual harassment cases differently, sexual discrimination cases differently.[73] "What you had for breakfast" might sound silly, but there have been studies looking at Israeli judges where they impose less punitive sentences immediately after lunch.[74] So all those things make a difference. We had an empathy debate with Justice Sotomayor's appointment, when President Obama said empathy is an important piece of a Justice's character, and Senator Sessions got up on the floor and said, look, empathy's just a code word, it's about bias, right? You want a judge who is biased.[75] So there are all of these biases out there, and they're very hard to identify.

I want to finish with what might be a pessimistic note. Keith Swisher opened today, he was the optimist;[76] I'm going to take a pessimistic note. I don't think recusal is the answer. I don't think recusal can solve the judicial-bias problem. We know these biases are out there, and recusal is tempting as a solution, in part because there's seemingly no other solution, and in part because it seems so perfect at the time. You have a biased judge? Well you can just get rid of that biased judge, that's the fix. And I want to suggest that this doesn't work for at least a couple of reasons.

One reason is one that others have already talked about, and everyone seems to agree on, which is that judges decide their own recusal motions.[77] I think this could be easily changed. I actually wrote an article recently that that procedure is unconstitutional, not just problematic, because it puts the judge in the position of deciding their own case.[78] If you're a lawyer you can make that argument, to be rejected by the court, I'm sure. But even if you have other judges making these decisions, judges like each other, and they don't like recusal.[79] Law-

72. *See* Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2015).

73. *Id.* at 45–47.

74. Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889, 6889 (2011), http://www.pnas.org/content/108/17/6889.

75. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7–8 (2009) (statement of Sen. Jeff Sessions, Ranking Member, Comm. on the Judiciary).

76. *See supra* pp. 484–89.

77. *See supra* pp. 500–03.

78. *See* Dmitry Bam, *Our Unconstitutional Recusal Procedure*, 84 MISS. L.J. 1135 (2015).

79. *See, e.g.*, *In re* Mason, 916 F.2d 384, 386 (7th Cir. 1990) ("Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions.").

yers hesitate to bring these motions.[80] It's almost impossible to create a true adversarial process. We think of recusal as any other motion, where you have two litigants getting together and filing a motion with a judge, but that's not what recusal is. Recusal is a dispute between a judge and a litigant. So even if you bring it to another judge to decide that dispute, it's almost impossible to create an adversarial process. And maybe we don't even want to create an adversarial process, where the litigant and the judge square off to decide whether or not that judge should be recused.

And the final piece here, really the biggest one here, is if bias is institutional, in the sense that elected judges are biased—and the numbers seem to back this up, of course not every judge in every case, but statistically significant—then every elected judge is biased, so recusal just can't fix that problem. You can't replace one elected judge with another elected judge when both of them have to face the electorate, which is going to be concerned about and focus on how that judge decided each criminal case, and the judge will have to worry about how a criminal case has been spun against them. These campaigns are typically about who is the toughest on crime.[81] So if you're a judge, you've got to be careful about those consequences.[82] So that's why I think recusal doesn't work, and also why I think it's inconsistent with the idea of elections. Think about an election. It's about giving the people a chance to decide—a sort of popular sovereignty, democratic values—decide which values they prefer. It seems odd to remove the judge who has made certain promises or commitments from being able to exercise those promises and commitments.

So there are lots of problems here. I don't have a great answer, unfortunately, but I don't think recusal is the answer at all to fix this massive bias problem. I say in my articles that I think it's the biggest problem facing law, really all of law. My colleagues always say, yeah you're just saying that to appeal to 2L law review editors to accept your articles, but no, that's not the case. It really is, I think, the biggest

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80. *See, e.g.*, Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in* Bush v. Gore, 61 MD. L. REV. 606, 641 (2002) (discussing concerns that lawyers have about bringing recusal motions in front of judges who will ultimately decide those motions).

81. *See, e.g*, Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 57 ARIZ. L. REV. 317, 328 (2010) (describing "tough on crime" boasts in judicial election campaigns).

82. *See, e.g.*, A.G. Sulzberger, *Ouster of Iowa Judges Sends Message to Bench*, N.Y. TIMES (Nov. 3, 2010), http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0 (describing the successful campaign to remove three justices on the Iowa Supreme Court following a unanimous decision legalizing same-sex marriage).

problem facing law. In ninety to ninety-five percent of all cases, all judging is done by state judges, and about ninety percent of those are elected judges, so that's a lot of our legal work.[83] And these are not driver's-licenses cases or bureaucratic cases, these are fundamental-rights cases that decide questions on U.S. constitutional rights, on voting rights, abortion law, same-sex marriage—these are key, fundamental cases being decided by potentially biased judges.

QUESTIONS AND ANSWERS

Questions from Jed Shugerman to the Panelists

Jed Shugerman:

Great, there's a lot on the table. I want to make sure we have plenty of time for discussion, but I wanted to start with a couple of questions to focus on. Dmitry ended with the problems, without necessarily pinpointing solutions, but given that we've had several panelists focus on the problems of implicit bias, I want to give just a couple notes. Remember the doll study that was the focus of *Brown v. Board of Education*?[84] It wasn't the most advanced social science—it was early social science when it came to race and implicit associations. Dr. Kenneth Clark gave white children and black children in the south white and black dolls and asked for associations with those two dolls, and found that both black and white children in Jim Crow South had negative associations with the black doll and positive associations with the white doll.[85] And it turns out that those numbers were worse in northern states than in southern states.[86] And here's another fun fact: the study was replicated recently, and those numbers are even

83. *See, e.g.*, Shugerman, *Economic Crisis*, *supra* note 6, at 1063 ("Almost ninety percent of state judges today face some kind of popular election.").

84. 347 U.S. 483, 494 n.11 (1954). Dr. Kenneth Clark testified about the "doll test" in *Briggs v. Elliott*, 342 U.S. 350 (1952), one of the cases consolidated into *Brown*. *See* ANGELO N. ANCHETA, SCIENTIFIC EVIDENCE AND EQUAL PROTECTION OF THE LAW 53 (2006).

85. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 321 (2011) (describing Dr. Clark's testimony about the doll test).

86. *See id.*; *see also* JACK M. BALKIN, WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 51 (2002); Chris Edelson, *Judging in a Vacuum, or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in* Plessy v. Ferguson, 45 AKRON L. REV. 513, 542 (2011); Note, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 737 (1952).

worse today, in 2014.[87] And one more note about that: we've had some reference to Mahzarin Banaji's study,[88] and the papers about implicit bias. I actually have given my students access to that study and asked them to look at it, and think about bias, all kinds of bias, when I teach tort law. So given that lay of the land now, where we're more aware of implicit bias at least as decision-makers, what are the solutions? Debra, in your writing you talked about education, trying to use those resources.[89] Here we've been talking about recusal, is that a solution? Is better judicial selection a solution, and maybe more elections, not fewer? Maybe more accountability to the people, so that people who are held over from an earlier era and are not moving into the twenty-first century can be voted out of office? What do you think about those solutions to implicit racial and gender bias?

