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Judicial Mindfulness

Evan R. Seamone
Mississippi College School of Law, erseamone@mc.edu

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JUDICIAL MINDFULNESS

*Evan R. Seamone**

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* J.D., University of Iowa College of Law; M.P.P., School of Public Policy and Social Research, University of California, Los Angeles; B.A., University of California, Los Angeles. I would like to thank Ken Kress, Margaret Raymond, Ellen Langer, Michael Bassecches, Martin Katz, John Brogan, and especially The Honorable Celeste F. Bremer for their helpful insights on earlier drafts of this manuscript. This Article is dedicated to Avis Ridley-Thomas, the staff, and the volunteer mediators at the Los Angeles City Attorney's Dispute Resolution Program who, often against great odds, successfully assist disputants to become aware of and confront their biases on a daily basis.

Like all human beings, judges are influenced by personal routines and behaviors that have become second nature to them or have somehow dropped below the radar of their conscious control. Professor Ellen Langer and others have labeled this general state "mindlessness." They have distinguished "mindful" thinking as a process that all people can employ to gain awareness of subconscious influences, and thus increase the validity of their decisions. In this Article, I establish a theory of "judicial mindfulness" that would guard against two types of "cold" bias when interpreting legal materials. The first harmful bias involves traumatic past events that might unknowingly influence judges when they decide cases that are reminiscent of the trauma. The second harmful bias involves the elimination of valid legal theories or the interpretation of ambiguous phrases to mean only one thing, thus motivating premature decision-making. Judicial mindfulness is attainable when judges implement two psychological techniques that fit within psychologists Wilson and Brekke's general framework for correcting instances of mental contamination: (1) negative practice and (2) transitional or dialectical thought. These systems alert judges to their biases by allowing them to understand how they arrive at decisions, and then offer a framework that analyzes the processes they employ to achieve legitimate legal conclusions.

I. INTRODUCTION

> "There are Three things extreamly hard, Steel, a Diamond and to know one's self."[1]
>
> —*Benjamin Franklin*

Only once have I witnessed a law student behave in a manner disrespectful of a judge. The student recounted the tale of a federal

1. POOR RICHARD: THE ALMANACKS FOR THE YEARS 1733-1758, at 175 (Richard Saunders ed., 1964) [hereinafter ALMANAC] (citing BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1750)). As a caveat, this Article rests on the assumption that judges should exercise self-awareness—they should know whether biases have impaired the legal justifications they provide—whenever they have measurable discretion. Just as America's judicial circuits have concerned themselves with the threat of gender and racial biases influencing the courts, a majority of Americans are concerned with these types of influences as well. *See generally* Article, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force: The Quality of Justice*, 67 S. CAL. L. REV. 745 (1994) (discussing concerns); John M. Scheb & William Lyons, *Public Holds U.S. Supreme Court in High Regard*, 77 JUDICATURE 273, 274 (1994) (noting that sixty-nine percent of the national public believed Justices should recognize and eliminate political biases from decisions). When a decision is biased, even if judges provide legal bases for their decisions, they are inherently less accurate. *See infra* Part III (describing harmful judicial biases). In the pages that follow, I provide a practical approach for judges to achieve greater self-awareness.

judge who read a self-help book in her chambers as she decided a case.[2] Because the student acted as if the judge were neglecting her official duties, his tale inspired an important question: should it be the case that judges refrain from self-help? Seemingly, the vast majority of the American judiciary are no different than book dealers: they see self-help as "the Rodney Dangerfield of publishing"—it just doesn't get any respect.[3] Like the movers-and-shakers of the business world, judges are supposed to be self-reliant in the face of personal conflict.[4] Yet, notwithstanding doubts regarding self-help, many of which are

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2. A student at a conference on judicial clerkships described a particularly odd experience while interviewing with a federal judge. When he met the judge, she was completing the review of a dispute that required a prompt judgment. The judge held two items in her hands. While, in one hand, she grasped the case file, in the other, the judge clenched a worn copy of a generic self-help book on improving decision-making. The book had been opened to a dog-eared and thoroughly highlighted page featuring a shaded box containing instructions on stress-reducing breathing techniques. Supposedly, while in the student's presence, the judge followed these exercises by the number, and then commented that such exercises enabled her to withstand the toils of her role. Professors, and students alike, were startled upon hearing the story. In fact, the student referenced the meeting to convey the downside of interviewing with judges. He echoed the popular criticism that it is not a judge's place to search for help from anything but case law or treatises in resolving a given dilemma.

3. Daniel McGinn, *Self-Help U.S.A.*, NEWSWEEK, Jan. 10, 2000, at 44.

4. Judges must achieve a final decision, just as the working world requires unquestioned obedience while performing work routines. The duty to apply the law to cases may consequently raise conflicts for judges. *See, e.g.*, Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (observing that "it is more important that the applicable rule of law be settled than that it be settled right"). *Compare* Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 255 (1998) (noting "traditional rules of finality of judgments" in all legal proceedings), *with* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (Talcott Parsons trans., 1958) (stressing the importance of working within an occupational calling without concern for life's pressures).

A factor that complicates matters for judges is a relatively widely held belief among judges that they should avoid referring to any personal influences in their decision-making. This situation existed in the 1920s when judges would have been "stoned in the street" for acknowledging such influences. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 275, 278 (1929). A decade later, the stigma continued, requiring judges to deal with behavioral matters in "a sneaking, hole-in-corner manner." JEROME FRANK, LAW AND THE MODERN MIND 152 (1930). And, even today, little has changed. While judges recognize the need to reduce racial and gender bias in the courts, the only way they have been willing to address such issues has been in an anonymous forum where they can deny claiming responsibility for their beliefs. *See* Article, *supra* note 1, at 969 (describing a program that "used a series of real-life vignettes gathered from the news media [and] elicited audience participation by providing each participant with computer capacity to give their opinion, anonymously and immediately, about whether a given scenario constituted gender-biased conduct"). The following risk thus presents itself: pressure to limit disclosure of personal conflicts, which do not rise to a level requiring recusal from a case, may very well condition judges to ignore such factors.

Under these models, reliance on self-help resources becomes a sign of personal weakness. *See* Julia M. Klein, Book Review, *A Noodler's Chicken Soup*, THE NATION, Mar. 12, 2001, at 31 (noting Tom Tiede's popular sentiment that readers who buy self-help books "may be congenitally programmed to fail"); Ira J. Hadnot, Editorial, *Therapy By the Book; Increasing Popularity of "Self-Help" Works Sparks Debate About Their Pluses, Minuses*, DALLAS MORNING NEWS, Apr. 23, 2000, at 1J (doubting individuals' choices when they rely on advice from unsupported research).

reasonably based,[5] executives in all fields increasingly purchase self-help titles and government agencies increasingly send top-level officials to self-mastery workshops at taxpayers' expense.[6]

While the general public might be wise to continue seeking personal guidance in its faithful trips to the bookshelves, it is less evident that judges' unique problems are best addressed in the same generic self-help racks.[7] Although judges are well respected, judging is one of the most stressful professions known (*i.e.*, judges are often torn between the mandate of the law as opposed to their own conscience).[8] From a

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5. *See* Hadnot, *supra* note 4, at 1J (observing estimates that over ninety-five percent of these books are "published without any [supporting] research").

6. Consider that the number of Americans buying self-help titles rose 15% in only three years, from 33% in 1988 to 48% in 1991. *Compare* Leonard Wood, *Self-Help Buying Trends*, PUB. WKLY., Oct. 14, 1988, at 33 (reviewing Gallup Poll from 1988); Leah Garchik, S. F. CHRON., July 27, 1991 (providing statistics for 1991), *with* Robert D. Putnam, *Are We Joiners or Loners?*, ATLANTA J. & CONST., Dec. 27, 1995, at 7A (noting that 40% of Americans belonged to some type of support group in 1994). These purchasers, in fact, occupied many of the higher stations of American professional life. *See* Wood, *supra*, at 33 (noting that the majority of self-help book buyers are college educated, aged 35-49, and earn an annual income over $30,000); Margaret Jones, *'Convergence' at the Bookstore*, PUB. WKLY., Nov. 3, 1989, at 32 (noting a "typical clientele [that is] 30-35 years old [and] college-educated or better").

In the realm of public service, self-help has touched the lives of our nation's most powerful leaders. On December 30, 1994, President Clinton invited a number of self-help specialists to a retreat at Camp David for counsel. His guests included Anthony Robbins and Stephen R. Covey, both of whom are known for self-help publications and seminars. *See* Ann Devroy, *Clinton Turns to Two Wizards of Self-Help*, MEMPHIS COM. APPEAL, Jan. 4, 1995, at 4A (describing how former Minority Speaker Newt Gingrich had also summoned Covey for advice). Yet, in light of this novel visit, a "prominent" official within the Clinton Administration reported: "I was appalled .... My information is that the chief of staff (Leon Panetta) didn't even know about [the meeting]." Robert Nova, Editorial, *Ickes' Unseen Hand Running Democratic Party*, BUFFALO NEWS, Jan. 14, 1995, at 3. Seemingly, this episode received more public outcry than rumors of President Reagan's multiple meetings with psychics, which incidentally evidenced similar reliance on metaphysical solutions to public officials' problems. *Compare* Wayne R. Anderson, *Why Would People* Not *Believe Weird Things?*, 22 SKEPTICAL INQUIRER, 42, 43 (1998) ("We smiled when we learned that Nancy Reagan arranged her schedule (and that of the president?) on the advice of an astrologer . . ."), *with* McGinn, *supra* note 3, at 45 (noting that agencies are spending taxpayers' money to send an increasing number of military officials and public administrators to self-help workshops like the Covey symposium regarding habits of effective people).

7. Seemingly, self-help book readers strive for keys to unlock the doors to their subconscious minds. They want to know what restrains them from attaining personal goals. When we consider that Americans have relied on such documents since the inception of this nation, such desires hardly seem immature or childish. *See, e.g.*, *Introduction to* ALMANACK, *supra* note 1, at vii (observing how most Americans found the *Poor Richard's* series "virtually indispensable"). However, it is not so clear that judges will prosper from applying methods that are not specifically intended for the complex legal decision-making that they face on a daily basis. *See* William J. Brennan, Jr., *Foreword*, *in* RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING, at xxi (3d ed. 1997) (noting that even college graduates are not prepared to handle the legal analyses performed by first-year law students, let alone judges).

8. *See* C. Robert Showalter & Tracy D. Eells, *Psychological Stress in the Judiciary*, 33 CT. REV. 6, 6 (1996) (noting the National Judges Health-Stress Project's findings that "judges are over-represented in ... 'high stress' categor[ies] compared to other professionals"); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104, 114 (1981) ("Although American judges . . . are subject to the expectation that they 'follow' precedents in making decisions, they are just as obviously expected, by others *and* by themselves, to 'do justice.'"); Karl Georg Wurzel, *Methods*

psychological perspective, the major difficulty that results from such stress is increased difficulty recognizing the presence of unwanted thoughts. Studies indicate that "when individuals participate in complex tasks, they are much less aware of themselves," which is only compounded by the stress, which makes them "less self-conscious [and] undermine[s] self-regulatory processes."[9] Not only does this stress impair the judge's ability to understand limitations on his conscious control, it results in a diminished ability to "carefully weigh and elaborate upon the various sources of information impinging on them."[10] In light of such impositions, judges may very well be obligated to better understand their own limitations to successfully discharge their duties.

While generic self-help may not be the appropriate way to build necessary linkages between judges' own personalities and the judicial role,[11] this prohibition should not outweigh every imaginable self-help method. The challenge is creating a resource for resolving a judge's inner conflicts that is acceptable to peers who hold him to extremely high standards.[12] This Article creates such an alternative resource. It probes judicial mindsets with the hopes of revealing the human factors that will enable judges to achieve greater reliability in their interpretations of the most difficult cases and controversies. While we could call this method judicial self-help, we should call it judicial mindfulness because of how it is applied.

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of Judicial Thinking, *in* SCIENCE OF LEGAL METHOD 286, 298 (1921) (noting that "the judge is exposed more than any other thinker to emotional influences," which can lead to errors in judgment).

9. James W. Pennebaker, *Stream of Consciousness and Stress: Levels of Thinking*, *in* UNINTENDED THOUGHT 327, 330 (James S. Uleman & John A. Bargh eds., 1989) (hereinafter UNINTENDED THOUGHT).

10. *Id.* at 341. *See also* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 783 (2001) ("[J]udges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment.").

11. For more on this connection, see Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 2028-29 (1996): "[P]erceived [judicial] constraint comes from a text, or more precisely, [judges'] agreed-upon perception of a text.... [T]he judges' own personal ideologies are not law, as judges themselves well know. They become part of law through a process of integration and coordination whose contours are established by existing legal categories.".

12. *See* Scott C. Idleman, *A Prudential Theory of Judicial Candor*, 73 TEX. L. REV. 1307, 1327 (1995) (noting how judges often write opinions to impress one another). To highlight the demands of peer pressure on the Supreme Court, see Jilda M. Aliotta, *Social Backgrounds, Social Motives and Participation on the U.S. Supreme Court*, 10 POL. BEHAV. 267, 279 (1988) (pointing out that "justices who graduated from less prestigious law schools [may] feel that they are at a disadvantage in attempting to persuade their colleagues").

II. PSYCHOLOGY AS TABOO IN LEGAL ADJUDICATION

The fact that scholars propound numerous conflicting theories of constitutional interpretation,[13] for example, suggests the possibility that these theories do not provide judges with enough guidance about how to achieve the best outcomes—how to weigh and balance the competing claims in a case. It follows that greater self-awareness of "blind spots" or internal biases will aid this balancing process. Yet, self-help hardly seems a leading contender for the appropriate solution to the problem of constitutional interpretation.[14]

The major difficulty with theories of constitutional interpretation is this: even if judges accepted them, none offer the kinds of practical guidance that judges need to improve their decisions.[15] For example, while Originalist methods of constitutional interpretation have been celebrated for eliminating instances of bias with a rigid analytical framework,[16] the theory has its drawbacks. It fails to identify how judges should prioritize conflicting historical sources or explain which approach for resolving such dilemmas is optimal in a particular instance.[17] Because the legal profession demands clarity and thorough evaluation in logical analyses, it seems hard to imagine that theories of constitutional interpretation are just too difficult for scholars to grasp or explain.[18] There has to be some other explanation that eludes us for determining whether a judge has achieved a sufficiently unbiased and

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13. Without listing the multiple variations of constitutional theories, scholars have noted the fundamental difficulty with most of these views. *See* Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 33-34 (1998) (observing the "irreconcilable tension" between variations of Originalism and living constitutionalism that "only increase as we move forward in time").

14. Presumably, some might argue that, at the most basic level, all theories of constitutional interpretation are essentially methods of judicial self-help. On this view, the only difference between the constitutional theories adopted by judges and self-help in general is the absence of psychological analysis. Yet, given the fact that constitutional scholars directly refute psychological models, this notion hardly seems compelling. *See* Robert A. Carter, *Self-Help: It All Started With Ben Franklin . . . And the Genre Continues Its Impressive Growth in Many Fields, Including Accounting Law and Medicine*, PUB. WKLY., Oct. 14, 1988, at 28 (referring to West's *Law in a Nutshell* series as a form of legal self-help); *infra* Part II.A (describing legal scholar's direct attacks on psychologists).

15. *See* Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1014 (1978) ("[E]ach [theory] is theoretically defective, and . . . insofar as any of them are cast in ways that make them plausible, they would not, even if accepted, be of much assistance for actual Justices.").

16. *See* David M. Zoltnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1379 (1999) (expressing Justice Scalia's view that an Originalist perspective defies the "mainstream constitutional theory, which he believes allows judges to inject their own personal values into constitutional law").

17. *See infra* notes Part IV.B.III and accompanying text (describing potential inaccuracies in Justices' attempts to consult historical and other authoritative sources).

18. *See* Greenawalt, *supra* note 15, at 1014. (claiming that these theories may be too complex "to yield to capsulization"—that they are beyond the comprehension of mere mortals).

thus more accurate decision. In this Article, I propose one respect in which constitutional theories are deficient in practice. They fail to address an essential element of reality: judges are human beings,[19] and as a result, are motivated by influences originating beyond the scope of their immediate comprehension.[20] This is not to say that all judges experience subconscious conflicts and psychoses to a level where they are mentally disabled without aid of a special process.[21] Instead, the proposition states that theories of constitutional interpretation and popular methods of legal analysis will work optimally if judges are aware of how their own personalities and experiences might influence their legal reasoning.[22]

While many might label this the psychology of judicial decision-making,[23] we must be careful not to adopt an overly broad reading of the term *psychology* here. Psychology, in general, involves a number of analytical frameworks,[24] whereas the science to which I am referring involves the much narrower field of self-awareness. The centerpiece of this Article is the concept of mindfulness, a relatively new theory that focuses on transcending self-imposed limitations on one's decision-making and determining the alternatives that exist absent such impositions.[25] Whereas the self-awareness theory offers practical tools to modify behavior, traditional psychological methods can do more harm than good to interpreters of the Constitution for two reasons.

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19. *See* BERNARD L. SHIENTAG, THE PERSONALITY OF THE JUDGE 3 (1944) ("It has been intermittently discovered that judges are human beings, subject to the same fundamental laws of biology and of psychology as are human beings generally."); LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 12 (1999) ("Each justice is only human, and being human means sometimes making decisions that are self-serving or in other ways biased.").

20. *See* Harold D. Lasswell, *Self-Analysis and Judicial Thinking*, 40 INT'L J. ETHICS 354, 356 (1930) (recognizing that judges are influenced by "unseen compulsions" when analyzing and deciding cases); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 11-12 (1921) (noting that judges are influenced by forces "so far beneath the surface that they cannot reasonably be classified as other than subconscious").

21. *See* ELLEN J. LANGER, MINDFULNESS 26-27 (1989) (observing that "[o]ne need not work through deep-seated personal conflict to make conscious those thoughts that are mindlessly processed"). In fact, scholars have doubted psychological models for this very same reason. *See* James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 758-59 (1978) ("The essential unresolved question is whether insight for effective self-scrutiny is possible without the encouragement and guidance of an experienced psychoanalyst or psychotherapist.").

22. *See infra* Part IV.

23. *See generally* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1 (1998) (reviewing various theories in this category).

24. *See generally* James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 POL. BEHAV. 7 (1983) (describing the applicability of multiple psychological components in the judging process, including role assumption, attitude, fact patterns, organizational behavior, environmental concepts, and self-esteem).

25. *See infra* Part III (explaining Langer's theory).