Rex R. Perschbacher:

I have a couple responses. One, remember there's also a part of (I think) the ABA's Section on Litigation study asking judges whether they were above average or not at detecting and deflecting bias, and ninety percent of the judges found that they were above average.[90] This is not a criticism of judges, this is us, this is human beings, this is the way in which we think about the world. Now I think recusal is not the answer, but I don't think there's any *better* answer. That can be my non-answer answer. I think that there's some virtue in adopting regimes where there's more-or-less automatic recusal—Chief Judge Lippman was talking about that in New York, where if you're given a certain amount of money you're not going to hear the case, that's that.[91] Because that would over time, I would hope, desensitize the judges to recusal; as a judge, I would see that I'm not being accused directly, I'm just following the law, this is what I have to do, I'm out of here. I think those sorts of approaches that are more peremptory—California of course uses a peremptory challenge for trial judges[92]—those kinds of things would help.

87. *See* Kimberly Jade Norwood, *Blackthink's Acting White Stigma in Education and How It Fosters Academic Paralysis in Black Youth*, 50 How. L.J. 711, 749 n.14 (2006) (citing Girl Like Me (Reel Works Teen Filmmaking 2005)).

88. *See* Greenwald & Banaji, *supra* note 17.

89. *See supra* pp. 591–94.

90. *See* Rachlinski et al., *supra* note 16, at 1225–26, 1226 n.127.

91. *See supra* pp. 552–56.

92. Cal. Civ. Proc. Code §§ 170–170.9 (West 2015).

Dmitry Bam:

But of course the peremptory piece doesn't work when it's implicit bias. We don't know our implicit bias ourselves, it's subconscious. The best answer I can think of is to try to look for evidence of actual bias. Maybe that's educating the public—one of the articles I wrote is about giving the public more information on the ballot itself[93]—so having more neutral evaluations about judges, and if you find evidence of a judge's bias that is not just subconscious bias that isn't acted upon, but rather if there is bias that a judge acts upon, somebody should be there to stop it. Who that somebody is, I think, has to be the people. They're the ones that are in charge here. A piece I'm working on right now is about the jury as a check on judicial bias and having more active roles for the jury, but those are the only possible solutions I can think of. Actually, we talked a lot about appearances, but here I think there's not much we can do with appearances—here, we have to actually find evidence that some judges are acting in a biased way, whether or not they have the implicit bias, in order to have somebody step in and try to stop them.

Debra Lyn Bassett:

One of the benefits of the research being done into the Implicit Association Test and unconscious bias is the idea that, by virtue of making people aware of the fact that they have these implicit biases, the educational component can help reduce bias.[94] At this point what they've developed so far has caused a temporary reduction, but at least there has been a reduction in unconscious bias moving forward. The hope is that as we get more and more psychological testing done, the reduction will increase—they've been able to now extend what started out as being a reduction lasting twenty-four hours to at least months,[95]

93. *See* Dmitry Bam, *Voter Ignorance and Judicial Elections*, 102 KY. L.J. 553 (2013).

94. *See* Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, 92 J. PERSONALITY & SOC. PSYCHOL. 1006, 1020–22 (2007); Rachlinski et al., *supra* note 16, at 1223.

95. *See, e.g.*, Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice with Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800, 801, 807 (2001) (noting that in a study that "sought to test whether automatic negative attitudes can be temporarily modified," participants achieved a temporary modification of racial bias lasting twenty-four hours); Kerry Kawakami et al., *Just Say No (to Stereotyping): Effects of Training in the Negation of Stereotypic Associations on Stereotype Activation*, 78 J. PERSONALITY & SOC. PSYCHOL. 871, 879 (2000) (measuring this effect over a twenty-four-hour time frame); Levinson, *Forgotten Racial Equality*, *supra* note 27, at 411–13, 415, 417–18 (emphasizing the temporary nature of reductions in im-

and so hopefully over time they'd be able to come up with something that would help reduce it altogether. But I think the educational component is absolutely crucial, because absent that awareness of the potential for unconscious bias, I think people are all too comfortable floating along thinking, "Who, me? I'm not biased. I can approach this case objectively." Think how often litigators use that in the juror context—you know, a juror who has said something and then the lawyer decides to try to rehabilitate them by saying, "But you can be fair, right?" "Oh yes, I can be fair." So, I think having the educational component as at least one piece in the arsenal helps. And I agree that judicial recusal or disqualification is not an absolutely perfect approach, but I'd sure hate to think of where we would be without it. Without it, would we really always have to come up with some sort of concrete proof of actual bias? I don't think we'd be comfortable with that either.

Gregory S. Parks:

I sort of agree with those arguments. I know the literature, and yes, you can reduce an individual's implicit biases by various methods, but the individual has to be motivated to want their biases reduced. So a judge that isn't interested in going to any training because they seriously don't believe that they're biased, or they believe that these are philosophical views that they have and it's not racial bias or gender bias or bias against LBGT individuals, creates a conundrum.

I think that diversification of the bench is a good thing. It can create some challenges in an elected judiciary. But there is a theory called social tuning, which is sort of two theories: one theory is that people aggregate to the middle, so if you have different ideas in the mix, then individuals might not be so extreme.[96] The other is that, at

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plicit bias achieved in psychological studies); Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 860 (2001) (decreased unconscious bias and stereotyping over a fourteen-week session); *see also* Irene V. Blair et al., *Imagining Stereotypes Away: The Moderation of Implicit Stereotypes Through Mental Imagery*, 81 J. PERSONALITY & SOC. PSYCHOL. 828, 838 (2001) (stating that their "current data cannot address the long-term consequences" of their counterstereotypic mental imagery).

96. Myriam N. Bechtoldt et al., *Motivated Information Processing, Social Tuning, and Group Creativity*, 99 J. PERSONALITY & SOC. PSYCHOL. 622 (2010); Jeffrey R. Huntsinger & Stacey Sinclair, *When It Feels Right, Go with It: Affective Regulation of Affiliative Social Tuning*, 28 SOC. COGNITION 290, 291 (2010); Garriy Shteynberg, *A Silent Emergence of Culture: The Social Tuning Effect*, 99 J. PERSONALITY & SOC. PSYCHOL. 683, 687 (2010); Lian Shufang, *A Study of Social Tuning Effect on Implicit Stereotype*, 27 PSYCHOL. SCI. 1046 (2004); Stacey Sinclair et al., *Social Tuning of*

least when it comes to race, individuals—for example, whites who have black friends, having a black friend does help reduce your bias, because you get to see a black person as a person, and not someone on TV, or in passing on the street.[97]

I do like the idea of recusal. With implicit bias the challenge is that there's not enough research to show how it plays out in various forms of behavior. But there is some research. So when we have a judge who makes racially insensitive comments, you can probably tie that to implicit racial bias at the very least, even if the judge denies that they're racist.[98] So if I can, I want to read something. February 20, 2012: Richard Cebull, Chief Judge of the U.S. District Court for the District of Montana, forwarded a racially charged email about President Obama from his official courthouse email address. The subject line of the email read "A Mom's Memory." It contained the following text:

> Normally I don't send or forward a lot of these, but even by my standards, it was a bit touching. I want all of my friends to feel what I felt when I read this. Hope it touches your heart, like it did mine. A little boy said to his mother, "Mommy, how come I'm black and you're white?" His mother replied, "Don't even go there, Barack. From what I can remember about the party, you're lucky you don't bark."[99]

Now it's an interesting play on miscegenation, a white woman and a dog, but the usual play here is actually what you saw a lot in the election, and post-election, and post–second election, associating the president with various forms of non-human primates.[100]

Automatic Racial Attitudes: The Role of Affiliative Motivation, 89 J. PERSONALITY & SOC. PSYCHOL. 583, 584 (2005); Stacey Sinclair et al., *Social Tuning of the Self: Consequences for the Self-Evaluations of Stereotype Targets*, 89 J. PERSONALITY & SOC. PSYCHOL. 160, 161 (2005).

97. Christopher L. Aberson et al., *Implicit Bias and Contact: The Role of Interethnic Friendships*, 144 J. SOC. PSYCHOL. 335 (2004); Tiffany Brannon & Gregory M. Walton, *Enacting Cultural Interests: How Intergroup Contact Reduces Prejudice by Sparking Interest in an Out-Group's Culture*, 24 PSYCHOL. SCI. 1947 (2013); Heidi Elizabeth McGlothlin, Children's Decision-Making About Social Relationships: The Impact of Similarity, Racial Attitudes, and Intergroup Contact (2004) (unpublished Ph.D. dissertation, University of Maryland, College Park), http://drum.lib.umd.edu/bitstream/handle/1903/1489/umi-umd-1441.pdf?sequence=1.

98. *See supra* notes 17–20 and accompanying text.

99. *See* M.J. Lee, *Judge Admits to Anti-Obama Email*, POLITICO (Mar. 1, 2012, 6:14 AM), http://www.politico.com/news/stories/0312/73486.html.

100. *See, e.g.*, Dan Amira, *GOP Official Who E-mailed an Obama Monkey Photo Won't Resign*, N.Y. MAG. (Apr. 20, 2011, 10:10 AM), http://nymag.com/daily/intelligencer/2011/04/gop_official_wont_resign_over.html; Catherine Taibi, *Belgian Newspaper Accused of Racism for Picture of Obama and Michelle as Apes*, HUFFINGTON POST (Mar. 24, 2014, 11:00 AM), http://www.huffingtonpost.com/2014/03/24/news

The challenge here was that Chief Judge Cebull's response, when called on the carpet, was, I received this email from my brother, it is indeed racist, so my brother must be racist but I'm not. I simply forwarded the email.[101] After Chief Judge McKee in the Third Circuit pressured the Ninth Circuit to do a closer review of other emails sent by Chief Judge Cebull, it revealed that he had sent many racist, homophobic, and sexist emails,[102] which underscored that even if he wanted to believe he is not a racist, he does harbor automatic, anti-black, maybe anti-whole-range-of-other-people attitudes.

Now this wasn't an issue about recusal, but I sure as hell would hate to be a black man in front of this judge in court in any kind of case. Luckily, he stepped down. So pushing back a little bit on your contention, Dmitry, I think recusal could be useful in certain circumstances, though probably not as widespread as one might hope.

Dmitry Bam:

Let me just clarify: I love recusal. I think it works in situations like that, and I think it's something we shouldn't abandon. I just don't think it's the answer. I don't think it solves the bulk of the problem. When you have a judge who writes racially insensitive emails, that judge should be recused. In the campaign contribution context, in cases like *Caperton*, I think Justice Benjamin should have been disqualified and should have recused. It's just whether or not recusal can really solve the bias, the core of the bias problem, and I don't think so. *Caperton* came out when I really started writing about this topic, and when I was in law school the *White* case came out, where Justice

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paper-obama-ape-belgian-satire-putin-barack-president-racism-racist_n_5020987.html; *South Korea Compares Obama to a Monkey*, N.Y. POST (Dec. 26, 2014, 11:48 PM), http://nypost.com/2014/12/26/n-korea-calls-obama-a-monkey-blames-us-for-web-crash/. For a more recent example, see *Univision Host Fired for Calling Obama an Ape*, USA TODAY (Mar. 12, 2015, 3:19 PM), http://www.usatoday.com/story/life/people/2015/03/12/univisions-rodner-figueroa-fired-for-michelle-obama-comment/70220006/.

101. *See* Lee, *supra* note 99 ("I didn't send it as racist, although that's what it is. I sent it out because it's anti-Obama.").

102. *See, e.g.*, Clair Johnson, *3rd Circuit Chief Judge Satisfied with Cebull Investigation*, BILLINGS GAZETTE (Jan. 29, 2014, 12:00 AM), http://billingsgazette.com/news/local/crime-and-courts/rd-circuit-chief-judge-satisfied-with-cebull-investigation/article_cca958e1-3316-579e-8bf6-a81d7d799416.html; Matt Volz, *Former U.S. District Judge Richard Cebull Sent Hundreds of Bigoted Emails Throughout Tenure*, HUFFINGTON POST (Jan. 18, 2014, 10:39 AM), http://www.huffingtonpost.com/2014/01/18/richard-cebull_n_4623151.html; Annie Youderian, *Judge Probe Reveals More Inappropriate Emails*, COURTHOUSE NEWS SERV. (Jan. 19, 2014, 10:22 PM), http://www.courthousenews.com/2014/01/19/64654.htm.

Kennedy said recusal can be the answer to these problems.[103] So for me it was love at first sight with recusal. It's just, and I've written papers about this,[104] I just don't think when we get to the real main problem—which is about elected judges thinking about their job prospects, and elected judges making promises and commitments on the campaign trail that bias their decisions—I just don't see recusal as solving those problems.