First, most psychological models are merely descriptive in nature and do not offer solutions to the problems they explore.[26] Second, and even worse, the great majority of these models are so obtuse and complex that many psychological theories exist, for all practical purposes, only within the confines of the ivory towers of the academics who originated them.[27]

Although the analytical methods that I propose would not force intensive therapy on judges before hearing cases, even my less demanding objective seems to be taboo in the field of American jurisprudence. Legal scholars dismiss the notion that judicial decisions should be evaluated on the basis of how a judge reached a particular decision. Most do not care if a judge was influenced by psychological factors, as long as the decision is justified by legally accepted methods.[28]

The remainder of this Article responds to the notion that psychology is useless in aiding judges in their decision-making by distinguishing several key points. Part II.B explains that the origin of a legal decision particularly matters to judges when facts give rise to legal indeterminacy, the condition in which "the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."[29] Next, Part III depicts the stages of the process by which judges exhibit any number of particular biases falling under five overarching categories. It then presents a model of judicial debiasing that envisions mindful judging as its objective. This Part attempts to preserve "good" biases and those instances where it is more optimal to keep a mental process operating within the judge's subconscious.[30] Part IV explains

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26. *See generally* Simon, *supra* note 23 (explaining the solely descriptive nature of current psychological models).

27. For example, consider the following "operationalized model" of judicial decision-making in the Supreme Court:

> Voting behavior on civil rights and liberties or economics = justice's party identification + appointing president's intentions index − southern regional origins − agricultural origins − family social status (for economics only) + non-Protestant religion − first born − father as government officer (for civil rights and liberties only) + judicial experience − prosecutorial/judicial experience index.

C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior: 1916-88*, 35 AM. J. POL. SCI. 460, 471-72 (1991). The researchers who developed this model confirmed that it accounts for up to fifty-one percent of the variance in decisions by forty-six Supreme Court Justices during the course of nearly six decades. *Id.* at 477. While this predictive model may be impressive to statisticians, it does little to improve the quality of judicial opinions. Just as a Justice cannot change the fact that she was born to a family of government officials, she probably would be unable to determine whether the characteristics of her fellow Justices fit neatly enough within the categories described to know how they would vote on a given issue.

28. *See infra* Part II.A (describing attacks on psychological theorists).

29. Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 320 (1989). *See also infra* Part III.A (discussing indeterminacy).

30. *See infra* Part III.C (distinguishing "good" from "bad" biases).

how and why the theory of judicial mindfulness successfully resolves some crucial problems of legal analysis. Part V addresses practical considerations regarding implementation of the theory. Part VI concludes that the proposed psychological model increases judges' decisional accuracy. We should note however, that the criticisms pointed out by philosophers and other legal practitioners, which are discussed immediately below, are often valid in cases where the law is determinate. Consequently, judicial mindfulness is not always required of the bench. We might say that this tactic should be reserved for the "tougher cases."[31]

A. The Demise of Social Science Approaches to Jurisprudence

Sociological jurisprudence—the implementation of psychological methodologies in legal analysis—emerged in the 1930s.[32] Judge Jerome Frank and Dean Roscoe Pound fostered this movement by echoing the sentiments of Justice Oliver Wendell Holmes[33] and challenging the legal profession to implement psychological methods in its analytical processes.[34] The movement grew so strong that lawyers and judges alike believed the Pound/Frank camp would soon transform the face of legal education.[35] But this raging inferno soon dwindled to no more than a candle's light.[36] And, while psychologists continue to float an occasional theory in the direction of our nation's law reviews, none have compelled

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31. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."); *infra* note 39 and accompanying text (explaining indeterminate and hard cases). Note, however, that cases can be "tough" for reasons other than legal indeterminacy.

32. *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609-10 (1908) (calling for a legal system "adjusted to human conditions").

33. *See generally* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881) (noting that "[t]he life of the law has not been logic: it has been experience"); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897) ("Law is merely a prediction of what judges will do.").

34. *See* FRANK, *supra* note 4, at 29 (demanding a psychological method because:

> Most of us are unwilling—and for the most part unable—to concede to what extent we are controlled by . . . biases. We cherish the notion that we are grown-up and rational, that we know why we think and act as we do, that our thoughts and deeds have an objective reference, that our beliefs are not biases but are of the other kind—the result of direct observation of objective data.).

35. James A. Elkins, *A Humanistic Perspective in Legal Education*, 62 NEB. L. REV. 494, 505, 505 n.45 (1983) (discussing the psychological movement in legal education).

36. *See* Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 348 (1984) (noting that "the checks [legal realists] drew on [social science] went unpaid for insufficient funds"); *see also* Elkins, *supra* note 35, at 508 ("After the appearance of the psychoanalytic critiques in the 1960's and the early 1970's, the concern for psychology began to wane as legal educators followed new intellectual currents.").

law schools or legal practitioners to adopt uniform systems of psychological training.

Although a myriad of theories have been advanced casting doubt on the need for psychological methods of self-awareness in the law, they essentially reduce to three primary explanations: (1) the notion of the justification process, as advocated by Richard A. Wasserstrom;[37] (2) the theory of legitimate legal reasoning, as advanced in Steven Burton's good faith thesis;[38] and (3) the notion of moderate, or what I call *healthy* indeterminacy, as illustrated by Ken Kress.[39] Together, the

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37. Wasserstrom observed that the outcome of a judicial decision does not necessarily depend on a judge's motivations when determining the law regarding that outcome. He distinguished the process of discovery from the process of justification, where justification involves applying "logic[al] analysis" and discovery involves the imagination and creative impulses a person experiences before directing her attention to the task at hand. RICHARD A. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION 26-27 (1961) (noting that the process of justification describes thought, rather than one's reaction to a text or situation). *See also* Scot W. Anderson, Note, *Surveying the Realm: Description and Adjudication in Law's Empire*, 73 IOWA L. REV. 131, 144 n.91 (1987) ("For example, Kekule discovered the structure of the benzene ring while dozing before his fireplace. This discovery came to him from the inspiration of his dream. That dream, however, does not justify that discovery. Justification rests, in this case, on the rigors of scientific investigation."); STEVEN J. BURTON, JUDGING IN GOOD FAITH 45 n.17 (1992) ("Some causal reasons bear no relationship to justification. We may be caused to act in some way by misfiring neurons, by operant conditioning, by emotional impulses, or by external threats of harm."). Accordingly, these reasons are not legal reasons because they fail to "establish that an act was right or wrong." *Id.*

38. The good faith thesis holds that judges can reach legally justified decisions even in the face of incompatible or indeterminate rationales because they follow legally acceptable guidelines. *See* BURTON, *supra* note 37, at 12 ("[T]he rules of interpretation might be indeterminate, but all relevant policies and principles supported by all relevant political moralities may converge on one resolution. Convergence is possible at any level of analysis and might produce determinate results in a case."). Burton observed the importance of serving the judicial role, from which judges would not intentionally depart. *See id.* at 35 (noting how "judges do not fulfill their legal duty if they act only on parts of the law with which they agree").

Burton's notion of judicial honesty represents the view that judges do not intentionally deceive. *Compare* Simon, *supra* note 23, at 93-94 (suggesting that judges are genuine because most cannot become aware of their own influences without the right tools), *with* Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y, 155, 156 (1994) (noting that because judges "must always deny their authority to make law, even when they are making law. . . . [c]ourts and judges always lie"). There are yet other explanations that mediate between these extremes. *See* Simon, *supra*, at 17 (noting that if judges are "deceptive," the deception exists when they believe "even though the law seems coherent and I am not constrained by a singularly correct decision, I will nonetheless report closure because that is what I am expected to do and that serves the judicial function best"). Others might simply cite cases like *United States v. Hatter*, 519 U.S. 801 (1996) (holding that it would be unconstitutional to make judges pay Social Security and Medicare taxes, as these taxes would diminish the judges' salaries while they are in office), for the proposition that judges are self-interested and have incentives to "regularly forego candor" when arriving at decisions. *See* Idleman, *supra* note 12, at 1310.

39. Professor Kress defined indeterminacy as a situation where "legal questions lack single right answers." Kress, *supra* note 29, at 283. *See also id.* at 320 ("[L]egal indeterminacy may properly be defined in terms of legal reasoning, as follows: Law is indeterminate where the correct theory of legal reasoning fails to yield a right answer or permits multiple answers to legal questions."). A number of scholars provide similar analyses. *See* H.L.A. HART, THE CONCEPT OF LAW 273 (2d ed. 1994) (defining indeterminate law as "incompletely regulated"); Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB.

Wasserstrom-Burton-Kress model of legal decision-making (hereinafter *WBK*) rests on three principles. First, judges must use legitimate legal reasons to support their decisions. Second, judges are compelled by official duty and legal training to reject purely emotional views as the byproducts of the discovery process. Third, some level of indeterminacy is healthful for the judicial process, because it provides new avenues of exploration, as long as judges employ the prior two principles in their analyses of less determinate legal bases.

B. Indeterminacy and the Rebirth of Psychological Analysis

Seemingly, the three *WBK* principles reject the notion that psychology matters in the judicial process. However, a detailed analysis of the principles reveals that each respective theorist, at the least, recognizes the potential for unreliable legal analyses when judges use traditional methods of interpretation. In Wasserstrom's model, "[t]he value of the justification process is lost . . . if the judge does not pay attention in good faith to the value of the justification he comes up with."[40] Burton acknowledges not only that "indeterminacy can be stubborn" but that decisions made in ambiguous situations deserve extra attention because they become the very "reasons . . . that justify [a] particular law in the first place."[41] Furthermore, Professor Kress acknowledges the ever-present threat of conclusions that are so rigid and formalistic that they can actually limit the level of justice delivered to the public. Perhaps these limitations might even include a judge's own decision to refrain from realizing her own participation in a system characterized by radical indeterminacy.[42]

POL'Y 411, 411 (1996) (defining indeterminacy as "the extent to which any particular legal theory cannot provide knowable answers to concrete problems"). Some even compare indeterminacy with the notion of the hard case. *See* HART, *supra*, at 272-73 (noting that in hard cases, when there is no law to be found, a judge may "follow standards or reasons for decision which are not dictated by the law").

Professor Kress affirmed that some level of indeterminacy or indecisiveness is actually beneficial and necessary for the proper functioning of the judiciary. *See* Kress, *supra*, at 293 ("[I]t is arguable that justice not only permits, but indeed *requires* moderate indeterminacy. Although justice demands that most things be settled in advance, there must be room for flexibility in marginal and exceptional cases in order that equity be done.") (emphasis added).

40. WILLIAM L. REYNOLDS, JUDICIAL PROCESS IN A NUTSHELL 60 (1980).

41. BURTON, *supra* note 37, at 48 (describing the "privileged status" that judicial decision-making should occupy in ambiguous situations because of its inherent risk). *Cf. also* Guthrie et al., *supra* note 10, at 781 ("As Jerome Frank put it, if judicial decisions are 'based on judge's hunches, then the way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge's hunches *makes the law*.'" (citing FRANK, *supra* note 4, at 104)).

42. *See* Kress, *supra* note 29, at 336 (surveying those who recommend the "instrumental use of the indeterminacy thesis to unfreeze the legal mind and encourage creative legal solutions[,]" which simultaneously cautions against the danger of inflexible analyses). *But cf.* Lawson, *supra* note 39, at 421 ("All

To a large extent, the reliability of each *WBK* theory rests on the proposition that a judge knows he is being influenced during the process by which he discovers some principle of law when deciding a case. After all, were a judge to say that it does not matter how he initially came upon an idea because he substantiated it later at some point with legitimate methods, for this assertion to be true, he would have to know: (1) the source and extent of the motivation for her idea; (2) the weight of the motivation in determining how he used legitimate methods of analysis; and (3) that he would have selected the same methods of interpretation if the motivation had differed.

The problem with theories like *WBK* is that, in their rejection of psychology, they leave the judicial decision-making process virtually unchecked. Professor Charles Lawrence has observed the exclusion and ostracism of "students of the unconscious" in legal forums whenever they address matters extending beyond expert testimony.[43] Lawrence further explains that this result is "hardly surprising" and that the reluctance may even be "appropriate":

> The law is our effort to rationalize our relationships with one another. It is a system through which we attempt to define obligations and responsibilities. Denial of the irrational is part of that system, as is our notion that one should not be held responsible for any thoughts or motives of which one is unaware.[44]

So, the legal community accepts the *WBK*, perhaps in an effort to let sleeping dogs lie.

In the scientific community, similar arguments prevail, limiting interest in locating and eliminating bias because of the unsettling implications of detecting such contamination: "As a colleague once remarked, 'If someone asks for constructive criticism, tell them something good, because they don't really want to hear anything bad.' In a way, [all] 'news' about human cognitive capacity *is bad*."[45] Just as the *WBK* theories represent the "good news" in the legal system, the "good news" that the scientific community conjures up in defense of its disinterest in debiasing is a set of similar and "[t]ypical arguments—'The group overcomes the limitations of individual scientists,' or

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else being equal, the more certain we can be about our conclusions, the less indeterminacy we will find."). Also note Kress's rationale that "[t]he pervasiveness of easy cases undercuts . . . claim[s] of radical indeterminacy" does not preclude the possibility of unhealthy indeterminacy occurring. Kress, *supra*, at 296.

43. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 329 (1987).

44. *Id.*

45. DAVID FAUST, *Preface to* THE LIMITS OF SCIENTIFIC REASONING, at xxvi (1984).

'Scientific method *ensures* protection from cognitive limitations'—[which] are put forth as self-evident, with little critical attempt to consider the substantive issues raised by the judgment literature."[46]

In judicial decision-making, the "good news" ignores these facts: "[M]aking true and making false are not things that facts do to judges. The facts don't reach out and grab the decision-maker, preventing her from deciding capriciously, or dictating themselves to her in any unavoidable way."[47] Because "[d]ifferent judges will reach different results even when they all take themselves to be pursuing the right answer," it logically follows that some level of self regulation is necessary.[48] Seeing that most of the small amount of what judges know about self-regulation has come from psychological research, the propositions for which the *WBK* theories stand exist more as a psychological defense mechanism than a true response to the issue of debiasing judges.

We are faced with the dilemma of whether judges can ever know whether or not the motivation for a decision masquerades as its justification—a justification that may happen to be false. If, indeed, judges deny recognizing their own behavioral influences, they run the risk of inaccurate[49] decisions.[50]

46. *Id.* at xxv.

47. Jeremy Waldron, *The Irrelevance of Moral Objectivity*, *in* NATURAL LAW THEORY: CONTEMPORARY ESSAYS 158, 183 (Robert P. George ed., 1992).

48. *Id.*

49. When I refer to inaccuracy, this does not mean judges are wrong. Instead it means they are less accurate. *See* Wurzel, *supra* note 8, at 300 (noting that "[*e*]*rrors* produced by emotion are felt most often and easiest in the field of legal thinking." (emphasis added)). Consider Robert Cover's model of the judging process. In it, he observes that judges use a process of elimination to achieve a desired result. *See* Franklin G. Snyder, *Nomos, Narrative, and Adjudication: Toward a Jurisgenic Theory of Law*, 40 WM. & MARY L. REV. 1623, 1624 (1999) (citing Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (defining term)):

> When a judge faces a question in which legal meaning is contested . . . the problem is not . . . that there is a "gap" in the law or that the law is "unclear." Rather, there is simply *too much* law—a host of meanings competing for recognition. . . . The role of the judge therefore is purely negative. It is "jurispathic" or law-killing . . . .

When judges unknowingly eliminate theories for the wrong reasons, while they are "not dishonest;" the writing of a judge's opinion will "not reflect the completeness and clarity essential to [the] thoroughgoing integrity" required of his office. Robert A. Leflar, *Honest Judicial Opinions*, 74 NW. U. L. REV. 721, 723 (1979). As a result, decisions lack accuracy because judges, in not stating the "real reasons" for their decisions "can be misled by th[e] pretense [of the opinion and a] hidden fact may not emerge, or may emerge incompletely." *Id.*

50. *See* Lawson, *supra* note 39, at 421-22 ("[B]ecause of the lack of consciousness about the need for standards of proof for legal claims, the standard employed in any context may shift without warning. It is difficult to apply a standard consistently if one is not aware of the standard or is not even aware that a standard is being applied.").

The concerns regarding whether a judge knows the real reasons for his decisions come into focus when we consider the risks posed by judges who do not show the "correctness of their action" when they adopt a particular theory or analyze a case in a particular way.[51] In such cases, justification may only "show that one or another way of going on should be advantaged over others without support for the reasons why."[52] Suppose that an analytical method justified under these circumstances leads to a correct decision only half of the time. Given that the decision could have gone another way, if psychological methods, such as the one proposed in this Article, help judges achieve a more well thought conclusion, it stands that the psychological method should count as a legitimate part of the justification process. In this instance, psychological methods would be relevant to the process of judging by helping judges determine and justify why they are using some approaches at the exclusion of others.[53] The next part of this Article will explore areas of legal analysis in which the lack of a psychological approach to limit bias threatens the accuracy of judicial determinations.

III. JUDICIAL BIAS AND ITS HARMFUL EFFECTS

A. *Defining Judicial Bias*

Critics of psychological methods of self-help in the law have treated the term "bias" in only the most general sense. The generic view of bias is so broad that it includes many aspects of the judge's own experience, which can be seen as a benefit rather than a drawback.[54] Often, the

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51. BURTON, *supra* note 37, at 19.

52. *Id.* (exploring the claims of "new jurisprudences").

53. Implementing psychological processes that reduce bias among judges makes sense for two reasons. First, scholars following the lead of Herbert Wechsler have argued that neutrality is an essential part of the judicial decision-making process. *See generally* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing for judges to provide "reasons that in their generality and their neutrality transcend any immediate result"). *See also* William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1263 (1986) (addressing concerns related to applying neutral principles in a modern context). Second, the Supreme Court publicly affirms these principles. *See infra* note 220 and accompanying text (explaining the position of the Supreme Court regarding the quest for neutrality).

54. Professor John Leubsdorf explains that lawmakers, by failing to define the criteria of bias or an unbiased "decision according to law," "cannot tell us what motives will subvert decision according to law and what motives will promote it." John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 241 (1987). In the most basic sense, "proof that a judge's mind is a complete *tabula rasa* demonstrates lack of qualification, not lack of bias," suggesting the value of certain personal experiences in judicial decision-making. LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 24 (2d ed. 1992). *Cf.* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS

definition of bias changes,[55] as legal scholars have understood that they "may omit important types of bias not yet envisioned."[56] Recognizing that certain biases are, in fact, healthy for the legal system,[57] the crucial determination becomes developing a method of debiasing that will simultaneously preserve the healthy aspects of judicial experience and eliminate the unhealthy aspects of partiality.[58] Regulations guiding judges in the area of judicial disqualification have attempted to strike this delicate balance.[59] The result has been law that is less than optimal and rife with "cloudy distinctions that disqualify an occasional judge while allowing many others to sit."[60] Even here, the Supreme Court expects sitting judges to detect and eliminate their own biases.[61]

67, 81 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION] ("[I]f relatively slow, serial, limited conscious thought had to take over everything typically handled by unconscious processes, we would not be able even to get out of bed in the morning.").