Jed Shugerman:

Let me push on this a little bit more, because I think we want to distinguish between the cases of explicit racism, which happen but only are signifiers, or are only symbolic, of how widespread implicit bias is, but people aren't aware of implicit bias, so I personally found it eye-opening when I and my friends, both white and black, took the Mahzarin Banaji Implicit Association Test. You have to hit buttons—so instead of just coming up with words loosely, they show pictures, faces, and then because of the faces you see and the words you see you have to immediately respond with hitting on the keyboard either the left side of the keyboard or the right side of the keyboard, and if you don't answer in half a second it doesn't register.[105] So it has to be immediate. When I took this test and others took this test, white and black, we were all surprised at how much we were racists. We all had negative associations with black faces and more positive associations with white faces, white or black. So it replicated the studies of the dolls.[106] So here are just two suggestions for the panel: one is requiring all judges to take this test. The judge will say, "I'm not a racist." Well it turns out, you take this test and it turns out you do have these biases. Just to push a little further, a modest proposal: then publish the results of those studies. So you have an index of which judges have the strongest implicit biases, and then those can be the basis for recusal or disqualification motions. So, how about that brave new world?

Debra Lyn Bassett:

The first part is already being done. That's exactly what the ABA Section on Litigation and the National Center for State Courts are do-

103. Republican Party of Minn. v. White, 536 U.S. 765, 802 (2002) (Kennedy, J., concurring).

104. *See, e.g.*, Dmitry Bam, *Making Appearances Matter: Recusal and the Appearance of Bias*, 2011 BYU L. REV. 943 (2011).

105. *See* Greenwald & Banaji, *supra* note 17.

106. *See supra* notes 84–87 and accompanying text.

ing in their workshops and programs that they're offering for judges, for sitting judges.[107] They offer these workshops for implicit bias and part of the workshop is taking the Implicit Association Test, so they can see firsthand how it works, and the reaction has been overwhelmingly positive. It's been sort of an "oh my goodness, I had no idea." And the judges have responded very favorably, and think this is very valuable information that they've learned.[108] And just kind of a half-step back, the creators of the IAT, Anthony Greenwald at the University of Washington and Mahzarin Banaji at Harvard, have repeatedly said that the result of this test does not automatically mean that you are a racist, it means you harbor these biases.[109] Maybe that's drawing a fine line, but they don't want people to have the idea that a strong race bias on the test automatically translates into the person being a racist, perhaps for obvious reasons. Because of largely vicarious experiences—that's what they're seeing in culture, that's what they've experienced—most of us carry these more negative associations with respect to race and gender and age and disability.

Rex R. Perschbacher:

I think it is both fair and unfair to say that judges are some of the toughest people to be in this position. They get every day people saying, "You're great, I love all of your opinions." That's just the way in which lawyers, in particular, tend to interact with judges. And for them to have to face saying, "I'm a racist, what do you mean?" is going to be very, very difficult. So I think judges have the hardest job of all in facing these situations. I'm glad Dmitry is on the side of recusal, at least part of the time. As I say, I think more automatic rules would work better, because they might eliminate some of the accusatory notions that are behind all this. So instead of "You're a racist, you're biased," "What do you mean?" it'd be nice to have more automatic rules that knock people off, and they adapt to that, and that's just the way it is.

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107. *See* CASEY ET AL., *supra* note 26, at 6; Drummond, *supra* note 26, at 20–21 (reporting on the ABA's creation of a program addressing implicit bias in the judiciary).

108. *See* CASEY ET AL., *supra* note 26, at 21 (reporting that with respect to the pilot judicial education programs in California, Minnesota, and North Dakota, "at least 80% of participants who responded to assessment questions in each state expressed satisfaction with the implicit bias program and saw its applicability to their work," and noting that "[t]heir comments used adjectives such as excellent, valuable, important, relevant, informative, worthwhile, and eye-opening to describe their reactions to the programs").

109. *See generally* MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE (2013).

Jed Shugerman:

Why don't we open it up to questions?

Question from Doug Lindner to the Panelists

Doug Lindner:

Thank you all for being here. My name is Doug Lindner; I'm a student here at the law school. My question for the whole panel is: I wonder if you have thoughts on whether the process of judicial selection has some effect on implicit political bias. Not just the issues of race, gender, et cetera, but also things like the environment of worship or any other issue that very politically active people may have stronger feelings about.

Rex R. Perschbacher:

Let me respond. Yes! Why does the President of the United States choose the people on the U.S. Supreme Court? Why does the governor of the State of California, second-time-around-governor, choose the people that he chooses for the bench? Because of the way they act politically, because of the steps they'll take. So I think there's no question that, at the higher-court levels certainly, maybe less so at the trial-court level, that the people chosen are chosen for deeply political reasons and it would be shocking to find them going contrary to that. I think we're just addressing things that come up in the course of their time on the judiciary where they may have an opportunity to step aside. So, yes, people are chosen politically. Look, in my state, California, we haven't had a direct recent history of judges being thrown off the bench because of their views, but we had a time in the 1970s I think it was, the late 1970s, when three members of the state supreme court were removed.[110] The first Governor Brown, in his first administration, put them on—and maybe he was more careless then—he put them on the court, they voted against the death penalty every single time, and they were pushed off the court through a retention election in which they were not retained. The people who were voting knew what they were going to get because the new governor, Deukmejian,

110. The removal of three justices from the Supreme Court of California occurred in a 1986 retention election. *See* G. Alan Tarr, *Rethinking the Selection of State Supreme Court Justices*, 39 WILLAMETTE L. REV. 1445, 1446 (2003); John T. Wold & John H. Culver, *The Defeat of the California Justices: The Campaign, the Electorate, and the Issue of Judicial Accountability*, 70 JUDICATURE 348, 348–49 (1986).

was very harsh on law-and-order issues.[111] The people who sponsored the campaign were largely business groups who wanted a change in the law of another sort.[112] I don't think there's any magical solution in the appointment process or the response process that'll fix these things.

Dmitry Bam:

We had a similar situation in Iowa, just a couple of years ago, where there were justices who voted in favor of same-sex marriage and got voted out of office in a retention election, which used to be completely safe.[113] So, undoubtedly, judges have to be conscious of what's going to get them elected, what's going to keep their jobs. I think the problem is even worse at the trial level where you know as a trial judge that each one of your decisions could be used against you in the next election, and that could drive the electorate against you. So that's why they are really cautious in cases that have high ceilings, which are usually criminal cases. You have to be cautious about how you sentence people, because if somebody gets out of prison and commits another crime, that's going to be what the next campaign is all about.

Jed Shugerman:

But judicial elections can be a red herring here. So let me take each of those examples and add another one. So in the example of

111. *See* William Blum, *Day of the Locust*, 75 A.B.A. J. 108, 108 (1989) (reviewing JOSEPH R. GRODIN, IN PURSUIT OF JUSTICE: REFLECTIONS OF A STATE SUPREME COURT JUSTICE (1989)) (noting that at the time of the retention election, former Governor Brown "was on his way out, to be replaced by the staunchly conservative George Deukmejian, the former state attorney general . . . [who] had climbed on the law-and-order bandwagon").

112. *See id.* (stating that the opposition to the California justices was funded by "sizeable contributions from oil and gas interests, insurance companies, and real-estate and agricultural associations"); Frank Clifford, *Financial Impact on Campaign: Stands on Civil Cases Stir Praise, Criticism of Bird*, L.A. TIMES (Mar. 9, 1986), http://articles.latimes.com/1986-03-09/news/mn-17892_1_bird (noting that "business interests have spent hundreds of thousands of dollars to defeat [the California justices]" and citing accusations that the justices were "anti-business" and "anti-insurance"); Tom Wicker, Opinion, *In the Nation; A Naked Power Grab*, N.Y. TIMES (Sept. 14, 1986), http://www.nytimes.com/1986/09/14/opinion/in-the-nation-a-naked-power-grab.html (noting that "a deeper motive of the business groups involved in the anti-Bird campaign—big contributors include the Independent Oil Producers Agency and the Western Growers Association—was suggested when Crime Victims for Court Reform issued a paper charging the Bird court with being 'anti-business' ").

113. *See* Sharyn Jackson, *Iowa Gay Marriage Ruling a Turning Point for Justices*, USA TODAY (Apr. 2, 2014, 11:40 PM), http://www.usatoday.com/story/news/nation/2014/04/02/iowa-gay-marriage-ruling-a-turning-point-for-justices/7237453/.

Rose Bird in California, if she were up for reappointment by Deukmejian, he would have never reappointed her. You take the Iowa judges with Governor Branstad, who helped orchestrate the anti–gay marriage campaign[114]—he would have never reappointed those three Iowa judges either. And Penny White, who has been a strong voice for reform, was a Democrat who was largely pro-death penalty on the Tennessee Supreme Court. She voted in one case, where there was a pretty strong procedural argument, to vacate a death sentence but still keep the killer in jail for the rest of his life.[115] That one case she was a concurring opinion on, and she was tossed off the bench.[116] The governor at the time, Sundquist, said she should have known better,[117] and no doubt, if it was up to the governor, she would not have been reappointed, and the legislature—they also would like to be governor one day—they would have cracked down on those three judges even harder.

So again, I think elections are messy for a bunch of unique reasons, like with money being so direct. But the politics are still behind the scenes in appointments. The money is still behind the scenes. In some ways it's scarier with appointments because of how the special interests are less transparent—there's less disclosure. Basically the governor and the legislature are organized political action committees, or the donor committees, because the judge doesn't get the money, but they know the governor and the legislature would be and they're going to be picking them and not picking them. So there isn't the same opportunity for disclosure. So in some way I think the election-versus-appointment debate obscures these other problems. Again, length of term is the thing I want to focus on the most, along with a selection process that doesn't privilege any one body or any one actor or any one corrupt force, but basically uses pluralism to direct the corruption

114. *See, e.g.*, O. Kay Henderson, *Hatch Says Branstad Will Use 'Bully Pulpit' to Push for Same-Sex Marriage Ban*, RADIO IOWA (Sept. 22, 2014), http://www.radioiowa.com/2014/09/22/hatch-says-branstad-will-use-bully-pulpit-to-push-for-same-sex-marriage-ban/ (reporting on statements by Iowa's Governor Branstad regarding the potential passage of a same-sex marriage ban within the state).

115. *See* State v. Odom, 928 S.W.2d 18 (Tenn. 1996).

116. *See* Colman McCarthy, *Injustice Claims a Tennessee Judge*, WASH. POST (Nov. 26, 1996), http://www.washingtonpost.com/archive/lifestyle/1996/11/26/injustice-claims-a-tennessee-judge/f0a28c33-fcb1-4c1b-9471-2d5704d56a88/.

117. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Justices from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 310 (1997) (quoting then-Governor Sundquist as responding to Penny White's defeat: "Should a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so.").

forces against each other. That way these forces all check the worst of the candidates, so they're left with perhaps more mediocre but less corrupt judges—or, ideally, better judges who through their merit rise above the special interests because everyone can agree that if they can't get their crony, they'll at least say that this person is the best candidate out there because they're the best at the rule of law, and we can at least trust that even if we haven't grabbed them with our dollars. So I think we need to think about this in a more complicated way than simply "elections are bad."

Rex R. Perschbacher:

Can I just add one thing: there are a couple of notable examples where federal judges who are not subject to retention elections have been picked on. Constance Baker Motley, a long time ago here in New York, was picked on as well. "She's a woman, she's black, she hates whites."[118] She says, I'm either going to be black or white, I'm either going to be a man or a woman[119]—but maybe it's not that simple today. In California recently with the same-sex marriage cases, Vaughn Walker, a federal district judge who was widely accepted as probably gay,[120] voted to strike down the laws restricting marriage to between a man and a woman.[121] He was then immediately accused of, and there was a whole hearing on, his bias—about whether he was just doing this for personal gain, because then he could get married to his long-time lover.[122] That was rejected, but these accusations are made.

118. *See generally* Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4–5 (S.D.N.Y. 1975) (denying a motion for recusal based in part on the argument that the judge would be influenced in her decision by a personal identification with a black female plaintiff); Amber Fricke & Angela Onwuachi-Willig, *Do Female "Firsts" Still Matter? Why They Do for Female Judges of Color*, 2012 MICH. ST. L. REV. 1529, 1544 (noting "the commonly held misperception that women of color cannot be neutral arbiters," and observing that some women of color have "face[d] requests for recusal from a discrimination lawsuit on the ground that they may identify with those who have suffered from race and/or sex discrimination"); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1207–08 (1992) (elaborating on the implications of the controversy involving Judge Motley).

119. *Blank*, 418 F. Supp. at 4–5.

120. *See, e.g.*, Jess Bravin, *Court Reporter: Judge's Gay-Marriage Ruling Now Embraced*, WALL ST. J.: WASH. WIRE (Feb. 21, 2014, 8:00 AM), http://blogs.wsj.com/washwire/2014/02/21/court-reporter-judges-gay-marriage-ruling-now-embraced/ (observing that "[a]lthough it's now known that Judge Walker himself is gay, few would have expected his role in marriage law" at the time he was first appointed to the federal bench).

121. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

122. *See* Maura Dolan, *Gay Judge Wasn't Required to Remove Himself from Same-Sex Marriage Case, U.S. Judge Rules*, L.A. TIMES (June 15, 2011), http://articles.la

So I do sympathize with judges. You make one—just one—mistake, that's all it will take, and you could be booted off the bench in an election. I kind of like the non-election long-term situation.

Jed Shugerman:

Other questions?

Question from Hugh Campbell to the Panelists

Hugh Campbell:

My name is Hugh Campbell, I'm not an attorney so forgive me if I use the wrong terms. All the panels seem to bring up money at some point, and in many cases dark money, and the desire perhaps by the ABA and especially some of the judiciary committees of the ABA to have more disclosure. Have these committees weighed in with the SEC on putting on the calendar, about public companies making disclosure? And if they haven't, should they?