55. The manner in which the definition of "bias" has transformed over the years in *Black's Law Dictionary* offers an intriguing perspective. As in the early years of *Bouvier's Law Dictionary*, *Black's* explanation of the term was similarly complex, attempting to offer a perspective on how the bias operated. *Compare* BOUVIER'S LAW DICTIONARY 238 (15th ed. 1883) (even recognizing exceptions that would permit courts to be biased against groups rather than individuals), *with* BLACK'S LAW DICTIONARY 130 (2d ed. 1910) [hereinafter BLACK'S SECOND] (containing a similarly lengthy definition). But, in more recent years, Black's has rescinded much of the former commentary. The most drastic omission occurred with the release of the Seventh Edition in 1999. No longer did the definition of bias require a judge's mind to be "perfectly open to conviction." *Compare* BLACK'S SECOND, *supra*, at 130 (alluding to a judge's "predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction"), *and* BLACK'S LAW DICTIONARY 205 (4th ed. 1968) (same), *and* BLACK'S LAW DICTIONARY 147 (5th ed. 1979) (same), *and* BLACK'S LAW DICTIONARY 162 (6th ed. 1990) (same), *with* BLACK'S LAW DICTIONARY 153 (7th ed. 1999) (limiting the definition to a pithy reference to "[i]nclination" or "prejudice," and noting that the state originates "during a trial"). Either the editors have recognized the impossibility of the mandate, or they have lost their grasp on the method by which a judge can attain such levels of impartiality. *See infra* note 72 (revealing that this is true even among the most learned judges).

56. ABRAMSON, *supra* note 54, at 24.

57. In *Liteky v. United States*, 510 U.S. 540 (1994), the Supreme Court recognized two such instances. First, it may be necessary for a judge to develop a certain animus towards a defendant to carry out his role:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) *necessary to completion of the judge's task.*

Id. at 550-51 (1994) (emphasis added). Second, the Court permits those types of judicial biases that arise from judges' exposure to legal scholarship and their resulting interpretations of the law. *Id.* at 554 ("[T]he judge's view of the law acquired in scholarly reading . . . will *not* suffice" as grounds for "'bias or prejudice' recusal").

58. *See infra* Part III.C.1 and accompanying text (explaining beneficial biases and unconscious processes of which judges lack awareness).

59. *See* 28 U.S.C. § 144 (1994) (regulating the disqualification of biased judges); 28 U.S.C. § 455(b)(1) (1994) (same); AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT § 3C (1990) (same).

60. Leubsdorf, *supra* note 54, at 238.

61. Justice Kennedy's concurrence in *Liteky* sheds light on the responsibilities of judges to detect and eliminate biases. In that case, he explains that the Court is not concerned with psychological types of biases that may be influencing the judge: "One of the very objects of law is the impartiality of its judges in fact

Vagueness is ultimately the greatest obstacle to debiasing judicial

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and in appearance. So in one sense it could be said that any disqualifying state of mind must originate from a source outside law itself. That meta-physical inquiry, however, is beside the point." *Liteky*, 510 U.S. at 558 (Kennedy, J., concurring). The reason why this rejection may at first seem undeniable is the role of the judge. The Court sees it as a duty of judges to become aware of their own biases and exercise control over them. Justice Kennedy conveyed that the Court has "accept[ed] the notion that the 'conscientious judge will, as far as possible, make himself aware of his biases . . . and, by that very self-knowledge, nullify their effect.'" *Id.* at 562 (citing *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943) (Kennedy, J., concurring)). He further noted as a "requisite[ ] of judicial office," the "skill and capacity to disregard extraneous matters," so that judges can remain "faithful" to their oaths and "approach *every* aspect of *each* case with a neutral and objective disposition." *Id.* at 561-62 (Kennedy, J., concurring) (emphasis added). Kennedy alluded to the fact that this skill had been "acquired" by the judge but failed to explain where. *Id.* at 562 (Kennedy, J., concurring).

If Justice Kennedy is mandating that judges should somehow know how to debias themselves with knowledge gained prior to their assumption of office, he appears to be overly optimistic. Simply consider the difficulty of the Justices and the counselors in oral arguments to definitively explain bias that would rise to a "really bad" level. First was the exchange between Chief Justice Rehnquist and Petitioner's Counsel Peter J. Thompson:

> MR. THOMPSON: I think–you know, Congress, by passing this statute, a broad statute like this, basically indicated that it may be very difficult to make these determinations. I don't –
>
> QUESTION: Whether it's difficult in a particular case for a judge to make it, I certainly agree with you, but don't we have to have some uniform definition of bias before we can get at the reasonableness and so forth, which may be very difficult?
>
> MR. THOMPSON: . . . [A] definition of bias as I think it would fit into the standards that were applicable in 455(a), and what I came up with was this: circumstances that would lead a reasonable person to question whether the judge's inclination or state of mind toward a party belies favor or aversion to a degree or kind that might affect the judge's impartiality in the case.
>
> I think a more exacting definition of bias or of the standard, or to anticipate all the different ways in which it could come up . . . would be almost impossible, and it needs to, of course, be handled on a case-by-case basis.
>
> QUESTION: The problem—your response to the Chief Justice disclosed this. The problem—what you're proposing is, it doesn't just open up every prior trial that a particular defendant has had before this judge. It opens up any prior trial that involved the same kind of issues. . . .
>
> . . . Isn't there any way to avoid subjecting the judiciary to that enormous burden?

United States Supreme Court Official Transcript, *Liteky* (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *10-12.

Another attempt similarly failed, this time initiated by Justice Scalia with Respondent's Counsel Thomas G. Hungar.

> QUESTION: Can you give me a definition of pervasive bias, because I really—I agree with Justice Kennedy, I don't see what's gained by adopting this rule with this exception.
>
> MR. HUNGAR: I'm not sure. It has to be—It has been fleshed out by the courts of appeals on a case-by-case basis, and obviously it would—
>
> QUESTION: Does it mean anything different than really bad bias? Is that what it means? (Laughter)
>
> MR. HUNGAR: That might be as good a way of putting it as any, Justice Scalia.

Id. at *29-30.

In both instances, counsel quickly entered into territory so murky that their best response was allusion to the difficulty of the hypotheticals offered and the suggestion that the definition of bias is so elusive, it is best interpreted on a case-by-case basis. *Liteky* never addressed the precise steps judges should take to improve their analyses if impeded by unconscious biases of some sort. Yet, in dicta, Justice Kennedy seemed adamant that judges have a duty to do so.

decisions. Without pointing to particular instances of unhealthy bias, it becomes relatively easy to oversimplify matters by explaining that no methods would be sufficient to solve the problem: "If . . . 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will."[62] This Article acknowledges the difficulties of determining when judges should disqualify themselves for being biased.[63] In part, it borrows from the literature in this field to identify the goal of impartiality and explain the basic premises behind bias that undercuts such impartiality. Yet, it focuses on the types of bias that may be eliminated upon their recognition, preventing the need for judicial disqualification.[64] To this end, the disqualification literature disfavors those instances in which the judge relies on "an extrajudical source, resulting in an opinion on the merits based on something other than what the judge learned from participating in the case,"[65] and favors circumstances when the judge is impartial (*viz*, "lacks motives and

62. *In re* J.P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). *Cf.* Leubsdorf, *supra* note 54, at 250 (challenging vague definitions of biases as mere "unconscious motives:" "If unconscious motives sway everyone, how can one find a judge who is free of them? If only Hercules can find the correct result—or if there is no correct result—how can we say that one judge is better suited to decide a case than another?").

A more popular method of oversimplifying matters is attributing anomalies in judicial decisions to the judges' politics. If "law is politics all the way down," short of changing political parties during a case, the judge has few options to remedy the problem. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991) (reviewing this popular view); *see also* C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 47 (1996) (noting not only that judicial decisions are strongly based upon judges' political orientations, but also that their decisions show allegiance to the political party of the president who elected them). The problem with this theory is that it relieves judges of the responsibility to understand other nonpolitical influences on their decision-making. Critics of the political explanation demand that judges be provided the tools that are necessary to explore their decisions in greater depth. *See* WRIGHTSMAN, *supra* note 19, at 55 ("Though [political] labels fit, we need to move beyond them in order to understand the determinants of opinion formation [to the] . . . theory [that] emphasizes the differences in processing information.").

63. *See, e.g.*, JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4 (1995) ("Within th[e] framework of rules that too often fail to give adequate guidance, disqualification issues are becoming increasingly complex."); Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 117 (1994) (observing "the generally accepted rule that virtually nothing the trial judge sees or hears during the proceeding in a case can spark a bias sufficiently serious to warrant her removal").

64. *Cf. infra* text accompanying note 115 (dispelling the notion that a stigma must accompany the treatment of all unconscious or preconscious processes occurring in one's decision-making).

65. ABRAMSON, *supra* note 54, at 24. *See also* RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 4.6.5, at 138-39 (1996) (explaining same notion). Extrajudicial sources create impairments in legal decision-making and reasoning when they make "finding the correct answer—or the class of answers that are not wrong . . . difficult for judges." Leubsdorf, *supra* note 54, at 261.

assumptions that would tend to warp her perception of the correct results"[66]).

Some legal scholars have attempted to categorize judicial bias broadly. For example, one commentator suggests that "[j]udges are biased when they adopt and give power to myths or stereotypes about a group."[67] Such attempts, however, do not provide methods for overcoming such biases. As a representative example, consider the reflections of Justice Lewis F. Powell on his deciding vote in *Bowers v. Hardwick*[68] in 1990: "I think I probably made a mistake in that one."[69] Powell's admitted "mistake" was basing his decision on his own experience, or lack thereof, with an entire segment of American society —gays and lesbians.[70] Some may read the quotation and determine that Justice Powell's lack of experience rose to the level of bias observed at the outset of this paragraph, or at least, perhaps, some degree of homophobia.[71] If this is so, we must ask the harder question: does the definition provided explain how the bias operates—when a "myth or stereotype" rises to a level that can contaminate a decision? Seemingly not.[72] Further, acknowledging those biases that are the most obvious does little to help categorize others that operate more discreetly.[73] The problem is simply that "[h]uman judgments—even very bad ones—do

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66. Leubsdorf, *supra* note 54 at 261; *cf. also* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 70 (stressing that "the areas of personal relationships and potential bias are in serious need of clarification").

67. Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 371 (2000).

68. 478 U.S. 186 (1986).

69. Arnold Agneshwar, *Ex-Justice Says He May Have Been Wrong: Powell on Sodomy*, NAT'L L.J., Nov. 5, 1990, at 3.

70. *See, e.g.*, Mark Tanney, Note, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 142 (1997) (suggesting that Powell was homophobic in his *Bowers* opinion based on his comments of 1990 and the fact that Powell "had never known a gay person").

71. *See* Brown, *supra* note 67 at 369-70 ("[I]n a legal system fraught with de jure discrimination against gay men and lesbians, what does it mean to say that a *judge* manifests bias on the basis of sexual orientation? To put the issue more provocatively, what does Canon 3 mean in a world where *Bowers v. Hardwick* is good law?"); Debra Lyn Bassett, *Judicial Disqualification in the Federal Courts*, 87 IOWA L. REV. 1213, 1218 (2002) (suggesting that the *Bowers* decision and Powell's quote represent "underlying, unconscious bias against gay men").

72. *See* Diane Kobrynowicz & Monica Biernat, *Considering Correctness, Contrast, and Categorization in Stereotyping Phenomena*, *in* STEREOTYPE ACTIVATION AND INHIBITION 109, 111 (Robert S. Wyer, Jr., ed., 11th ed. 1998) (discussing the inherent difficulty of "determining the accuracy of a stereotype," let alone when one is, in fact, "bad"); Guthrie et al., *supra* note 10, at 782 (noting that "even the most learned judges have acknowledged that they do not understand *how* judges make decisions" because of the lack of probing research on the topic and the failure to connect the task with an advanced body of psychological research) (emphasis added). *But see* Brown, *supra* note 67, at 370 (explaining three instances that she believes would qualify as actionable biases under Canon 3).

73. *See* ABRAMSON, *supra* note 54 (explaining that there are many biases that have yet been discovered).

not smell."[74] The law, therefore, fails to distinguish where the line exists distinguishing good biases from bad.

Psychology can be useful in assisting judges in their analyses because a number of psychologists investigating bias and debiasing processes have begun to explain biases in terms of how they operate, rather than by their results in individual instances. Norbert Kerr and his colleagues have identified three such categories of bias, in which individuals act under "self-enhancing or self-protective motives," use "cognitive short-cuts or heuristics," or exhibit "inappropriate sensitivity or insensitivity to certain types of information."[75] Such biases lead to inevitable and detectable results. Most notably, and relevant to the process of judging, biased individuals commit "sins of omission," in which they "miss . . . good cue[s]"[76] or "sins of commission," in which they "use a bad cue" in decision-making.[77] The legal community has only recently begun to grasp these concepts,[78] and has of late focused more on sins of commission, which are easier to detect among samples of judges.[79]

In an exhaustive study of 167 federal magistrates, Professor Chris Guthrie and his colleagues investigated the effects on judges of several heuristics noted in the psychology literature during the decision-making process.[80] The study concluded that "even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment."[81] While observations on how to debias judges were minimal in comparison to the authors' efforts to identify the presence of the heuristics, the researchers doubted that the simple

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74. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 121 (1994).

75. Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 687 (1996).

76. *Id.* at 689. Particularly, these sins are committed when "the judge fails to use information held to be diagnostic by the idealized model of judgment." *Id.*

77. *Id.* An example of this sin occurs when judges use a litigant's race to reach a decision that is different from what it would have without such consideration. *Id.*

78. Guthrie et al., *supra* note 10, at 782 ("Few [studies] have dealt with the sources of judicial error.").

79. The focus of Guthrie and his colleagues' research was admittedly directed towards sins of commission. "Just as certain patterns of visual stimuli can fool people's eyesight, leading them to see things that are not really there, certain fact patterns can fool people's judgment, leading them to believe things that are not really true." *Id.* at 780. Consequently, it is mainly errors in prediction of phenomena that occupied the attention of the researchers. *See also* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, *in* JUDGMENT AND DECISION MAKING: AN INTERDISCIPLINARY READER 38, 53-54 (Hal R. Arkes & Kenneth R. Hammond eds., 1986) (explaining that their focus on many of the same heuristics considered by Guthrie and Rachlinski was mainly concerned with errors in applying "fundamental statistical rules" or considering "the effect of sample size on sampling variability").

80. *See* Guthrie et al., *supra* note 10, at 784 (providing descriptions of the "five common cognitive illusions" tested on the judge-respondents); *id.* at 787-816 (applying the theories to their research results).

81. *Id.* at 779.

methods accepted by most legal commentators supporting prevailing *WBK* theories—they doubted that "increased attention and greater deliberation [would] enable judges to abandon the heuristics that they are otherwise inclined to rely upon [and] avoid the illusions of judgment that these heuristics produce."[82] Instead, the study recommended that "judges ... learn to educate themselves about cognitive illusions so that they can try to avoid the errors that these illusions tend to produce."[83] Exactly how judges should do this was an uncertain question in the literature.

The Guthrie et al. study rejected the *WBK* approach to judicial decision-making, concluding that

> [e]ven with greater [legal] resources, judges will still resort to cognitive shortcuts. If judges are unaware of the cognitive illusions that reliance on heuristics produces, then extra time and resources will be of no help. Judges will believe that their decisions are sound and choose not to spend the extra time and effort needed to make a judgment that is not influenced by cognitive illusions.[84]

These findings are equally applicable to sins of omission because the biasing processes work nearly identically. In both cases, the judge's actions raise to the level of *sins* because he "cannot easily distinguish between what 'the law says' and what [he] believes ...."[85] He therefore "may not know how much he is (or should be) investigating what legal sources say, and how much he is applying his own ideals."[86] Consequently, biased judicial decision-making becomes detrimental to the justice system when the "investigation is so difficult that judges must use intuitions and short-cuts, or when there is an unclear boundary between questions having correct answers and those left to the values of judges."[87]

This Article is more interested in "sins of omission" because they are more difficult to detect and have been equally, if not more, neglected than the dialogue on heuristics. While there is likewise "no single, simple answer to" the question of "[w]hat ... the legal system [can] do to avoid or minimize" such biases,[88] there have been significant advances in the exploration of sins of omission that are worthy of mention and experimentation in judicial self-awareness. At its heart,

82. *Id.* at 819. In fact, increased scrutiny of difficult legal sources that initially brought on biases can "feed [directly] into some cognitive illusions." *Id.* at 820.

83. *Id.* at 821.

84. *Id.* at 820.

85. Leubsdorf, *supra* note 54, at 262.

86. *Id.*

87. *Id.* at 266.

88. Guthrie et al., *supra* note 10, at 821.

this Article aims to develop a more comprehensive view of what bias is and how it operates. To this end, the section below depicts a more complete picture of how a judge progresses through the levels of developing a biased judicial opinion.

B. The Elements of the Judicial Biasing Process

Figure 1, on the next page, charts five aspects of the biasing process that can lead to judicial inaccuracy under Professor Leubsdorf's theory of cognitive judging.[89]

1. Influences Present During Issue Framing

At the most basic level, the judge can potentially trigger certain networks of thought that lead to biases when determining the essential issues to be decided in a case. According to psychologist Donal E. Carlston, all decision-makers work their way to the conclusion of a determination by accessing nodes of senses and experiences that are connected to neural networks.[90] Essentially, distinctions are blurred between sight, sound, memory, and the other senses as these nodes are activated.[91] An individual can be led anywhere along the continuum of the past events he has experienced without intending that destination.[92] In the judging process, the determination of issues can relate to matters as varied as the existing precedent,[93] rules of interpretation,[94] the judge's experience with the issue in both legal and nonlegal terms,[95] and the audience for which the judge is writing.[96] Each of these sources for issue identification can raise unwanted though associated thoughts that increase a judge's propensity toward multiple varieties of bias.

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89. *See supra* notes Part II.A (explaining criteria).

90. Donal E. Carlston, *Impression Formation and the Modular Mind: The Associated Systems Theory*, *in* THE CONSTRUCTION OF SOCIAL JUDGMENTS 301, 318-22 & fig.11.4 (Leonard L. Martin & Abraham Tesser eds., 1992) [hereinafter CONSTRUCTION].

91. *Id.*

92. This also means that "retrieval of [specific] information . . . will vary depending on the nature of other currently accessible material." *Id.* at 320. *Cf.* Timothy D. Wilson & Sara D. Hodges, *Attitudes as Temporary Constructions*, *in* CONSTRUCTION, *supra* note 90, at 37, 38 (suggesting that "people often have a large, conflicting 'data base' relevant to their attitudes on any given topic, and the attitude they have at any given time depends on the subset of these data to which they attend").

93. *See supra* Part II.A and accompanying text (discussing the presumed reliability of accepted conventions of legal reasoning).

94. *Id.*

95. *See supra* notes 54 and 57 (explaining the necessity of judges to rely on such experiences, which they do often).

96. *See supra* note 12 and accompanying text (describing audiences judges may contemplate when authoring opinions).

FIGURE 1:

PROCESS THROUGH WHICH JUDGES' BIASES INFLUENCE THEIR LEGAL DETERMINATIONS

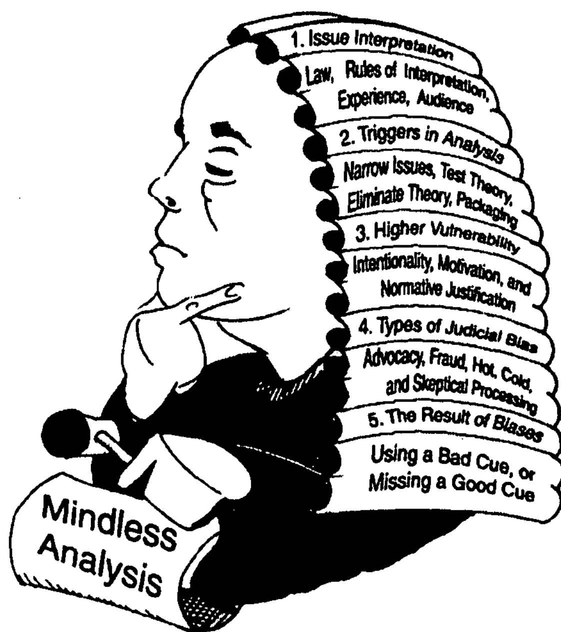

Illustration by Jamie Boling

2. Triggers in the Process of Legal Analysis

Following the specification of issues to be decided by the judge, certain conventions of legal reasoning can trigger biases related to the issues.[97] These trigger points emerge when the judge further limits an issue for the purpose of clarity,[98] selects and eliminates theories of

97. *See infra* notes 148 and 228 (addressing practically infinite tools to aid the judge in legal reasoning).

98. The power of initially framing issues in resolving any dispute is best illuminated in the mediation literature. Professor James Stark observes the following: "For their part, lawyers—who, like physicians, are taught to think in diagnostic categories—often prematurely 'classify the flow of reality' into the wrong categories, because of insufficient training or insufficient sensitivity to the unique aspects of each client's situation." James H. Stark, *Preliminary Reflections on the Establishment of a Mediation Clinic*, 2 CLIN. L. REV. 457, 480-81 (1996). Often, practitioners of the law will have to retrace their steps to alert themselves to issues missed on the first go around. *Id.* at 481.

interpretation,[99] attempts to test a theory's utility by applying particular unique facts to the theory,[100] or relies on certain aesthetic measures to package the final determination for a particular audience or the general audience who will be reading the opinion.[101]

3. Factors Increasing Susceptibility to Bias

In a third element of the biasing process, the judge's own personal characteristics will determine his susceptibility to a particular variation of bias. These characteristics include the judge's level of "intentionality," in which a "judge is aware of a bias yet chooses to express it when [he] could do otherwise";[102] his "motivation," which relates to conditions where "the bias has its origins in the judge's preferences, goals, or values,"[103] or the "normative justification" in which he engages.[104] In this final instance, judges use "some normative system" to "distinguish[ ] appropriate or defensible biases from inappropriate or indefensible biases."[105] Based on the invocation of these three factors that increase susceptibility to biases, the judge may display any of countless biases falling under five overarching categories.

4. The Types of Bias Influencing Judges

The first type of bias is "advocacy," which roughly equates to the "selective use and emphasis of evidence to promote a hypothesis,

99. *See supra* note 49 and accompanying text (discussing jurispathic decision-making and law killing).

100. *See* Simon, *supra* note 23, at 27 (explaining a prevailing model of judicial decision-making that includes, as key elements "test[ing] conceptions" and using the results of such tests to "decide[ ] which conception is the most satisfactory"). Some have asserted the possibility and recommendation that judges attempt to test the validity of their hunches. On this view, judges similarly "follow the consequences of their decisions [and evaluate] whether their subjective feeling of rightness has consequences that verify it." Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 81 (2001) (responding to William James's pragmatic epistemology). Because each judge is an individual who views life and the law in different and unique ways, there are few specifications on exactly how analyses based on precedent or hunches are to be tested in any definitive way. For the judge presiding in *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995), as explored in context *infra* note 191, the Archie Bunker/Homer Simpson test for determining whether a defendant's behavior rose to a sufficient level of egregiousness may have been totally warranted.

101. *See infra* Part IV.A (describing use of ornamental quotations and science fiction in legal opinions); Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051-52 (2002) (describing four distinctive systems of legal analysis that he labels "aesthetics").

102. Robert J. MacCoun, *Biases in the Interpretation and Use of Research Results*, 49 ANN. REV. PSYCHOL. 259, 267-68 (1998).

103. *Id.* Note the way MacCoun differentiates between motivation and intentionality: "intentional bias is motivated, but not all motivated biases are intentional." *Id.* at 268.

104. *Id.*

105. *Id.*

without outright concealment or fabrication."[106] The second is "fraud," or "intentional, conscious efforts to fabricate, conceal, or distort evidence, for whatever reason—material gain, enhancing one's professional reputation, protecting one's theories, or influencing a political debate."[107] The third is "cold bias," which operates at a largely "unconscious" level "even when the judge is earnestly striving for accuracy."[108] The fourth is "hot bias," which is likewise unintended but "directionally motivated," where "the judge wants a certain outcome to prevail."[109] The final variation is "skeptical processing," where a "judge interprets the evidence in an unbiased manner, but [his] conclusions may differ from those of other judges because of [his] prior probability estimate, his asymmetric standard of proof, or both."[110] While these biases may operate in different ways and their definitions may overlap to a degree, it is possible to understand practically all instances that commentators usually call biases as falling into one of these five groups.

5. Consequences of the Presence of Bias

Biases are bad when they either lead the decision-maker to use a bad cue or miss a good one. In anticipation of the following section, which identifies ways to become aware of biases, it is assumed that the more the judge increases the missing of good cues or the use of bad ones, the more mindless his decision is in the legal sense.

In the context of Figure 1, this Article is concerned with those judges whose biases are triggered by the elimination of theories or packaging of results, which evokes instances of cold biases that cause the judge to miss good cues. To address the debiasing process in this respect, this Article draws from a number of sources. The section below identifies the framework for the process of debiasing in the most general sense, which should be equally applicable to sins of omission and commission. At each stage of the process, it highlights those actions that judges should take to gain awareness of and correct instances of mental contamination.

106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.* at 269. This is the category in which most heuristics probably fall. *See supra* notes 79-83 and accompanying text (describing the operation of most heuristics).

C. *The Stages of the Judicial Debiasing Process*

1. The Necessity of Adopting a Pragmatic Approach

Before explaining the framework for debiasing mentally contaminated judgments, further comment is necessary on distinguishing good from bad biases. The disallowance of extrajudicial reasons for an opinion, which underlies legal definitions of bias, is too vague for use as a uniformly applicable standard to determine inappropriate biases.[111] "[S]ome forms of bias are more forgivable than others" and others "seem normatively defensible"[112] because certain mental processes are better left to the unconscious.[113] A body of literature addressing the values of unconsciously dictated thoughts and actions sheds much needed light on the issue.

Two pioneers in this field are psychologists E. Tory Higgins and John A. Bargh.[114] They have advocated that preconscious and unconscious thought processes are too often inappropriately stigmatized because unwanted and uncontrollable "psychoanalytic variables such as repression and perceptual defenses" have similar origins.[115] They suggest that people naively ignore the flipside of the equation indicating that "consciousness is good when unconsciousness is bad."[116] Namely, consciousness "may be less helpful when unconsciousness itself is good."[117] While, on their face, "neither [level of mental processing] is inherently good or bad,"[118] consciousness is good in instances when "unconsciously generated influences on decisions and responses are undesirable or inappropriate to current goals, or lacking altogether (as

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111. The Supreme Court so stated when it rejected extrajudiciality as the singular meaningful factor when determining whether judges should disqualify themselves:

> As we have described [the "extrajudicial source" doctrine] . . . there is not much doctrine to the doctrine. The fact that an opinion held by a judge derives from a source outside judicial proceedings is not a *necessary* condition for "bias or prejudice" recusal, since predispositions developed during the course of a trial will sometimes (albeit rarely) suffice. Nor is it a *sufficient* condition for "bias or prejudice" recusal, since *some* opinions acquired outside the context of judicial proceedings (for example, the judge's view of the law acquired in scholarly reading) will *not* suffice.

Liteky v. United States, 510 U.S. 540, 554 (1994).

112. MacCoun, *supra* note 102, at 263.

113. *Infra* Part III.C.1.

114. *See generally* E. Tory Higgins & John A. Bargh, *Unconscious Sources of Subjectivity and Suffering: Is Consciousness the Solution?*, *in* CONSTRUCTION, *supra* note 90, at 67 (making several key distinctions).

115. *Id.* at 67 n.1

116. *Id.* at 81.

117. *Id.*

118. *Id.* at 97.

in completely novel circumstances)."[119] Consciousness is bad, however, when it "inhibits the use of relevant stored knowledge."[120] As the researchers have stated:

> When considering the advantages and disadvantages of consciousness, it might be useful to distinguish *consciousness of the problem* and *conscious problem solving*. When people are functioning maladaptively, it may be necessary for them to become conscious that there is a problem before the problem can be addressed. In this sense, consciousness may be critical to problem solving. This does not imply, however, that conscious processing is the best way to solve the identified problem. . . . Once one has identified the problem, perhaps the best next step is to "sleep on it." To attempt control at this stage may restrain rather than facilitate discovering a solution.[121]

The authors likewise suggest "distinguish[ing between] the generation of solutions and the assessment of solutions."[122] While "[u]nconscious processing may be most effective and efficient when attempting to generate the broadest range of possible solutions. . . . [c]onscious processing . . . may be best when assessing the comparative utility of alternative solutions."[123]

Essentially, judges can learn two lessons from the research situating unconscious biases. "[C]onsciousness implies awareness but not understanding. If understanding is lacking, conscious processing per se is not going to solve the problem."[124] Furthermore, "the relative advantages and disadvantages of conscious versus unconscious may vary for different stages and aspects of problem-solving."[125] Observing the various dimensions of the biasing process illustrated above in Figure 1, it is clear that judges may not need to scrutinize their decision-making until they are alerted to the fact that they have increased their own

119. *Id.* at 80.

120. *Id.* at 97. Such inhibition occurs when reference to the "here and now" only has a "less informative" orientation than reflection on the past. *Id.* at 96. Furthermore, the researchers note how it is often optimal to "[l]et sleeping dogs lie" and not waste time on an issue when "there is no solution to the problem." *Id.* at 88. They present the following hypothetical to illustrate this point. "Telling a male friend, 'Women don't find you attractive because you're so short,' may increase his consciousness of the problem, but it is unlikely to improve matters." *Id.* Yet another related difficulty is the natural tendency of decision-makers to attempt to prove their theories correct even when new information indicates that they have erred: "[W]hen one becomes aware of information disconfirming one's belief, one does not change the belief. Instead, one mentally reworks the disconfirming evidence (*e.g.*, by discrediting its validity, or through a situational attribution) in order to preserve the prior belief." *Id.* at 95.

121. *Id.* at 96.

122. *Id.* (emphasis omitted).

123. *Id.*

124. *Id.*

125. *Id.*

susceptibility to bias or they have definitively identified one. Judges also need to know when their debiasing efforts are likely to succeed.

2. Goals for Judicial Debiasing

Just as biasing needs an overarching definition, so does debiasing. In this context, debiasing cannot merely mean thought suppression or exercising some modicum of conscious control. While it is possible to gain control over unwanted thoughts, many recognize the exhausting nature of the practice if it is exercised on a regular basis.[126] Others highlight the pitfalls of a premium on vague notions of suppressing unwanted thoughts.[127] To be of use to judges, debiasing should be defined according to a feasible objective. The definition must account for the difficulty of eliminating negative thought processes that have yet to be recognized by decision-makers,[128] let alone psychologists.[129] The proposed model for judicial debiasing envisions judges who can better understand how their particular personal experiences might trigger certain biases; who can appreciate the limitations that such biases impose; who can detect these biases once triggered; and finally, who can determine the strength of such biases. Such an objective provides the judge flexibility in responding to biases. If the judge is capable of suppressing the thought sufficiently, he can allocate his energy accordingly. If the judge experiences difficulty, he might seek other help or disqualify himself, if necessary.

The value of this pragmatic approach of limiting the scope of judicial debiasing's objectives is evident upon comparison to decision-making enhancers in other professional fields. Most notable is the Recognition-Primed Decision (RPD) Model,[130] which has been applied to decision-making settings as diverse as "firefighting, command and control,

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126. *See id.* at 79-80 ("Through constant, repeated suppression of the habitual impulse, and the substitution of a different, more acceptable or appropriate response, an undesirable unconscious response may be supplanted with a new, desired one—but only through deliberate, conscious effort.").

127. Daniel M. Wegner & David J. Schneider, *Mental Control: The War of the Ghost in the Machine*, *in* UNINTENDED THOUGHT, *supra* note 9, at 287, 303 (explaining that people who want to eliminate thoughts often can, yet "thought suppression [can] ha[ve] ironic and troubling effects . . . in that the suppressed thought can return, sometimes to be more absorbing than it was at the start").

128. *See supra* note 84 and *infra* note 210 and accompanying text (describing the difficulty of dealing with problems of which someone is unaware).

129. *See* Abramson, *supra* note 54 (explaining that definitions of bias are growing in the advent of new research).

130. *See* Gary Klein, *How Can We Train Pilots to Make Better Decisions*, *in* AIRCREW TRAINING AND ASSESSMENT 165, 171 fig.9.1 (Harold F. O'Neil, Jr. & Dee H. Andrews eds., 2000) (depicting and describing how the RPD model is used to assist professionals in making more accurate decisions under uncertain conditions).

process control, [and] medicine."[131] Experts who have implemented this measure have recognized that attempting to remove all harmful biases with any type of decision-making aid is an impossible undertaking.[132] Instead, these implementers recognize that certain heuristics can create error and adopt the more realistic objective of "build[ing] the experience base for [recognizing and] using heuristics more skillfully."[133] The method of judicial debiasing proposed in this Article will similarly assist the judge in becoming more knowledgeable of himself. The specific methods highlighted provide the judge vital tools sufficient to gain such awareness.

3. Debiasing in General

In a practical context, judicial debiasing involves three categories of action by the judge to eliminate instances of mindlessness, which will be developed more fully in Part IV. The framework for the process was developed by psychologists Timothy D. Wilson and Nancy Brekke.[134] After exploring aspects of several cold biases that extended far beyond the realm of heuristics to several sins of omission,[135] the authors pointed out the four criteria necessary to correct contaminated thought processes:[136] First, people "must be aware of the unwanted mental process," which they can detect "directly" or "suspect" with awareness of an appropriate "theory."[137] Second, "[p]eople must be motivated to correct the error."[138] Although, "[e]ven if motivated to correct the error, people must be aware of the magnitude of the bias."[139] Finally, the individual must exhibit "[c]ontrol over [personal] responses to be able to correct the unwanted mental processing."[140] One example of the exercise of such control is turning off the counterargument autopilot that

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131. *Id.* at 165.

132. *Id.* at 190.

133. *Id.*

134. *See generally* Wilson & Brekke, *supra* note 74, at 119 fig.1.

135. *See id.* at 142 app. B (describing "Unwanted Consequences of Automatic Processing" and mental contamination relating to "Source Confusion" as distinct from "Failure[s] of [Applying a] Rule of Knowledge and Application" and associating each type of bias with existing theories and specific studies).

136. "Mental contamination" is defined as "the process whereby a person has an unwanted judgment, emotion, or behavior because of mental processing that is unconscious or uncontrollable," with the term "unwanted" signifying that "the person making the judgment would prefer not to be influenced in the way he or she was." Wilson & Brekke, *supra* note 74, at 117.

137. *Id.* at 119. *See also id.* at 130.

138. *Id.* Elsewhere, the researchers explain that "people's motivation to correct for bias and, more generally, their motivation to form an accurate judgment are important determinants of the extent to which they will avoid mental contamination." *Id.* at 131.

139. *Id.* at 120.

140. *Id.*

Higgins and Bargh explained was likely to persist after realization of an error in judgment.[141] The Wilson and Brekke model for debiasing is no simple one.[142] Those legal scholars who have attempted to apply it in the absence of specific practices that build on the framework have found it to be of some value, but also that it poses a number of confusing and unanswered questions.[143]

4. Judicial Debiasing

In developing a judicial debiasing approach, it must be accepted that the task is extremely complex, if for no reason other than the fact that "people [often] do not have the proper control conditions, with random assignment, that would enable them to determine how biased their judgments are, even in the aggregate."[144] Stated differently,

> [D]ecision biases will not go away by manipulating simple variables, such as asking people to work harder, or informing them about the bias, or restructuring the task, but rather will require sophisticated theories and techniques dealing with basic cognitive processes.[145]

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141. *See id.* at 133; Higgins & Bargh, *supra* note 114.

142. Elsewhere, the authors have explained the difficulty of understanding mental processes. *See* Wilson & Brekke, *supra* note 74, at 121:

> When [people] form an evaluation of someone, what they experience subjectively is usually the final product (e.g., "This guy is pretty attractive"), not the mental processes that produced this product, such as the operation of a halo effect (e.g., people do not consciously think, "Well, I like this guy, so I guess I'll boost my perception of how attractive he is").

Id.

143. *See, e.g.*, Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1287-99 (1998) (applying Wilson and Brekke's theory to the hypothetical issue of evaluating an African American student's poor level of preparation in a class the author was teaching); *id.* (describing serious unresolved issues about the course of action she should pursue under the model to correct likely errors in her unconscious thought process).