Jed Shugerman:

I might just invoke that the panel's title is "Beyond the Bank," and so it's beyond the jurisdiction of this panel to talk about the SEC and banking policy. Is that fair?

Rex R. Perschbacher:

The ABA for a long time had a bunch of rules about economics. Money is actually easier to deal with than all the things we've been talking about here, as I think my co-panelists here were saying, because the ABA had a set of rules, where if you have any economic interest in a case you couldn't sit on the case.[123] Those have been cut back a little bit now, but I think money turns out to be a simple thing. The kinds of bias we are talking about are really difficult.

Question from an Audience Member to the Panelists

Audience Member:

We have judges and we have people who know they are fair-minded, really know it. And then we have people who are fair-minded, but will say, "I think I can sit in this case, but I can understand if somebody else reasonably doesn't think so." Now, you talked

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times.com/2011/jun/15/local/la-me-0615-gay-judge-20110616 (describing the recusal hearing and decision).

123. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.11(3) (AM. BAR ASS'N 2011).

about the subconscious. I'd like to suggest that the recusal does tend to surface things from the subconscious, or at least you use words to address them. But what do we know about that particular turn of mind that will see the other side and act upon it with a kind of understanding of the reasonable layman's view of the case?

Debra Lyn Bassett:

In terms of where that line is between somebody who says, "I'm not biased," but maybe they really are biased, versus someone who says, "I'm not biased, I know I'm not biased, but I do understand where the perception might come from"?

Audience Member:

How do some people get that way and other people don't? And do you train for that?

Debra Lyn Bassett:

I actually do think that, in part, that's a piece of what these current programs are trying to do through educating judges—sitting judges—to understand this phenomenon of unconscious bias so they can get to the point where they can see "oh!" And the program, although it invokes the Implicit Association Test so they can see some of their own reactions, is also generally reminding people about diversity and other kinds of matters.[124] This helps them see more readily where perceptions can differ, and where—even though they may believe down deep in their hearts that they're not biased at all, or that if they have some biases that they can nevertheless rise above those biases and act fairly—the educational component is trying to help them see that sometimes those perceptions can exist nonetheless. So I think that's about the best answer I have, maybe Gregory has a better one than that.

124. *See, e.g.*, Casey et al., *supra* note 20, at 6; *see also Helping Courts Address Implicit Bias: Resources for Education*, NAT'L CTR. FOR ST. CTS., http://www.ncsc.org/ibeducation (last visited Sept. 1, 2015) (providing links to articles and resources on implicit bias); *Implicit Bias Initiative*, A.B.A. SEC. LITIG., http://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias.html (last visited Sept. 1, 2015) (providing links to three videos developed by the Education Division of the Administrative Office of the Courts for California that "review[ ] the science of implicit bias and offer[ ] suggestions for approaching this issue").

Gregory S. Parks:

No, I would concur with that. I think for individuals, judges, being scientifically sophisticated helps them make that judgment. And the question is: how many state courts are actually doing this kind of training? Not a lot. I know that, I clerked on the Fourth Circuit, and my judge, Andre Davis, participated in Duke's L.L.M. program for judges about empiricism and law. I don't know if my judge finished his thesis yet, but I think judges who are willing to take this information in and not resist it are probably more inclined to make good judgments about their own bias. What's troublesome are the judges who believe that they are not biased, that no one can tell them they're biased, whether at the explicit or implicit level across any range of categories—yes, hardheaded ones.

Question from an Audience Member to the Panelists

Audience Member:

I'd like to push a little bit harder on this thought that recusal could function in response to gender or racial bias. So one thought about recusal is that that judge is qualified to be a judge and can sit as a judge on cases, but just not this particular case. And if you had enough information to demonstrate that because of gender or racial bias that judge should not sit on that case, aren't you really saying that judge should not be a judge at all?

Debra Lyn Bassett:

I think that what's going on with the programs that the ABA is doing is just making them think about whether this could be a factor. I don't think they're trying to come out and say, "You are a racist, you are a sexist, you are an ageist, you are somebody who discriminates always on the basis of disability." I think what they are trying to do is just educate the judges that these biases do exist, that these are within ourselves, and that by virtue of reminding ourselves—judges in particular, but all of us—if we all remind ourselves that most of us do harbor these biases, and if we make ourselves more aware of that on a regular basis, that can help—not eliminate, but help—to mitigate that bias. And if indeed someone has risen to the level where they are not just having some of these unconscious biases but they are actually actively racist or sexist or whatever, then, of course, arguably that person shouldn't be a sitting judge. But that's not what this educational program is about. What this educational program is about is heightening awareness, so you will not so blindly walk into situations. You

won't just assume, "Well, hey, I'm educated, so therefore how can I possibly harbor any racist or sexist or other kinds of biases." It's an increased self-awareness, that's what it's about.

Gregory S. Parks:

I would concur with that. I make a sharp distinction between being a racist and having implicit racial biases. Racist is a very high standard. You use the "N-word" frequently, well this gets complicated, and you're not an African American around other African Americans, but you use it as an epithet and you explicitly despise African Americans. You're a member of the Ku Klux Klan. You're a racist, right? The challenge with implicit bias is that, especially around issues of race, so many people have them. Like the numbers I gave, seventy-five to ninety percent of whites, approximately sixty percent of Latino and Asian Americans, and thirty to sixty-five percent of African Americans suggest that it is in the ether, that it is in the environment that we all take in; and so to say that a judge cannot be a judge because they have implicit racial or gender or sexual orientation biases would mean we probably wouldn't have judges. And so, the question is, what do we do then, once we know that so many people have implicit or automatic biases? To my co-panelist's point, we try to educate them. We hope for the best. We hope that they are actually interested in not being biased, that they will want to continue to do things that will militate against their automatic associations with racial categories, gender, sexual orientation, and positively and negatively valenced concepts and words. So, that's my point. I think you have to make a sharp distinction between a sexist, a racist, a homophobe, and someone who simply has an automatic preference or bias.

Question from an Audience Member to the Panelists

Audience Member:

Thank you, I just had a quick question. There is one type of bias that I don't think anyone has really touched upon, but I'd just be curious as to the panel's views on this. It's a simple fact—I guess for lack of a better word I'd call it professional bias—the fact that unlike in some countries where judges are trained from law school or shortly thereafter to become judges and to think (hopefully) as impartially as possible, the judges here, whether appointed or elected, all come for the most part from a professional background and they bring their personal experience, whether it's from the plaintiffs' bar or the prosecutor's office or otherwise. Obviously, having been an advocate for

many years, it's not a bad thing necessarily to have a bias in that context, but how do you turn the switch off? I was curious to see whether anyone has empirically measured the effect of those types of very obvious professional biases on the way cases get decided, because I would think it's probably one of the first things that people look at when they're doing research on a particular judge: what's their background? Where do they come from? What's their point of view?