144. Wilson & Brekke, *supra* note 74, at 122. These concerns, however, have not stopped some commentators from praising simpler methods for uncovering unconscious biases. In one instance, a Web-based computer program has been theorized to settle the matter with regard to gender, race, and age bias. *See* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 959-64 (1999) (describing several aspects of "Implicit Association Testing"); *see also Fight Hate and Promote Tolerance, Test for Hidden Bias*, *at* http://www.tolerance.org/hidden_bias/02.html (providing self-administered computer tests to detect unconscious "Sexual Orientation Bias," "Racial Bias (Arab/Muslims)," "Racial Bias (Weapons)," "Racial Bias (Black/White Children)," "Racial Bias (Black/White Adults)," "Racial Bias (Asian Americans)," "Age Bias," "Gender Bias," and "Body Image Bias"). The drawback of this approach is the level of specificity of the biases that the tests indicate. They fail to detect biases in particular instances, leaving one to determine the presence of unconscious bias in only the most general sense. Respecting particular cases, indications of the absence of a type of bias on the computer program may even be misleading to a judge who experiences such bias in the courtroom.

145. Phillip M. Massad et al., *Utilizing Social Science Information in the Policy Process: Can Psychologists Help?*, *in* ADVANCES IN APPLIED SOCIAL PSYCHOLOGY 213, 225 (Robert F. Kidd & Michael J. Saks eds., 1983).

A more intensive effort to build on these basic principles is not futile, however, "We may not be able to avoid a stereotypical or prejudiced thought, but we can stop ourselves from acting on it."[146] As depicted in Figure 2, below, the proposed method adopts three of Wilson & Brekke's four steps as guideposts. It dismisses the third step, which requires motivation to correct the bias, given that judges are required to correct biases they know may influence their judgment and that any method of self-help is of little use to those who do not desire such help.

FIGURE 2:

THE THREE STAGES OF THE JUDICIAL DEBIASING PROCESS

While Parts IV and V, below, explain the operation of the debiasing process in great detail, it is wise to highlight the fact that debiasing is a shared responsibility between judges and their educators. After judges

146. *Id.*

learn the types of strategies to identify and eliminate biases, they must endeavor to use the process in self-regulation. The judge's job at this stage is not all that daunting. As one scholar has noted:

> Judges can choose to forgo useless or misleading information. They can adjust their responses—if not internal representations—in light of information about nonrepresentativeness. They also have a third option: They can make different use of the nonrepresentative information. More specifically, they can use such information not as a basis for judgments, but as a standard of comparison. Judgments thereby acquire a comparative, relative quality, yielding a contrast effect.[147]

After a judge becomes alerted to an anomaly in his analysis, correcting the process may be as simple as relying on a different system of reasoning.[148] In Professor Pierre Schlag's view, judges inevitably resort to four of these legal "aesthetics," any of which may be shortsighted due to lack of conscious awareness.[149] Testing a theory using the DS Framework, explored in Part IV.B.1, *infra*, may demonstrate a more optimal form of reasoning that favors one aesthetic over the other. Consequently, the optimal decision may rely on a reinterpretation of fact or law in an analytical framework that enables more transitional thought.[150]

With these basic assumptions stated, the focus of this Article is not bias in the generic sense, if "generic" means an inclination to decide a case in a certain way based upon the judge's personal experience. This is because, as the *WBK* postulates, we would expect the judge to adopt legal justifications that make his ultimate decision valid regardless of his

147. Fitz Strack, *The Different Routes to Social Judgments: Experiential Versus Informational Strategies*, *in* CONSTRUCTION, *supra* note 90, at 249, 270.

148. *See* Schlag, *supra* note 101, at 1051-52 (describing four types of legal aesthetics used by judges to achieve judicial decisions, including the "grid aesthetic," the "energy aesthetic," the "perspectivist aesthetic," and the "disassociative aesthetic"). Because all aesthetics under the model are necessary to the legal reasoning process, it is presumed that some further indication of cognitive limitation, besides the act of privileging one aesthetic over another, is necessary before a judge must implement a corrective measure. Greater awareness that an aesthetic may be limiting a judge after review of an opinion is more probable because "[a] legal aesthetic is something that a legal professional both undergoes and enacts, most often in an automatic, unconscious manner." *Id.* at 1102. After recognition that there is a problem, it may be more evident that "[a] position that may seem inexorable, or compelling [will] turn out to be an effect of operating or thinking within a particular aesthetic . . . that is itself neither necessary nor particularly appealing." *Id.* at 1112.

149. *Id.* at 1114.

150. To this end, different factors may result in biases depending on whether the analysis involves interpreting the law, facts, or mixed questions of law and fact. *See* Leubsdorf, *supra* note 54, at 262-63 (explaining that fact determinations most often create problems when they involve reliance on unproven assumptions, while legal determinations create problems when "judges do not know to what extent their own values do or should influence the result").

personal feelings.[151] Instead, the dangerous "bias" comes in two distinct forms. In the first case, the culprit is the traumatic past experience a judge may have had—one that a present legal dispute invokes and one that can ultimately determine the extent to which the judge considers and applies the governing law. The second culprit is the mistaken assumption resulting from the information a judge perceives in one way, but which could have, and should have, been understood in a completely different context. In both cases the problem is one of process (*i.e.*, these negative influences exist when judges initially review data and organize responses to them).[152] In other words, if judges have certain inclinations towards seeing things—or not seeing things—in certain ways, if the causes of these inclinations relate to the judges' past or another extralegal influence, the *WBK* approach to decision-making may not validate the judge's resolution of the legal issue.

Judges' past experiences, especially the more unsettling ones, have long been a cause for concern in the judicial disqualification literature.[153] When researchers have tested judges to determine the type of situations involving bias that would cause judges to disqualify themselves from deciding cases, they have found that the majority of judges are either ambivalent to or disposed against disqualification,[154] even when circumstances may create the appearance of impropriety.[155] Researchers explain that the "variety of factual situations with which judges are confronted daily" influence judges based on their past experiences to a much greater extent than the scenarios researchers have developed in laboratory settings.[156] Recognized examples of such situations may include instances where judges dislike defendants they

151. It is not the aim of this Article to suggest that all of the biases indicated in Figure 1 can be eliminated or controlled sufficiently with any uniform process, or that *all* instances of such bias are possible to control or eliminate.

152. *See* LANGER, *supra* note 21, at 75-77 (describing the value of adopting a critical orientation toward process over outcome in improving one's ability to function optimally).

153. Consider Justice Frankfurter's noted comments as he disqualified himself from deciding *Public Utilities Commission v. Pollak* in 1952: "My feelings are so strongly engaged as a victim of the practice in controversy that I had better not participate in judicial judgment upon it." Jeffrey M. Shaman, *Forward to* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT, at ix, x (1986) (citing Justice Frankfurter).

154. *See* SHAMAN & GOLDSCHMIDT, *supra* note 63, at 31 (1995) (finding that fifty-four percent of judges in their sample were ambivalent and thirty-two percent of the judges were disposed against disqualification "in cases involving bias").

155. *See id.* at 37 (addressing the similarity of the current case to the judge's own recent divorce); *id.* at 40 (addressing a judge who is a member of a group that restricts membership based on race and gender deciding a similar case).

156. *Id.* at 51 (commenting that a judge's experiences to open-ended questions expanded the researchers' understanding of pertinent conflicts based on the researchers' limited estimates).

knew before hearing cases,[157] where judges are assaulted by defendants in the past and later decide cases involving the same defendants,[158] or where judges make public statements on topics regarding how certain cases should be decided in general and then are assigned several of those particular types of cases.[159]

A survey of 571 trial and intermediate court judges from Arkansas, Nebraska, New Hampshire, and Ohio[160] provides crucial insight into the types of issues that judges consider are worthy of recusal on the grounds of bias. More important than those cases in which judges would promptly disqualify themselves are those cases in which judges would sit throughout the case. On balance, the judge-respondents were more likely *not* to disqualify themselves when, for example, "a divorce case [was] similar to the judge's own divorce"—even when the divorce occurred "less tha[n] three years ago,"[161] and when the "judge's son [was] threatened by a party."[162] Judges were ambivalent to disqualification in situations similar to those where "the judge [was] a member of a restrictive club and the case involve[d] a claim of discrimination similar to the [racial and gender] restriction placed by the club."[163] These examples provide only a sampling of the majority of bias-related scenarios to which judges were either ambivalent or disposed against.[164]

One explanation for these prevalent behaviors may be that the judges lacked the ability to determine the degree to which their unsettling past experiences would influence their decision-making processes. For example, "[t]he judges that mentioned situations involving relationships noted that it was difficult to pinpoint just when a personal or professional relationship becomes too close to allow them to remain impartial in a proceeding."[165] Because the disqualification decision mainly rests with judges themselves, the judges may have been warranted in deciding to wait and see if any bias would emerge in such cases. Yet, in the context of those pre- and subconscious factors that threaten to limit the judges' analyses of theories or interpretations of phrases or facts during decision-making, there can be no similar hope

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157. *Id.* app. A, Item 32, at 32.

158. *Id.* app. A, Item 21, at 77.

159. *Id.* app. A, Item 23, at 77.

160. *See id.* at 1, 8, 5, 31 (explaining conditions under which judges were tested).

161. *Id.* at 37.

162. *Id.* at 54 tbl.3.

163. *Id.* at 40.

164. For further investigation of particular scenarios that were tested, see *id.* app. A, in which the researchers labeled questions 20-25, 27-29, 31-33, and 39-40, as involving bias. *Id.* at 31 n.12 (labeling).

165. *Id.* at 61.

for self-awareness. Although these unconscious impediments on judgment may not rise to a level requiring recusal, they certainly caution us to the quality of the judges' product.

The neural networks that make judges more susceptible to bias involving past experiences can be activated by scenarios less charged than hearing a case dealing with a defendant who had formerly struck the same judge. More related to the potential bias involving the judge who had recently experienced a similar divorce, suppose that a judge had been assigned a case involving a rape or robbery resembling one that he had experienced—or, for that matter, a rape or robbery experienced by a relative or close friend. The judge's gut instinct will naturally tell him to vindicate the interests of the victim of the familiar crime. And, while the judge may attempt to control thoughts that incline him to decide the case in a manner favoring such vindication, the judge cannot deactivate preconscious networks of thought that may foreclose the evaluation of theories of law that would otherwise be available in the more traditional process of legal reasoning.[166] It becomes essential then for the judge to implement a process that evaluates the consistency and reliability of the analysis that created the outcome of his decision.[167]

The second, more prevalent, example of cold bias considered by this Article is best related in the following hypothetical scenario. Suppose that a state supreme court justice attends a distinguished panel at the local university's law school. While there, the Dean invites the justice to visit his home: "Justice, it would be an honor if you came to meet my son; he's so *spontaneous*, you'll just love him." The justice cheerfully agrees and proceeds to his waiting suburban utility vehicle. In the alternative, suppose the Dean instead had said: "Justice, it would be an honor if you came to meet my son; he's so *impulsive*, you'll just love

166. *See* Wegner & Schneider, *supra* note 127, at 303 ("[M]otivated thinking may not have the clean-cut success we sometimes find with motivated physical activities. When we want to brush our teeth or hop on one foot, we can usually do so; when we want to control our minds, we may find that nothing works as it should.").

167. Perhaps this example brings Sigmund Freud's work to mind. Freud often emphasized the concept of "working through" serious emotional issues to gain awareness of their influence in people's lives even years after the initial incident. Anne C. Dailey, *Striving for Rationality: Open Minded: Working out the Logic of the Soul*, 86 VA. L. REV. 349, 366 (2000) (book review) (describing concept). The resulting issue for the purpose of this Article becomes whether it is realistic for us to expect that the judge has the tolerance and capacity to scrutinize the horrific details of his own misfortunes and then direct his effort toward reducing their negative effects. One view might hold that judges, as most humans, will find the process too uncomfortable and would rather leave these types of decisions unexplored as not to bring skeletons out of the closet. The contrary view would recognize that these types of situations rarely arise. Because the resulting disruption will be infrequent, judges must still recognize their official duties and address factors that might potentially influence their impartiality, regardless of the discomfort associated with the task. As we shall see, this Article identifies tools that judges may use to locate, identify, and deal with such conflicts.

him." With that, the judge instead provides a well thought excuse and proceeds to mingle with the other guests. In these last two examples, the difference in the judge's response depended on the connotations he had preconceived about the meaning of the word "impulsive," as opposed to the word "spontaneous," even though they both meant the same thing.[168] Professor Langer provides similar examples of this judgmental phenomenon:

> [T]here are as many different views as there are different observers. . . . If there is only one perspective, you can't both be right. But with an awareness of many perspectives, you could accept that you are both right and concentrate on whether your remarks had the effect that you actually wanted to produce. . . . It is easy to see that any single gesture, remark, or act . . . can have *at least* two interpretations: spontaneous versus impulsive; consistent versus rigid; softhearted versus weak; intense versus overemotional; and so on.[169]

In fact, in an experiment she appropriately titled "Patient by Any Other Name,"[170] Langer documented the same type of error in judgment among mental health professionals. Langer was prompted to investigate the prevalence of premature labeling by the troubling realization that she considered people who described certain emotional problems in clinical settings as being "patients"[171] with troubles, while she viewed friends describing the same exact emotional difficulties outside of the clinical setting as being perfectly normal.[172] Consequently, to test how widespread these types of biases were in the decision-making process, Langer and her colleague recorded an interview with "a rather

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168. *See* WEBSTER'S II NEW COLLEGE DICTIONARY 1067 (1999) [hereinafter WEBSTER'S II] (defining "spontaneous" as "[i]mpulsive; unpremeditated"). On the view that it is questionable to rely on dictionary definitions and the ambiguity of these words appears dubious, *see infra* note 218 (describing the unreliability of dictionary definitions), consider the example of a judge determining the fate of a juvenile offender. In one instance, the defendant is described by the prosecutor as being a "troubled youth." In the alternative, the same defendant is described as "a good kid who made a mistake." Although the same defendant with the same record is being described, simply based on the difference between these two contrasting designations, the judge could foreseeably reach a different conclusion.

169. LANGER, *supra* note 21, at 68-69.

170. *See generally* Ellen Langer and Robert Ableson, *A Patient By Any Other Name . . .: Clinician Group Differences in Labeling Bias*, 42 J. COUNSELING & CLINICAL PSYCHOL. 4 (1974).

171. LANGER, *supra* note 21, at 155 ("When we discussed certain behaviors or feelings that they saw as a problem, I also tended to see whatever they reported as abnormal. I saw their behavior as consistent with the label of patient.").

172. *Id.* As Langer explains,

> Later, outside of the therapy context, when I encountered exactly the same behavior [as exhibited by the patients] (for example, difficulty in making a decision or in making a commitment) or feelings (like guilt or the fear of failure) in people whom I know, it appeared to be perfectly common or to make sense given the circumstances.

Id.

ordinary-looking man" discussing aspects of his employment.[173] They previewed the film to a group of psychotherapists and told one half that he was a "patient," as opposed to the other half, to whom they told he was a "job applicant." The researchers had further placed professionals trained in two different types of clinical theory—one that supported labeling patients and one that rejected the notion of labeling—in both the control and experimental groups.[174] They subsequently observed the following:

> [W]hen we called the man on the tape a job applicant, he was perceived by both groups of therapists to be well adjusted. When he was labeled a patient, therapists trained to avoid the use of labels still saw him as well adjusted. Many of the other therapists, on the other hand, saw him as having serious psychological problems.[175]

In Langer's study, it was the viewers who had not been immunized—those who had not eschewed the use of labels—who proceeded in a mindless way by letting their preconceptions dictate their interpretation of the evidence. Without a method for determining when judges have closed their minds to meaningful alternatives, judges often fall into the same trap when interpreting statutes or cases in which word meanings or theoretical concepts can potentially lead to contrary conclusions.[176] In other words, judges might prematurely assume that the facts of a case should lead them to a certain mode of constitutional interpretation, for example, or a specific method within that mode.[177] On balance, these

173. *Id.*

174. Half of the subjects were familiar with the "classical doctrine of mental illness," which is heavily dependent on labels indicating patients' illnesses, while the other half were behavior therapists whose training "explicitly encourages" discounting such labels. Langer & Ableson, *supra* note 170, at 8, 9.

175. LANGER, *supra* note 21, at 156. *See also* Langer & Ableson, *supra* note 170, at 7 ("Do the traditional clinicians generate a significantly bigger adjustment difference between job applicant and patient than do behavioral clinicians? The answer is yes ($F = 4.75, p < .05$).").

176. *See also supra* note 168 (discussing a judge's possible different reactions to a youth offender described as a "troubled youth" versus "a good kid who made a mistake.")

177. Edward R. Hirt & Keith D. Markman, *Multiple Explanation: A Consider-an-Alternative Strategy for Debiasing Judgments*, 69 J. PERSONALITY & SOC. PSYCHOL. 1069, 1070 (1995). Psychology offers a number of possible explanations for this result. The following commentary synopsizes a number of studies. Consider the "change-of-standard" effect, in which "people make an initial judgment . . . in relation to one standard and then later, when using the judgment in their current responding, reinterpret the meaning of that judgment in relation to a different standard without taking the change of standard into account sufficiently." E. Tory Higgins & Akiva Liberman, *Memory Errors From a Change of Standard: Lack of Awareness or Understanding?*, 27 COGNITIVE PSYCHOL. 227, 228 (1994). On this view, a judge might see a similarity between the way he had interpreted a statute earlier and mindlessly jump into the same type of analysis without considering the unique new questions posed by the litigants or the facts. Alternatively, consider the notion of "self-enhancement bias," where people exhibit "the tendency to see [themselves] as better than [they] really are." Jonathan A. White & S. Plous, *Self-Enhancement and Social Responsibility: On Caring More, But Doing Less, Than Others*, 25 J. APPLIED SOC. PSYCHOL. 1297, 1297 (1995). The danger here is that such biases "lead to a complacency in which people ignore legitimate risks and fail to take necessary actions

types of bias show how judges may be stopping short their analyses and thus their achievement of the better or best resolution to the legal problem in question at any given time.