Dmitry Bam:

Yeah, there was that—I forget the author now, somebody will probably remember it, there was a great book that came out just a couple years ago called *The Judge-Lawyer Bias*, which looks at how judges make decisions that are sort of in favor of the legal profession.[125] They try to make laws more complicated, try to make lives better for lawyers.[126] I can't remember the author, but it's a great book and he's done a lot of sort of empirical work. There are other kinds of biases that stem from that, as well. I mentioned friendships, right? I mean, that's what happens when you have judges who come from the ranks of lawyers, who were partners in the same firm. You can have a lot more friendships, and you have to try to figure out how you're going to deal with those kinds of biases that really result from the fact that judges didn't go to special judge school with their own little community like is common in Europe, but really are just lawyers at heart.

Gregory S. Parks:

Following up on what we've been talking about, which is educating judges: so, implicit racial or gender bias is only one kind or two kinds of cognitive biases that are out there. There are dozens of different types of cognitive biases. And so I know my mentor at Cornell, Jeff Rachlinski, when he travels around the country and goes to judicial conferences, he actually collects data and he gives a presentation—so the judges get some benefit, and he gets a publication—and what he does is he tries to educate them about cognitive biases that are much broader than simple implicit racial, gender, and sexual-orientation biases.[127] The Wistrich article that I just mentioned with Chris

125. *See* BENJAMIN H. BARTON, THE LAWYER-JUDGE BIAS IN THE AMERICAN LEGAL SYSTEM 23 (2010).

126. *Id.*

127. *See, e.g.*, Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Heuristics and Biases in Bankruptcy Judges*, 163 J. INSTITUTIONAL & THEORETICAL ECON. 167 (2007); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227 (2006); Andrew J. Wistrich, Chris Guth-

Guthrie, Dean of Vanderbilt Law School, and Jeff Rachlinski, who's at Cornell Law School, is simply focused on anchoring—how large numbers and small numbers sort of orient a person as to what kind of settlement figure they would come up with or damages award they would come up with.[128] So I know that there are individuals out there who are actually trying to train judges around broader notions of what cognitive biases are, and maybe how to address them, but I'm not sure if they focus on the specific one that you talk about.

Jed Shugerman:

One point to add is that I was making an argument for merit selection earlier, but one of the big downsides of merit selection is that a big player in that process is the state bar association. So we're talking about replicating the profession—in fact, you're giving them a seat at the table to pick who gets sent to the governor on that list of three. So here are a couple more layers to that. First of all, it turns out when they did studies of Missouri—of what is often called the Missouri Plan, because they are one of the innovators of it[129]—studies showed that it was equally balanced between the plaintiffs' bar, the big plaintiffs' bar, and the big defense bar, but there were no labor lawyers who got appointed and, surprisingly, no criminal defense lawyers. They're out no matter what with this process we have in America. So that's one angle. The other problem with merit selection, at least in the past, is that we're talking about how to counteract implicit bias. Studies in the '70s and '80s found that these merit selection systems produce more white men for the bench, whereas the parties—whether Democrat or Republican—were more likely to nominate female and racial-minority candidates, in part because they were more accountable to the broader public whereas the bar still was largely run by white men.[130] Query whether this has changed a bit as the bar has changed in the twenty-first century, but it certainly seems to lag behind society, so that's certainly in my mind a mark against the merit system despite its other advantages.

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rie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005).

128. *See supra* note 59 and accompanying text.

129. *See* MAUREEN O'CONNOR, OHIO COURTS 2013: A PROPOSAL FOR STRENGTHENING JUDICIAL ELECTIONS 1, 3 (2013), http://ohiojudicialreform.org/wp-content/resources/Plan13.pdf.

130. *See, e.g.*, Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 51–54 (2008) (comparing diversity on the bench between the years 1985 and 2005).

Question from Leonard Horowitz to the Panelists

Leonard Horowitz:

Thank you. My name is Leonard Horowitz. I have a broad question for you. It seems to me that impartiality and the appearance of impartiality are a bedrock of democracy, and we're having now—and it's probably happened for a long time, but I think it's more apparent now than maybe ever before—we're seeing important decisions come with political bias. Cases, especially in the health care act cases and the voter ID cases, are being decided on strictly political lines, which seems to me to be a very dangerous trend, and potentially taking away confidence in the judicial system. I would wonder if you would comment on that, please.

Rex R. Perschbacher:

I don't have a helpful comment—I think that's true! Personally, anyway. Yes, our society is becoming much more politicized in every sort of way. We used to just worry about lawyers getting into everything, but now it's politicians, I guess, getting into everything. And I don't think there's a darn thing we can do about it from the bias point of view.

Dmitry Bam:

Yeah, part of the question is: we can describe lots of things as biases, but it's very hard to define what exactly we want to get rid of, so what *is* impartiality, right? I think we've sort of accepted the fact that partisan preferences, political preferences, play an important role in judges' decisions. We've known this for a long time but pretended for a long time that it wasn't the case—but we've known for a long time now that judges' backgrounds and their political preferences shape how they view the world, and I think we've just come to the conclusion that that's not the kind of impartiality that we demand. In the *Republican Party of Minnesota v. White* case that we've talked about a couple of times, the court grapples with defining impartiality.[131] And one of the definitions that Justice Scalia rejects is complete open-mindedness—sort of a clean slate, "I'm accepting every argument"—and he says we don't want that kind of impartiality.[132] We select judges based on their views. We want them to be educated, having made up their minds on certain issues, and just because I, Jus-

131. 536 U.S. 765, 775–79 (2002).

132. *Id.* at 778.

tice Scalia, have made up my mind on abortion and you've seen that view in my decisions, that doesn't mean I'm not impartial. I'm still impartial; I just have a legal view that has shaped my political and partisan preferences.

Question from Susan Lerner

Susan Lerner:

I think it's interesting—I'm Susan Lerner by the way—to look at the trial-court level in Los Angeles over a period of time, starting with Jerry Brown in his first incarnation and going all the way through to now. There's a tremendous transition in terms of the sorts of people appointed or elected. Los Angeles for the trial court, and California in general, have the mixed system: it's appointed, judges are appointed not from a panel, just generally—unless there has been no appointment when the election comes up for that particular seat, in which case it becomes an open seat and anybody can run.[133] And my friends who are judges in Los Angeles pointed out that a big emphasis in the past twenty years is prosecutors are appointed to the bench there, and in fact when you interview them for evaluations and you say, "Why do you want to go on the bench?" some of them actually say, "well, it's the next step in my career! I've done what I can in the DA's office." So you get that bias, but the election then ends up being a break from that process because people who have different backgrounds are able to run. So it isn't always the case that elections work in a negative way. But just in response to your comments about Scalia's comments and the biases, and I'm forgetting the Ninth Circuit conservative judge who wrote a beautiful book almost ten years ago now where he said that the most important quality of a judge is the ability to continue to learn and grow on the bench. And don't we have a problem with some of the judges who have been appointed—particularly, from my bias, that come through the Federalist Society who have their formed opinions, and are not listening to the litigants and who are not learning and growing on the bench but rather putting everything into the box that they came with, and isn't that a problem?

Jed Shugerman:

On this question, Linda Greenhouse just wrote a piece yesterday called *Law in the Raw*, and the point was that we've reached a new era

133. *See Methods of Selection: California*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=CA (last visited Sept. 1, 2015).

where judges are just politicians in robes.[134] And my reaction is, welcome to the party, Linda! I mean, just look at American history. They were *literally* politicians in robes throughout the entire nineteenth century. They were actually running from the bench; during Lincoln's presidency and right after, Lincoln's appointees were all people who had political ambition—this is sort of the book *A Team of Rivals*, that shows that many of these appointments were specifically because they were rivals to Lincoln and he kept his coalition together, and many of them harbored presidential ambitions from the bench.[135] Charles Evans Hughes resigned from the Supreme Court to run for President.[136] And so they were deeply political in the nineteenth century, and deeply biased in the nineteenth century obviously as well. The Supreme Court was attacked for being political through the *Lochner* era, and through the New Deal era, and it was always on the conservative end until it was deeply political on the left for about fifteen years. I liked those decisions in general, but they were political. Earl Warren was a politician who only got on the Supreme Court because he was a successful politician and because he had been a challenger in 1952 for the Republican nomination.[137] So it's a proud tradition in America, unlike in other countries, to appoint politicians to the bench. So whether we have elected judges formally, or politicians appointed, it's deeply in the American judicial fabric.

Okay, so that sounds negative. Rex talked about European judges and why they don't talk about the appearance of bias as much—it's because they're bureaucratic functionaries. Do we want the European system, where if you get the right grades coming out of a European law school, you're selected to go from college right into judge school without doing anything else with your life, and then you're literally a self-promoter?[138] Academics do that too, right? But European judges work their way up; they promote themselves without ever meeting a non-judge or non-lawyer. And so Europeans haven't exactly gotten the right balance, either, but somewhere between the two may be a better mean.

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134. *See* Linda Greenhouse, Opinion, *Law in the Raw*, N.Y. TIMES (Nov. 12, 2014), http://www.nytimes.com/2014/11/13/opinion/law-in-the-raw.html.

135. *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN, at xvi (2005).

136. *See, e.g.*, Jill Lepore, *Benched*, NEW YORKER (June 18, 2012), http://www.newyorker.com/magazine/2012/06/18/benched.

137. *See generally* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT (1992).

138. *See* SHUGERMAN, *supra* note 1, at 5.

Question from an Audience Member to the Panelists

Audience Member:

Yes, I think that two barriers to exposing judges' biases are, number one, the judges' ability to alter transcripts of the hearings, and secondly, closed courtrooms. Although in New York it's supposed to be open courtrooms, that's not the case all the time in Queens family courts, and I think those are two barriers.

Dmitry Bam:

On the second piece I just want to say that I agree that more openness is part of the answer, more exposure to the public. Jocelyn Simonson, who I think is here, who is, I think, a fellow at NYU right now, wrote a great piece that recently came out about having the public—courtroom visitors, participants—being able to be more exposed to what's going on as sort of a check on judges.[139] That's part of the answer, and part of what I've been thinking about is how you get the public more involved and educated about what it is that judges are actually doing, and not being able to sort of hide it behind a cloak.

Question from an Audience Member to the Panelists

Audience Member:

I wanted to follow up on *White*, and whether there have been any studies relating to this as it applies to judges. I think there have been some as it applies generally, but psychologically, once a person announces some type of position, even if they don't commit to it, which is sort of that line in *White*, have there been studies that say it's more difficult for the individual to change or be open-minded? Has any of that been done in terms of judges who have announced something in a campaign and then been confronted with a similar case and then stayed "in the box," as the commenter over there said? Has *White* created a whole new set of biases that didn't exist because now, once you've announced, you're on the record and you can't then be more open-minded? Are there any studies, anything you can speak to on that?

Dmitry Bam:

Well, I don't know if there were studies done with judges—I mean, there's lots of social science that looks at making previous com-

139. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173 (2014).

mitments or being stuck to those views, so that has been done; but I haven't seen a study that's been done with judges on that. But of course, the majority in that case actually rejects that reasoning. The majority says, "Look, we as judges, sometimes we've committed ourselves in previous opinions, sometimes committed ourselves in books that we've written as academics." So Justice Scalia, in the majority, says, "It doesn't really matter. Just because we've announced our views on something, that doesn't mean we're biased, even if it sort of suggests that that's what we believe."[140]

Audience Member:

But is there a difference between doing that publicly on the campaign trail versus in an opinion or in a law review article?

Dmitry Bam:

I would think so. And I think Justice Stevens or Ginsburg in dissent says that there is a difference, and in fact, if you look at federal nomination hearings, there's a reason why we don't say anything, right? We don't say anything useful because we're worried about how that would look, but now we're letting judges do it in the course of their campaigns.[141] And what that really means, when you let them do that, is you *make* them do it because they're competing against others who are doing it, or you've got questionnaires coming to judges and they say "What are your views?" and you have to answer them, so I think you're right that there is a difference, but the Court rejects it.

Jed Shugerman:

I mean, this is part of the point in *White*. Both Kennedy and O'Connor say that if a state chooses judicial elections, you're going to have people campaigning in those elections; that's what you get with elections.[142] And so the downside is, people make these campaign statements, and some would say about democracy that you actually hope that people would actually have some stickiness to the things that

140. *See* Republican Party of Minn. v. White, 536 U.S. 765, 777 (2002) ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason.").

141. *Id.* at 806 (Ginsburg, J., dissenting) ("Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench.").

142. *See id.* at 789 (O'Connor, J., concurring) ("Moreover, contested elections generally entail campaigning.").

they say on the campaign trail that anchor them in. I think that's wise; I think if it's uncomfortable for judges to be making promises or to be making campaign statements or to be asking directly for money, there is a plausible view that says, "That's what comes with elections, so if you don't like it, then let's see elections in full, and then the public can either take them or reject them based upon what their benefits are."

Audience Member:

So are judicial elections unconstitutional?

Dmitry Bam:

Some have argued that.[143]

Jed Shugerman:

I think the point about federalism is to say that the public should at least be able to see them in one way or the other and then make that choice.

143. *See, e.g.*, Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986) (observing that "the use of non-tenured state judges seems to be a clear violation of procedural due process" in at least some cases).