The thrust of this Article is that premature information processing during the judicial decision-making process poses a societal problem even if the legal analysis that results from the premature commitment is perfectly rational and legitimate from a legal standpoint. What we see both in the case of the judges whose past experiences triggered a subconscious reaction and the judge at the cocktail party is a harmful type of bias. The negative connotation does not arise because the judges failed to provide a reliable justification. After all, the cases on which the first grouping of judges would rely to support their decisions, and the dictionary meaning of the word "impulsive" on which the second justice proceeded, would be perfectly legitimate.[178] Instead, these biases are dangerous if the judges allow their first impressions of a situation to dominate the structure of their future analyses without recognizing other equally viable alternatives. Put differently, danger arises if these judges stop analyzing facts too soon.[179]

On a grand scale, when such biases go unchecked during the process of legal interpretation, there exists a risk that the optimum answer will not be given. It is a danger that judges may not consider all of the relevant arguments and will thus achieve a result that—albeit certainly legally legitimate—still falls short of the best answer in the given situation, or, at the very least, a better answer. One can base this result on the fact that continuing review and reflection might have resulted in a more informed decision. And, quite possibly, the more informed

or precautions. For example . . . people who believe they will not become sick are less likely than others to immunize themselves against the flu." *Id.* at 1298 (citations omitted). In this case, judges might feel overconfident regarding their abilities to apply constitutional theories to issues based on the fact that they have implemented such analyses for years, all the while knowing the ironic truth that they may be determining new areas of law that have not yet been addressed and require the most demanding models of interpretation. The notion that certain legal issues have never been addressed should caution judges to be especially aware of unique circumstances, while routine application of an interpretive theory would call for the opposite (*i.e.*, finding similarities with predetermined outcomes to guide the present analysis).

178. WEBSTER'S II, *supra* note 168, at 1067.

179. Normally, it poses no problem when a judge decides to stop reviewing materials in a case. Professor Simon's theory of "satisficing" sees decisions to stop researching as a natural practice among all decision-makers. *See* J. MARCH & H. SIMON, ORGANIZATIONS 140 (1959) (describing how individuals settle for the solutions that are "good enough" to meet the criteria for a decision without continuing the search until they find the best answer); *see also* Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 141 (1998) (noting how the concept of satisficing embraces, rather than rejects rationality in its approximation of human nature). The problem I address does not attack judges for satisficing. Instead, it deals with judges' conclusions that fall short of a "good enough" decision because the materials on which they rely fail to account for equally compelling or legitimate theories or facts—facts that may be at their fingertips, though they choose to ignore them due to the influence of biases.

decision could have altered the outcome of the case and thus could have transformed the law into a more responsive body of authority capable of meeting the challenges of an ever-changing society.[180]

The two instances of bias described above threaten judges because they petrify the law and limit it to the past, while the social dynamics and norms of our lives are constantly changing.[181] Accordingly, limiting the influence of these biases should be among judges' major priorities. But this task poses a significant challenge: determining *when* judges should seek help and not only *where* they need to look when they find a dilemma. I offer the following framework to illustrate how judges can determine whether they should attempt debiasing in the two situations described above.

Assume that there are two types of judges: those who are willing to address biases of which they are made aware, and those who are unwilling to address biases they know exist in a given case (short of recusal) or in the course of decision-making in general. This Article concerns itself with the first group of judges because they are the ones who will benefit by learning about new methods of self-analysis. However, both categories of biased judges will fall into three groups based on their behaviors. In the first cluster, the biased judge represents himself to peers, the public, the press, or the parties in a case as if he has not been influenced in any way. In the second cluster, these audiences will suspect something unusual about the way the biased judge reached a decision based on the textual sources he quotes or the analogies he raises. Finally, the third cluster of biased judges will make statements or issue opinions that blatantly reveal the presence of the bias.

In responding to biases in these three groups, we can easily address two of the scenarios: the first and the third. The first group of biased judges poses the greatest risk because the biased judge's audience may assume that he achieved a legal decision by exhausting all legitimate avenues of analysis, when, in fact, the bias caused him to decide the case prematurely. These judges must become aware of their own inclinations and should constantly check themselves with the methods described in Parts IV and V of this Article when making decisions. Similarly, in the third group, we need not worry excessively about the effects of bias,

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180. *See* Guthrie et al., *supra* note 10 at 778 ("The quality of the judicial system depends upon the quality of decisions that judges make.").

181. *See* HANS-GEORG GADAMER, TRUTH AND METHOD 309 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. 1989) (1960) (noting that a "text . . . if it is to be understood properly—*i.e.*, according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way.").

because the biased judge's audience will know of the bias and will most likely dismiss the validity of the contaminated analysis.[182]

The second group of judges, those who act peculiarly, create the most trouble for the public because they challenge their audiences, and even themselves, to gauge whether the deviant behavior reveals the presence of bias or exists for some other purpose. To eliminate these biases, a number of legal scholars have proposed tentative solutions. Some suggest further empowerment of juries.[183] Others would invest greater resources in litigants, such as the implementation of a peremptory challenge system to remove biased appellate court judges.[184] Yet others would develop multi-judge panels instead of having judges sit alone.[185] And still more explain that certain "rules of thumb" can succeed in limiting unconscious bias.[186]

The difficulty of implementing many of these reforms would stem from the complete overhaul of the justice system that they would require. As the dialogue expands on developing ways to implement such reforms, this Article offers temporary measures that might help

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182. For example, Professor Wrightsman points to the judge who decided that a father who had been convicted of murdering his former wife, had been accused of child molestation, and had been behind in paying his child support, should have custody of his eleven year-old daughter in a legal battle against her lesbian mother because of the judge's position on homosexuality: "I'm opposed to it, and that's my beliefs." WRIGHTSMAN, *supra* note 19, at 49 (citing L. Pitts, Jr., *Judicial Homophobia Led to Bizarre Custody Decision Favoring Killer Dad*, KANSAS CITY STAR, Feb. 8, 1996, at C13). In such a case, if the judge had not turned to any legal basis for proclaiming that the girl's mother was unfit, then his statements should naturally alert others to be weary of the assessment. *Cf. Panel to Examine Remarks of Judge on Homosexuals*, N.Y. TIMES, Dec. 21, 1988, at A16 (citing Judge Jack Hampton's reason for giving a murderer a lenient sentence, "I don't care much for queers cruising the streets, picking up teen-age boys. I've got a teen-age boy . . . . [I] put prostitutes and gays at about the same level . . . . I'd be hard put to give somebody life for killing a prostitute.").

Similar sentiments about obvious biases were expressed during oral arguments in *Liteky*:

> QUESTION: Supposing that a judge—take in this 1983 trial, Judge Elliot had made rulings that were beyond challenge at all, and—but commented when the defendant finally was led off to where—["Y]ou know, I think you're a worthless, mealy-mouthed little tool, and I hope I never see you in this court again.["] Now, is that pervasive bias?
>
> MR. HUNGAR: Obviously, Mr. Chief Justice, it's difficult to draw precise lines in this area. That might well rise to the level of pervasive bias.
>
> QUESTION: If that doesn't, what would?
>
> (Laughter).

United States Supreme Court Official Transcript, Liteky v. United States, 510 U.S. 540 (1994) (No. 92-6921), *available at* 1993 U.S. TRANS LEXIS 129, at *20-21.

183. *See* Patricia Cohen, *Judicial Reasoning Is All Too Human*, N.Y. TIMES, June 30, 2001, at B9 (recounting Professor Shari Seidman Diamond's recommendation to "[r]ely on juries because they can be shielded from unlawful evidence").

184. *See generally* Bassett, *supra* note 71.

185. *See* Cohen, *supra* note 183, at B9 (relating the recommendation of Professor Steven Landsman to "[c]onsider having a panel instead of a single judge rule on [lower court] cases, as is regularly done on the appellate level").

186. *Id.* at B9 (noting the comments of Professor Jeffrey J. Rachlinski).

biased judges and their audiences recognize the need for debiasing. Often the judicial opinion itself can provide the framework for the detection of bias through the manner in which judges package their arguments. In Professor Amsterdam and Bruner's work *Minding the Law*,[187] the researchers analyzed judicial opinions to determine whether judges internalized certain societal myths.[188] Professor Guthrie and his colleagues also recognized a point helpful to their research: "[m]ost importantly, published judicial opinions include examples of the influence of cognitive illusions."[189]

To illustrate this phenomena, I will address judges' reliance on fictitious texts as authoritative materials in the decision-making process.[190] In particular, I address authoritative uses of works by George Orwell and William Shakespeare.[191] Citations to these works may

187. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

188. *Id.* at ch. III. For an overview of several limiting archetypes in legal opinion writing, see also Collin O'Connor Udell, *Parading the Saurian Tail: Projection, Jung, and the Law*, 42 ARIZ. L. REV. 731, 751-74 (2000) (describing the operation of shadow jurisprudence in the courts).

189. Guthrie et al., *supra* note 10, at 821.

190. A growing body of literature suggests that judicial opinions do not reflect the judge's process of arriving at a ruling contained within it, and are thus useless as indicia of the decision-making process. *See* Simon, *supra* note 23, at 34-35 (explaining that judges themselves "emphasize[] the discrepancy between the opinion and the decision making process"). For the most part, this sentiment is true, since, for example, Supreme Court Justices involve themselves in multiple discrete levels of analysis before writing opinions. *See generally* JUDGES ON JUDGING: VIEWS FROM THE BENCH Part II, Chs. 7-11 (David M. O'Brien ed., 1997) (discussing these stages). However, in some respects, judges *do* show us aspects of their own behavioral influences, which are so powerful in cases that they survive through each decision-making stage and appear in the opinion. *See* Theodore Schroeder, *The Psychologic Study of Judicial Opinions*, 6 CAL. L. REV. 89, 90, 94 (1918) (noting that "every [judicial] opinion is unavoidably a fragment of autobiography . . . [that] amounts to a confession" not to mention that the "genetic understanding" of an opinion constitutes a psychological revelation); William Domnarski, *Shakespeare in the Law*, 67 CONN. B.J. 317, 323 (1993) ("With the use of figurative language the judge declares his interest in going beyond the issue and facts before him and connecting them to the larger world of ideas . . ."). This section explores these particularly telling examples, which pertain to the entire judging process.

191. Consider that these extralegal sources represent only a small portion of a much more varied spectrum, ranging from reliance on television series and children's nursery rhymes to paintings, and even sculptures. For television series, see, for example, *De Angelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 595 (5th Cir. 1995) (comparing the conduct of an alleged harasser to that of fictional television characters: "The R.U. Withmi column did not represent a boss's demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity . . . . R.U. Withmi intended to be a curmudgeon, the police department's *Archie Bunker* or *Homer Simpson*, who eyed with suspicion all authority figures, academy-trained officers . . . whatever had changed from the old days.") (emphasis added). For nursery rhymes, see, for example, *Ex parte Kailer*, 255 P. 41, 42 (Kan. 1927) (assessing the best interests of children: "Casuists could make a good argument that in the legendary case of the old woman who lived in a shoe, who had so many children she did not know what to do, the welfare and best interests of those children would be to rescue them . . . ."); *In re* Guardianship of Denlow, 384 N.Y.S. 2d 621, 630 (1976) (addressing child abandonment: "The predicament of this mother—even as [the party to proceedings] seemed to view it—was somewhat akin to the 'old woman who lived in a shoe'"); *see also* Lee v. Venice Work Vessels, Inc., 512 F.2d 85, 87-88 (5th Cir. 1975) (noting problems with "extending survival of the cause of action beyond the Administrator to the heirs" in inheritance matters: "[This] reminds us, somehow, of the fabled end of

provide a way to determine whether biases are at work. Yet, before beginning, it is noteworthy that some caution is necessary any time individuals attempt to point out biases in people other than themselves. As Professor Robert MacCoun observed:

> [T]alk is cheap—it is easier to accuse someone of bias then to actually establish that a judgment is in fact biased. Moreover, it is always possible that the bias lies in the accuser rather than (or in addition to) the accused. There are ample psychological grounds for taking such attributions with a grain of salt.[192]

While it is presumed that the review of written judicial opinions can work optimally as one method to indicate the need for judicial debiasing, judicial mindfulness moves beyond those judges who write only opinions.[193]

When judges refer to extralegal sources in their opinions, we can reach a number of conclusions. Usually, these citations are merely fleeting references, crafted by the judge to demonstrate his learnedness. One author appropriately defines these references as "ornamental" quotations, because they are merely decorative in nature.[194] However,

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'Humpty-Dumpty':

> Humpty-Dumpty sat on a wall
> Humpty-Dumpty had a great fall
> All the King's horses
> And all the King's men
> Couldn't put Humpty-Dumpty together again.

Id. at 88 & n.4). For paintings, see, for example, *In re Subpoenaed Grand Jury Witness Subpoenaed Witness v. United States*, 171 F.3d 511, 513 (7th Cir. 1999) (citing the difficulty of interpreting the Mona Lisa's smile as the basis for applying precedent and the case's outcome: "While a bright line rule would be easy to understand and enforce, *Cherney* requires that we read the nuance in Mona Lisa's smile."). For sculptures, see, for example, *Johnson v. State of Florida*, 351 So.2d 10, 13 (Fla. 1977) (Adkins, J., dissenting) (alluding to two sculptures to justify that a graphic magazine was not obscene:

> The magazine "Climax" was examined. Just as the sculpture "Bound Slave" by Michelangelo, and "David with the Head of Goliath" by Donatello, the magazine contained pictures of men with their genitals completely exposed. Just as Rembrandt's "Danae," the magazine contained pictures of a nude female stretched out in a sensuous position. . . . Granted, the magazine lacked serious literary, artistic, or scientific value, but this alone does not bring it within the rule prohibiting certain publications.).

192. MacCoun, *supra* note 102, at 263.

193. While analyzing judicial opinions to detect bias may be a useful form of oversight, the process disregards the many decisions of trial judges that are not supported by written opinions. Judicial mindfulness reaches trial judges as well.

194. Domnarski, *supra* note 190, at 318 (defining ornamental quotations as "quotations invoked because of their subject, theme or key word relationship with the judicial opinion"). *See also* Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1237 (1998) (noting that judges use extralegal allusions "not . . . to derive constitutional norms but simply to sell them"). In the present context, various citations to Orwell show no more than an ornamental use. *See* USW v. Weber, 443 U.S. 193, 219-20 (1979) (citing a passage relating to the fictional government of Oceania's declaration of war in a way that "[w]ithout words said, [sent] a wave of understanding

while ornamental quotes predominate the federal reporters, certain references are instrumental in nature—ones that seemingly convey legal principles where the law is apparently silent. I am of the view that we can gain much from distinguishing between ornamental and instrumental uses of fiction because instrumental uses are more likely to indicate that some type of force—very likely bias rooted in a past experience or hasty interpretation of an ambiguous term—has altered the way a judge has been trained to resolve a legal dispute. Consider the following example.

The case of *Florida v. Riley*[195] is one of the most illustrative examples of a judge's instrumental use of a fictional work. *Riley* involved police deployment of a helicopter to monitor an individual who cultivated marijuana bushes in his back yard. Here, the Court addressed whether police surveillance was unreasonable based on the low altitude of the helicopter (*i.e.*, it determined when surveillance exceeded the bounds of plain view and became particularized and intrusive to the individual). On balance, *Riley* emphasizes that the issue of privacy invasion is among the hardest constitutional issues to adjudicate, especially since the Framers of the Constitution could not contemplate many of the technological advances that currently define our society.[196] Seemingly then, it should raise no eyebrows that this privacy case generated conflicting beliefs and legal justifications.[197] When a plurality of the *Riley* court held that helicopters traveling above 400 feet did not violate

rippl[ing] through [a] crowd [of spectators]" for the proposition that the majority's decision regarding Title VII "represent[ed] an equally dramatic and . . . unremarked switch in this Court's interpretation" (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR 181-82 (1949)); United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) ("The year 1984 came and went without the government's transformation into the ubiquitous and all-seeing Big Brother of George Orwell's book. (This, at least, is how everyone but dyed-in-the-wool conspiracy devotees would characterize things.)").

195. 488 U.S. 445 (1988).

196. *See* David Chang, *Conflict, Coherence, and Constitutional Intent*, 72 IOWA L. REV. 753, 796 (1987) (noting "issues that the framers and ratifiers did not consider, or could not have considered").

197. *See* Erwin Chemerinsky, *The Supreme Court 1988 Term: Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51 (1989) (noting difficulties with "open textured" constitutional terms like "speech," "search," "cruel and unusual," and "excessive fines"); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 63 (1994) ("The textual provisions at issue in constitutional adjudication are usually susceptible to more than one reasonable construction, at which point an interpreter must refer to something else to settle the ambiguity of the relevant text."). Accordingly, judges commonly refer to the Orwellian conception of an imposing government as a "Big Brother" who sees all. *See, e.g.*, United States v. 15324 County Highway E., 219 F.3d 602, 603 (7th Cir. 2000) (referencing the notion of "Big Brother" in a short line without citing the novel). They similarly cite Orwell for the notion of "double-thinking." *See, e.g.*, Rushman v. City of Milwaukee, 959 F. Supp. 1040, 1044 n.3 (E.D. Wis. 1997) ("Double-thinking is the deliberate reversal of facts and words. So, in Ocenia, the Ministry of Peace waged wars; the Ministry of Truth spread lies"); Passarell v. Glickman, 1997 U.S. Dist. LEXIS 2719, at *8 (D.D.C. 1997) (noting Orwell's notion of double-speak and adding that "Orwell did not anticipate that the current Department of Agriculture of the United States would add to that list . . . .").

individual privacy interests, Justice Brennan responded by citing eight lines of George Orwell's *1984*—a passage involving Big Brother's use of helicopters:

> The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . . In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.[198]

This was a far cry from the run-of-the-mill Orwell reference for two reasons. The first striking thing about this quote is its length in comparison to the majority of such citations. But second, and even more intriguing, is Brennan's statement immediately following the quote: "Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours? I respectfully dissent."[199] Characteristic of a great many cases, *Riley* represents a bold leap by a court official. In it, Justice Brennan directly defied the notion that judges are not supposed to be literary.[200] In doing so, he also exposed his inner-self to the public and his fellow Justices.[201] We gain much from this form of irregular behavior, especially when contrasted with other judges' uses of the same passage.

Compare *Gibson v. Florida Legislative Investigation Committee*,[202] in which Justice Douglas cited the very same passage from *1984*, but for a contrary purpose. *Gibson* involved the determination of whether compelled production of documents relating to membership in an organization violated the Free Exercise clause and individuals' rights to associate. In the following excerpt, note the passages redacted by Justice Brennan in *Riley*, which I have marked in italics:

> *Outside, even through the shut window pane, the world looked cold. Down in the street little eddies of wind were whirling dust and torn paper into spirals, and though the sun was shining and the sky a harsh blue, there seemed to be no color in anything except the posters that were plastered everywhere.* The black-mustachio'd face gazed down from every commanding corner. There was one on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, *while the dark eyes looked deep into*

198. *Riley*, 488 U.S. at 466 (Brennan, J., dissenting) (citing ORWELL, *supra* note 194, at 4).

199. *Id.* at 467 (Brennan, J., dissenting).

200. *See* Domnarski, *supra* note 190, at 344 (recounting the recommendations of Chief Justice Charles Evans Hughes).

201. *See* Schroeder, *supra* note 190, at 90 (referencing judicial opinions as windows to the judge's mind).

202. 372 U.S. 539 (1963).

Winston's own. Down at street level another poster, torn at one corner, flapped fitfully in the wind, alternately covering and uncovering the single word INGSOC. In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. *The patrols did not matter, however. Only the Thought Police mattered.*[203]

Something obviously missing from Brennan's reference was the fact that "[t]he patrols did not matter," which, in *Riley*, would have undercut Brennan's claim that society deems helicopter surveillance an unreasonable invasion of privacy.[204]

While readers might interpret a fictional text in an infinite number of ways,[205] Brennan's disingenuous use of *1984* may demonstrate a strong personal attachment to the work, which most likely interfered with his interpretation of the passage.[206] The danger inherent in Brennan's actions is that he may have imported other past experiences and emotional inclinations along with the initial interpretation, thus increasing the likelihood of inaccurate, or what I will soon define as mindless, decision-making. Given the good faith thesis and other affirmations of judicial honesty,[207] Brennan most probably interpreted the passage in the same way it struck him during an initial read, long

203. *Id.* at 575-76 n.11 (Douglas, J., concurring) (noting additionally "[w]here government is the Big Brother, privacy gives way to surveillance" (footnote omitted)). While it is not my role to be a literary critic here, I still find it interesting that Justice Douglas's use of the passage shifts its focus away from the individual to society, while Brennan's draws our attention to the individual's plight.

204. It may be true that only Orwell can tell us what this phrase means. However, on its face, the notion that citizens found helicopter surveillance permissible ran contrary to Brennan's argument. The cannons of legal interpretation would direct Brennan to explain how the sentence supported his view. Justice Brennan did not explain the meaning of the quote. Instead, he let it stand as if the sentence never followed.

I should acknowledge the alternative view that Brennan's use of the Orwell passage merely underscored the invasiveness of Orwell's fictional government, which might require no mention of the omitted sentence to support its validity. Even on this reading, the sheer length and contents of the passage in both *Riley* and *Gibson* alert us to stirred emotions not normally present in judicial opinions.

205. *See* John F. Coverdale, *Text as Limit; A Plea for Decent Respect for the Tax Code*, 71 TUL. L. REV. 1501, 1511 (1997) (explaining the deconstructionist view that "words are so subjective that texts are open to numerous or even infinite interpretations, none of which can be shown to be correct in preference to any other").

206. While there is always the possibility that one of Justice Brennan's clerks wrote the portion of the opinion referencing Orwell, it is still a safe assumption that Brennan reviewed that passage and let it stand. In any event, the question becomes why he would not address a portion of the cited work that contradicts his major point. Without a better explanation, it is likely that Brennan felt so strongly about the passage that he did not care to dilute it. Seemingly these types of abnormal behaviors alert us that judges are influenced by some other source besides the law when making their determinations. In these types of situations, it behooves the judge to consider self-analysis.

207. *See supra* note 38 and accompanying text (confirming that judges do not intentionally deceive).

before he became a judge.[208] In this respect, one could say he may have been influenced by his emotions, which were evoked by the memory of this portion of the text [209]

In analyzing *Riley*, we must look to the mechanics of Justice Brennan's reasoning process, and not necessarily its product. In other words, we must resist falling prey to an argument that may seem perfectly reasonable to the uninformed reader—an argument suggesting that *Riley* actually supports philosophers' rejection of psychology's relevance in the decision-making process. After all, none of Brennan's fellow Justices adopted or even referred to his citation of Orwell. Not to mention, Brennan's cite appeared in the dissenting section of the opinion, suggesting that the *Riley* plurality gave it no weight because of its irrelevance to the law. But the key assumption underlying this deceiving rationale is the notion that either the judge is capable of spotting the extralegal influence or his audience is. This notion ignores the fact that when judges do not disclose personal influences, it is extremely difficult for their peers to establish the possibility of bias. Furthermore, when the

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208. Researchers confirm the notion that judges return to their initial interpretations of fictional works by observing how judges cite different volumes and editions of works published in the years when they attended college, thereby increasing the probability that they used a personal edition for reference. *See* Domnarski, *supra* note 190, at 349 ("The Shakespeare judges have used is not just the Shakespeare found in *Bartlett's Book of Quotations* . . . . [J]udges have cited to more than a score of different editions of Shakespeare. . . ." With respect to quotations of *1984*, older judges cite the Harcourt & Brace version from 1949, while those who have been appointed in more recent years cite the newer versions. *See* Florida v. Riley,, 488 U.S. 455, 466 (1988) (citing 1949 edition); USW v. Weber, 443 U.S. 193, 220 (1979) (Rehnquist, J., dissenting) (same); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 576 (1963) (Douglas, J., concurring) (same). *Contra* Cramer v. Consolidated Freightways, Inc., 209 F.3d 1122, 1136 (2000) (Fisher, J., dissenting) (citing 1992 Signet Classic version); Rushman v. Milwaukee, 959 F. Supp. 1040, 1044 (E.D. Wis. 1997) (citing from an edition reprinted in 1977).

209. At this point, I should distinguish that this Article does not take sides in the popular debate regarding whether emotions should have a place in moral decision-making. In this debate, some scholars argue that judgments made on the basis of the judge's morality are characterized by emotivism, "the doctrine that all evaluative judgments and more specifically all moral judgments are *nothing but* expressions of preference, . . . attitude, or feeling." ALASDAIR MACINTYRE, AFTER VIRTUE 11-12 (2d ed. 1984). On this view, "reason is employed only in the selection of means to ends or values already given, but not in the critical examination or clarification of the ends or values themselves." Frank I. Michelman, *The Supreme Court 1985 Term: Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 25 n.118 (1986). Others refute "emotivism" with the process of "reflective equilibrium," in which interpreters follow the "subtle process" of "adjusting the settled law by deleting mistakes." Ken Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CAL. L. REV. 369, 378 (1984) (summarizing Dworkin's version of reflective equilibrium from RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 159-68 (1977), which built on Rawls's theory in JOHN RAWLS, A THEORY OF JUSTICE 20-21, 48-50 (1971) and John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 184-90 (1951)); *see also* Larry Alexander & Ken Kress, *Against Legal Principles*, *in* LAW AND INTERPRETATION 279, 306 (Andrei Marmor ed., 1995) ("In the moral realm, reflective equilibrium is championed as the correct epistemological method for discovering (constructing?) correct moral principles."). This Article does not reach the debate noted above because it addresses practical psychological tools to deal with judicial biases—a far step from the broader philosophical debate regarding the role of morals in the law.

judge doesn't know about his own influences, he can't alert others to them, and lack of self-searching makes it more likely that he will not discover them.[210] This result is more than likely guaranteed by the lack of self-inquiry that characterizes the bench, introducing the greater danger—a hidden danger—that the judge may be unaware of his combining of factual analyses with emotional ones in the creation of hierarchies of legal reasoning.[211] We can see these threats more clearly when we consider legal decision-making as a process of elimination.

According to Professor Robert Cover, law is a process of elimination where a judge eliminates theories until he arrives at the appropriate solution.[212] On this model, as Professor Burton's comments suggest, when law is indeterminate, elimination *is* justification.[213] Consequently, if judges eliminate theories on the basis of emotional attachments, they decrease the legitimacy of their legal analyses. Accordingly, if other judges have no way to know that the biased judge's reasoning is illegitimate, and adopt the same reasoning, the eventual judicial decision will be less accurate. *Riley* therefore shows us an exceptional circumstance: unless the biased judge is bold enough to provide the real reasons for his decision, or is bold enough to address these reasons with the appropriate psychological tools before sharing his view, all of the judges may fail to achieve the most accurate legal determination possible, which would be a different outcome under the same circumstances if no bias were present. The key becomes recognizing one's own biases and restraining them or alerting other judges that such influences are present.

Riley hardly stands alone. In fact, it provides a fresh perspective on countless judicial opinions, and, in each situation, compels us to shed a new light on the citing judges' conceptions of legal reasoning. When in *Levy v. Louisiana*,[214] for example, a majority of the Supreme Court addressed the issue of discrimination against children born out of wedlock and inaccurately cited lines from a despicable character in Shakespeare's *King Lear*, the quote suggests that Justices were in search

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210. *See* Simon, *supra* note 23, at 36-37 (explaining how judges are "[n]aturally" helpless to act on forces "of which they are not consciously aware").

211. Scholars have long recognized the danger of the judicial hunch—that a judge will jump to conclusions and find legal reasons to support them. *See* Hutcheson, *supra* note 4, at 277 (noting the practically uncontrollable intensity of judicial hunches as the "restless, eager ranging of the mind to overcome the confusion and the perplexities of the evidence, or of constricting and outworn concepts"); Lasswell, *supra* note 20, at 359-61 (noting unexplained feelings judges have toward attorneys based on their past experiences).

212. *See* Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 53 (1983) (describing the elimination process).

213. *See* BURTON, *supra* note 37, at 48 (discussing the danger of ambiguous law).

214. 391 U.S. 68 (1968).

of a message with social or moral value, even though it was codified in an extralegal source.[215]

While fiction may be the most telling of behavioral influences, a number of scholars evidence the biased use of history in Originalist interpretations. In one study, a comparison of Justice Brennan and Rehnquist's opinions revealed that "both Justices . . . use[d] the intent of the framers to support an outcome consistent with their [ideological rather than legal] predispositions."[216] With Originalism, as in their use of fiction, judges often act contrary to their professed rationales.[217] The same can be said of judges' authoritative use of dictionaries.[218] Quite

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215. *Id.* at 72 n.6 (Douglas, J.) (citing WILLIAM SHAKESPEARE, KING LEAR ACT 1, SC. 2, 1.6) (supporting rights for children born out of wedlock with the following citation:

Why bastard, wherefore base?
When my dimensions are as well compact,
My mind as generous, and my shape as true,
As honest madam's issue? Why brand they us
With base? with baseness? bastardy? base, base?)

Contra Glona v. Am. Guarantee & Liab. Ins. Co., 391 U.S. 73, 77 n.3 (1968) (Harlan, J., dissenting) (noting how Edmund, the character cited by the *Levy* majority, was an awful and untrustworthy individual, thereby conveying a different contextual message in the cited text). Note the commonality of inaccurate statements regarding such sources. *See* Domnarski, *supra* note 190, at 333 ("To a surprising and embarrassing degree judges have misused these quotations on law by not knowing the quotation's original context."). While it would not be difficult for a judge to read an entire work, and in the case of Brennan's dissent in *Riley* only one line further, emotional and behavioral inclinations evidence the operative factors dictating such mischaracterizations.

216. John B. Gates & Glenn A. Phelps, *Intentionalism in Constitutional Opinions*, 49 POL. RES. Q. 245, 256 (1995) (noting how, in some cases, both Justices used vague language with no historical examples to support the Framers, while, in other cases, they provided detailed historical analyses). *Compare* Valley Forge Christian Coll. v. American's United, 454 U.S. 464, 494 (1982) (Brennan, J., dissenting) (commenting how the Framers "surely intended" a result, without explaining how); Cent. Hudson Gas & Elec. Corp. v. PSC of N. Y., 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting) (describing commercial speech as "the kind of speech that those who drafted the First Amendment had in mind" but refraining from further historical analysis), *with* National League of Cities v. Usery, 426 U.S. 833, 876-77 (1976) (Brennan, J., dissenting) (citing extensively THE FEDERALIST NOS. 45 and 46 to support the adequacy of state protections against government encroachment); Ry. Labor Executives' Ass'n v. Gibbons, 455 U.S. 457, 466 (1982) (Rehnquist, J.) (interpreting extensively THE FEDERALIST NO. 42 to determine the constitutionality of a uniform bankruptcy law).

217. *See* Gates & Phelps, *supra* note 216, at 257 (1996) (noting inconsistency in rationales); *see also* Raymond, *supra* note 63, at 1242 (noting the way references to totalitarian governments like those depicted by Orwell are used inconsistently and unpredictably by judges in the same circumstances (observing Justice Frankfurter's "understate[ment]" of circumstances where individuals would expect him to draw such an analogy in *Rochin v. California*, 342 U.S. 165 (1952))).

218. While dictionary quoting has become a "fanatical movement," judges use them haphazardly and unpredictably. Nicholas Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Noncontractability and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995); *see also* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1446-47 (1994) ("[T]here has been no apparent pattern to (or discussion of) the Justices' choices of volume or vintage" of dictionary. "Individual judges must make *subjective* decisions about which dictionary . . . to use." (emphasis added)).

Critics point to cases like *Chisom v. Roemer*, 501 U.S. 380 (1991), in which Justice Scalia turned to a dictionary published in 1950 to define the word "representatives" for the purpose of interpreting a

possibly, each of these dilemmas are related to unrecognized biases, the type of which I described above.

For those who argue that emotional factors are not at work in the way judges justify their decisions, the initial burden of proof is on them to prove otherwise.[219] On this note, we should consider the comments of Professor Erwin Chemerinsky, which I will define as the Chemerinsky challenge. After recognizing that the only thing that accurately characterizes the Rehnquist Court is the quest for impartiality in decision-making,[220] Chemerinsky observed the following: Either the Court should reject the quest for neutrality all together as "a rhetorical gloss to explain . . . rulings . . . that the Court favors," or we should accept that "the Court truly seeks neutrality, but lacks a consistent theory and is thus left with an inconsistent method of decision-making."[221] In the next part of this Article, I propose that psychology can meet the demands of the Chemerinsky challenge by demonstrating the possibility of an adequate and consistent method for achieving neutrality.

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statute passed in 1982, ignoring more recent definitions of the word. *See id.* at 410 (Scalia, J., dissenting) ("There is little doubt that the ordinary meaning of 'representatives' does not include judges, see Webster's Second New International Dictionary 2114 (1950)."). These types of misuse suggest that Justices would rather use dictionaries as "'a second robust coordinating device' that permits [them] to decide and dispose easily of technical cases that they . . . find uninteresting as well as to 'reach some methodological consensus, in the face of substantive disagreements.'" Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 278-79 (1998) (citing Frederick Shaver, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV., at 232, 253). While dictionary definitions accordingly provide an "optical illusion" of "certainty—or 'plainness,'" when all that exists may be the "appearance" of these notions, the Court refrains from addressing the threat of inaccuracy. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL. 71, 72 (1994) (citation omitted). *See also* Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (refusing to create a method for determining which of two conflicting definitions of the same word in the same dictionary prevailed as the correct meaning).

219. *See* Chemerinsky, *supra* note 197, at 51 (noting the worthlessness of Justices' dedication to neutral principles when they fail to define "what constitutes such principles or how they are to be determined"). For generations, scholars have commented against "sententious admonitions to 'know thyself'" and mere assertions that judges have the ability to reach unbiased decisions. *See* Lasswell, *supra* note 20, at 362; FRANK, *supra* note 4, at 260 (noting "Peter Pan legends of juristic happy hunting ground in a land of legal absolutes"); *see also* Jerome Frank, *Are Judges Human? Part One, The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 42 (1931) (explaining the "fiction" in jurisprudence that "so-called rules were the controlling influences affecting decisions, although *we know perfectly well that what we are saying is not true*"). With assertions of this nature, it seems likely that judges, like all decision-makers, cannot combat the negative effects of behavioral influences until they can observe these influences in action.

220. *See* Chemerinsky, *supra* note 197, at 91 (noting that the Court "sweepingly reject[s] all judicial value imposition," finds "certain types of value judgements are impermissible," and yet "never explain[s] the line between the allowable and the unacceptable"); *see also id.* at 48 (noting that commentators are "hard pressed to find a coherent approach to constitutional decisionmaking" on the Rehnquist court, even in light of their goal of neutrality).

221. *See id.* at 59.

IV. JUDICIAL MINDFULNESS

This section aims to develop the general framework for judicial debiasing by exploring aspects of Professor Ellen Langer's theory of mindfulness. The theory is extremely helpful in clarifying the goals of debiasing and in identifying what debiasing seeks to avoid with respect to two types of cold biases outlined above in Part III.C. Professor Langer's theory developed out of her investigations of the way people limit themselves during the decision-making process.[222] Her research explored the conditions required for overcoming such limitations, distinguishing mindful thinking from mindless thinking by highlighting the importance of "cognitive flexibility,"[223] a condition in which people view "[a] situation or environment from several perspectives," instead of "rushing headlong from questions to answers."[224] Put simply, mindful thinking involves "drawing novel distinctions, examining information from new perspectives, and being sensitive to context,"[225] whereas mindless thinking is characterized by "treat[ing] information as though it were *context-free*—true regardless of circumstances."[226] This theory echoed the concerns of sociological jurisprudes and others, who warned against judges with slot machine minds.[227]

At first glance, it may seem reasonable to assume that judges are engaging in a mindful approach when they analyze facts and apply

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222. *See generally* LANGER, *supra* note 21 (exploring the human process of decision-making).

223. Justin Brown & Ellen Langer, *Mindfulness and Intelligence: A Comparison*, 25 EDUC. PSYCHOLOGIST 305, 314 (1990).

224. Ellen J. Langer, *A Mindful Education*, 28 EDUC. PSYCHOLOGIST 43, 44 (1993).

225. *Id.*

226. LANGER, *supra* note 21, at 3. Mindlessness occurs in three distinct ways. The first form, "entrapment by category," applies when we limit ourselves to interpreting the facts in life in the way we originally encountered them, which is harmful because we do not update our original assumptions. *Id.* at 10. The second form, "automatic behavior," occurs when "we take in and use limited signals from the world around us . . . without letting other signals . . . penetrate as well." *Id.* at 12. Finally, in the third form, "acting from a single perspective," we simply see rules as "inflexible." *Id.* at 6. In each of these cases, the danger is "moving directly from problem to solution" without exploring other viable alternatives. Brown & Langer, *supra* note 223, at 314.

To Langer, the more we force ourselves to follow regimented rules, the greater the chances are that we will miss our marks. In essence, the less certain we are about an issue, the more we will have an opportunity to recognize viable alternatives. So, it is ultimately the illusion of control and order that can hurt, rather than help, our interpretations. Langer explored mindlessness in a number of studies, during which she found that mindless thought can reduce an individual's performance by more than half of his potential. *See generally* Benzion Chanowitz & Ellen J. Langer, *Premature Cognitive Commitment*, 41 J. PERSONALITY & SOC. PSYCHOL. 1051 (1981) (measuring the performance trends in research subjects who believed they had a debilitating disease, as opposed to others who were provided with information leading them to doubt the accuracy of the estimate).

227. Hutcheson, *supra* note 4, at 275.

calculated tests to weigh them. After all, judges apparently have a variety of resources with which to distinguish and interpret facts, each of which seemingly counts as one of Langer's requisite diverse perspectives.[228] But we must take Langer's theory a step further. That is, we must look not only at the way judges distinguish and interpret facts, but also at the way judges select analytical systems that necessarily limit the use of particular analyses (*e.g.*, how judges decide which constitutional theories to apply in specific cases). This last distinction raises an entirely different issue.

While it is no news that lacking theoretical options poses the greatest danger to anyone applying a theory, as the *WBK* rationale emphasizes,[229] Langer offers a practical solution to the problem based on her research of people's discriminatory beliefs. Langer's work suggests that people's levels of prejudice drop when they "increase rather than decrease the number of distinctions" they establish about "the relative importance of any particular difference."[230] This finding highlights the benefits of creating new categories of understanding. It also expands on the notion of healthy indeterminacy, under which "[f]lexibility is needed to permit experimentation with and investigation of alternative normative structures, to assure fairness, and to promote other substantive values in situations not anticipated or fully appreciated in advance."[231]

Langer's findings stress that informed decision-making is not automatic. Since one must challenge a theory or mental process that formerly defined the limits of a given realization, there is some illusion of risk.[232] Nevertheless, the reward for taking the first bold step is

228. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73-75 (1990) (describing a virtual "grab bag" of resources judges use to attribute meaning, including: "introspection, "common sense," and "memory"); *but cf.* Lawson, *supra* note 39, at 412 (questioning whether theories like Originalism can solve these problems since they still do not codify "*what materials count* towards establishing a provision's original meaning," "*how much* the various materials ought to count[,]" or clarify matters of "*application*" (*i.e.*, how much the actual materials reflect history).

229. *See supra* notes 39 and 42 and accompanying text (describing the danger of inflexibility in judicial interpretation).

230. Ellen Langer et al., *Decreasing Prejudice by Increasing Discrimination*, 49 J. PERSONALITY & SOC. PSYCHOL. 113, 113 (1985) (reporting the results of various tests involving studies of disabled individuals and questions intended to provoke various levels of mindful thought). Here, whereas research subjects first categorized handicapped persons as generally disabled, after learning to make calculated distinctions, the same subjects were more likely to label the same person as a "person who cannot do *X*." *Id.* at 114.

231. Kress, *supra* note 29, at 294.

232. *See* MICHAEL BASSECHES, DIALECTICAL THINKING AND ADULT DEVELOPMENT 29 (1984) (discussing the dangers of self-questioning but noting the benefits of a more accurate thought process). Basseches particularly notes that "[i]n questioning these boundaries, we may be questioning precisely those points of reference which provide us with a sense of intellectual stability and coherence about our world." *Id.* *But cf. id.* at 30 ("The dialectical analysis is more likely to allow one to experience [such] pain as loss and

greater consistency and reliability in the final product of the analysis. In other words, the more a person admits areas of uncertainty, the more he will "create[ ] the freedom to discover meaning where experts choose to see only random noise."[233]

Langer used the common experience of starting a car each morning to illustrate these benefits. While there is "very little choice involved" with turning the key in an ignition each morning, "the degree of choice increases" whenever your car will not start.[234] In essence, by finding yourself in a situation that calls into doubt your initial assumption, you as the driver, must become more aware of factors that you would not have originally considered.[235] You might even decide to look under the hood, only to find that other dangerous conditions exist besides the fact that your battery is low. Seemingly, the same is true of the judicial decision-making process.

With Langer's theory in mind, if judges were truly confident that they could select the right method of constitutional interpretation, it follows that they would explain the merit of selecting a particular constitutional theory in the same painstaking detail with which they describe factual evaluations under those very theoretical systems. Yet judges rarely, if ever, write opinions in this way. Instead of defining each of the factors needed for an appropriate analysis (including defining the appropriateness of the theory and its limitations in the case-specific context),[236] most judges apply an interpretive theory as if the theory speaks for itself.[237] Subsequently, if judges are simply searching for ways

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to mourn the loss. At the same time, the pain of loss may be counterbalanced by an emotionally positive intellectual awareness of (a) order in the developmental process, (b) new discovery, and (c) the opening of new possibilities.").

233. Brown & Langer, *supra* note 223, at 324.

234. *Id.*

235. Langer supports this proposition by citing the discovery of alternative uses for the drug Monoxidil, which began as a product to lower blood pressure, and an agricultural machine that initially destroyed crops with its icy foam byproduct. In both cases, the alternative uses (*i.e.*, using the crop machine as a snowmaker and Monoxidil as a hair growth stimulant) "occurred because the discoverers recognized that their unsuccessful attempts to resolve problems could be viewed from other perspectives." Brown & Langer, *supra* note 223, at 314.

236. *See* Lawson, *supra* note 39, at 412 (describing necessary factors for justifying use of a constitutional theory like Originalism).

237. Justice Walter Schaefer stressed that judges should articulate the bases for their decisions to increase the legitimacy. *See generally* Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966) (suggesting that judges explicitly state reasoning for decisions individually rather than in a unified manner). And, while it seems that Justices like Antonin Scalia provide detailed analyses of their methodological processes, his actual judicial opinions reveal blatant contradictions. *See* Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997) (noting specific types of documents he believes to "display how the text of the Constitution was originally understood"); *but cf. supra* note 218 and accompanying text (discussing Justice Scalia's inaccurate reliance

to achieve predetermined outcomes and conceal their motives for arriving at a particular solution, their decision-making processes are more likely to be susceptible to bias.[238] Langer implies that judges should articulate to themselves the reasons for selecting a particular theory and then employ an objective procedure to address mindless impulses. The following section provides a method for achieving mindfulness and address the conditions that are necessary to achieve mindful adjudication.

The Elements of Judicial Mindfulness

Because the goal of mindfulness does not explain how to achieve its objectives, we must distinguish the conditions required by Langer's theory. Langer's theory presupposes that judges not only have a method to determine how their own beliefs influence analyses of facts in a particular case, but also whether these beliefs influence selection of a particular theory of interpretation.[239] The concept of judicial mindfulness, as opposed to mindfulness in general, involves applying two steps.[240] First, judges need to determine the magnitude and direction of their own bias: this essentially requires identification of the ways that they are influenced by factors related to the cases they hear. In the case of interpreting the Constitution, judges must thus know what the Constitution means to them, as viewed through the lens of their past experiences.[241] They can accomplish this goal by applying the

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on a weak dictionary as a source of meaning). Seemingly, in permitting interpreters to consult Justices' external materials regarding the decision-making process, supporters of this approach would need an additional method of interpretation for interpreting each Justice's interpretative theory of each method of constitutional interpretation.

238. Determining which theories to use in their analyses, judges are more vigilant rather than mindful. To Langer, vigilance represents a condition in which "one has to have a particular stimulus in mind, an expectation of what the stimulus is rather than what it could be." Langer, *supra* note 224, at 44. Consequently, the risk judges run is "pay[ing] attention to something[,] [while] at the same time, something else may go unnoticed." *Id.*

239. Langer's theory is thus the psychological translation of Professor Chemerinsky's objective in challenging the Court. Let us recall his challenge, which demands a consistent theory demonstrating self-awareness. The general notion of mindfulness achieves this objective by increasing the distinctions that individuals make about their experiences. Therefore, by showing how to achieve mindfulness in the judicial realm, we simultaneously show that it is possible to achieve awareness of biases in reaching judicial opinions, thus increasing our likelihood of selecting a correct model of constitutional interpretation.

240. That is, assuming that judges have alerted themselves to the manifestations of mindlessness (entrapment by category or automatic behavior), as evident in analyses of their opinions (perhaps after locating ornamental quotations rising above the level of decoration).

241. While the trend among judges may be to ignore instances in which personal issues arise in the decision-making process, at least some have been willing to explore the effects of their personality types on their interpersonal relations and general attitudes. A growing number of judges have experimented with the Meyers-Briggs Type Indicator (MBTI), a forced-choice test designed to evaluate a subject's preferences

psychological theory called negative practice, a method for discovering subconscious influences by consciously engaging in an activity that is the opposite of one's initial inclinations (*e.g.*, reading the Constitution in a totally subjective manner). Second, with knowledge of their personality preferences and subconscious constitutional influences, judges should engage in what psychologists call transitional thinking to adjust for unwanted responses in decision-making; that is, they must begin to ask themselves directed questions that move beyond the limitations of their own belief systems. Each of these steps is described below in detail.

A. Gauging Subconscious Constitutional Influences Using Negative Practice

A necessary condition for self-modification is awareness about unconscious behavioral influences, an object many constitutional scholars fear judges will never attain.[242] In America's psychology wards, however, clinicians turn to a number of methods to achieve this goal. The theory of negative practice emerged from the overarching theory of satiation, which dictates, *inter alia*, that patients can extinguish unwanted habits by overindulging in them.[243] While monitoring the process, psychoanalysts observed how "troublesome symptoms—including obsessive-compulsive ones—often disappear when the client intentionally engages in them rather than fights ineffectually against

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toward certain behaviors. For a general overview of the MBTI, see generally MOST EXCELLENT DIFFERENCES: ESSAYS ON USING TYPE THEORY IN THE COMPOSITION CLASSROOM (Thomas C. Thompson ed., 1996) (explaining the origin and operation of the MBTI).

For an overview of the MBTI's effectiveness in helping judges, see John W. Kennedy, Jr., *Personality Type and Judicial Decision Making*, 37 JUDGES' J. 4, 9 (1998) ("If judges are tuned into their own personality type . . . they can minimize the extent to which their own biases affect their evaluation of . . . [a] case."). Judge Homer Thompson also experienced similar success in his training of fellow judges. *See* Larry Richard, *Law Practice; How Your Personality Affects Your Practice*, 79 A.B.A.J. 74, July 1993, at 76 (noting Judge Homer Thompson's comment: "I observed that they [several hundred judges to whom he administered the MBTI] found it tremendously valuable in better understanding themselves, their associates and the public they serve"). Judge Kennedy even warns that judges are "unable to guard against the type of biases that influence their decisions" if they are "unaware of typological differences." Kennedy, *supra*, at 9. While these words of praise suggest that the MBTI might solve all of a judge's problems, the test has a number of limitations, the foremost of which is the fact that it cannot predict how a judge would approach a given case. For general criticisms of the MBTI, see generally M.H. Sam Jacobson, *Themes in Academic Support for Law Schools: Using the Meyers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype*, 33 WILLAMETTE L. REV. 261 (1997) (doubting the MBTI and supporting this sentiment with various studies).

242. *See* Idleman, *supra* note 12, at 1321 (quoting Shirley S. Abrahamson, *Judging in the Quiet of the Storm*, 24 ST. MARY'S L.J. 965, 989-90 (1993) (arguing the impossibility of developing an adequate psychological model because "neither full self-awareness nor full disclosure is possible").

243. *See generally* ARNOLD A. LAZARUS, BEHAVIOR THERAPY AND BEYOND (1971) (introducing the concept of paradoxical intention to counter patients' obsessive fears by intentionally inflating them).

them."[244] Negative practice, as a subset of satiation, helps patients explore the sources of their compulsions by "deliberately . . . performing [any unwanted] behavior while consciously attending to it."[245] For the purposes of this Article, negative practice is more promising than general satiation theory because it places the subject in control of realizing solutions to her own problem, which is exactly what judges need to do. A pioneer in the field explained why negative practice can benefit judges:

> The value of . . . negative practice is that of increased insight. The student is assigned deliberately to create situations in which the former insecurities and inadequate behavior would tend to be present. The old inadequate reactions, however, are not to be used, but, instead, the appropriate behavior is to be carried out. . . . [D]eliberate entrance into insecure situations not only teaches new reactions, but also gets rid of a great deal of the fear associated with them.[246]

While the theory might be applied by judges in a number of ways, the proposed modification specifically addresses implementation of the theory in the area of constitutional interpretation.

In the proposed modification of negative practice, a judge should begin the awareness process with two essentials: a copy of the Constitution and some scratch paper. He should then analyze the textual provisions of the Amendments that have created the most difficulty for judges, writing exactly how each phrase applies to his own collective life experiences, in the absence of case-specific factual

244. JOHN L. SHELTON & MARK ACKERMAN, HOMEWORK IN COUNSELING AND PSYCHOTHERAPY: EXAMPLES OF SYSTEMATIC ASSIGNMENTS FOR THERAPEUTIC USE BY MENTAL HEALTH PROFESSIONALS 149 (1974). In practice, therapists "often assign intentional obsession or compulsion times" for compulsive worriers to "obsess thoroughly. . . . [and] [w]rite a one page description of each worry-time" for discussion during treatment. *Id.* at 149-50. The researchers note that "[c]lients often do the homework once or twice, then begin to forget to do so—at the same time recording fewer (and sometimes no) obsessions or compulsions per day on their data sheet." *Id.* at 150.

245. DAVID L. WATSON & RONALD G. THARP, SELF-DIRECTED BEHAVIOR: SELF-MODIFICATION FOR PERSONAL ADJUSTMENT 89 (6th ed. 1993). In one clinical case: "Garrett, who habitually cracked his knuckles, spent five minutes each morning and five minutes each evening [engaging in the behavior] while paying close attention to every aspect of the behavior. This helped him learn to pay attention to the target behavior." *Id.* at 90. Negative practice is useful to judges in the same way it was useful for Garrett: It can make them aware of their behavior when interpreting the Constitution in a biased way. *See also* FREDRIC M. LEVINE & EVELYN SANDEEN, CONCEPTUALIZATION IN PSYCHOTHERAPY: THE MODELS APPROACH 80-81 (1985) (describing successful applications of the theory in up to ninety percent of the cases where it was implemented and exploring the diverse settings where the theory was used, including inhibiting nervous tics and stuttering); *cf.* G.K. YACORZYNSKI, MEDICAL PSYCHOLOGY 113 (1951) (explaining the value of the process in a strictly physiological sense).

246. C. VAN RIPER, SPEECH CORRECTION: PRINCIPLES AND METHODS 85 (1939).

circumstances.[247] With little more, this process should help begin to reveal to judges what their own inclinations are regarding the Constitution. While this process may seem almost trivial, we must ask ourselves whether judges actually do engage in this kind of inquiry or whether any judge would otherwise have reason to engage in it.[248] Ultimately then, regardless of its simplicity, the proposed method allows judges to develop a baseline for analyzing the intensity of their constitutional inclinations. The process might resemble a method proposed by one judge in an effort to address levels of confidence in one's decision, "Use a mental meter that establishes a blue zone between 30% to 50% confidence, a green zone from 50% to 90%, and a red zone from 90% to 100%."[249] Judges could rate the intensity of their dispositions toward or against certain provisions of the Constitution in a similar way. This model, however still does not explain what judges can do to discount these influences while making decisions. Part IV.B, below, explores this notion.

B. Transcending Self-Imposed Belief Systems Through Transitional Thinking

1. The Dialectical Schemata

Assuming that the process of interpreting the Constitution in a personal way (negative practice) helps some judges become aware of (a) their reliance upon past experiences to evaluate new facts and/or (b) their inclinations to view a certain constitutional phrase in a narrow-minded manner, these judges must still determine whether they bypassed viable alternatives for resolving issues in the case. In essence, this next logical step in the evaluation process requires a judge to move beyond the limits of the *legal* decision-making process[250] to transitional thought (*i.e.*, "distinguishing between the actual ideas or answers [you]

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247. In fact, she should go through great lengths to support her conclusions as clearly as possible, perhaps to the point where she uses specific emotional experiences to justify her conclusion, as if applying a legal precedent.

248. If anything, the multiple incentives compelling judges to deny behavioral influences have probably prevented the application of negative practice—that is, until now.

249. STEPHEN D. HILL, DECISIONS: THE SYSTEMATIC APPROACH TO MAKING COMPLEX DECISIONS FOR BUSY TRIAL JUDGES 24 (1999).

250. *See* Emily Souvaine et al., *Life After Formal Operations: Implications for a Psychology of the Self*, *in* HIGHER STATES OF HUMAN DEVELOPMENT 229, 229 (Charles N. Alexander & Ellen J. Langer eds., 1990) (noting that "[t]he very nature of being subject to a system prevents the individual from reflecting upon the limits of that system"). Also note Langer's observation that "the freedom to define [a] process—outside of which the outcome has no inherent meaning or value—may be more significant than achieving that outcome." Brown & Langer, *supra* note 223, at 327.

produce[ ] and the reasoning or process by which [you] arrive[ ] at these ideas or products").[251] This thinking involves, *inter alia*, the ability (1) "to reflect on one's basic premises and pursue evidence of their limitations," (2) "to be somehow qualitatively less defensive in relation to others," and (3) "to recognize and [temporarily] tolerate paradox and contradiction."[252]

This kind of transitional thought calls for a dialectical evaluation process similar to the one envisioned by Professor Michael Basseches. For the purpose of this Article, dialectics characterizes thought that occurs in a fluid and moving way.[253] Because the object of dialectical thinking is "actively oriented toward shifting categories of analysis and creating more inclusive categories,"[254] transitional thinking encompasses it, and judges can use the criteria that characterize a dialectical system to determine if they have achieved a transitional state. The concept of the dialectic relates back to mindfulness because Langer actually envisions two simultaneous systems in her theory. First, a person can "simply resolv[e] [a] crisis in a mindful manner."[255] Second, and of greater significance, he can use the process of being mindful as "an opportunity for [further] innovation."[256] Langer terms this innovation "second-order mindfulness,"[257] which ultimately involves fixing the cognitive system that created the problem, rather than only the problem itself, the objective of both transitional and dialectical thinking.

In 1984, Professor Michael Basseches introduced the Dialectical Schemata (DS) Framework, an analytical tool that identifies nine discrete attributes of cognitive functioning that help a person achieve systems-transcending thought.[258] Each of these nine schemata addresses

251. Souvaine et al., *supra* note 250, at 245.

252. *Id.* at 237.

253. *See* BASSECHES, *supra* note 232, at 55 ("Dialectical thinking is thinking which looks for and recognizes instances of dialectic—developmental transformation occurring via constitutive and interactive relationships."); *id.* at 24 ("Orienting toward dialectic leads the thinker to describe changes as dialectical movement (*i.e.*, as movement that is developmental movement through forms occurring via constitutive and interactive relationships) and to describe relationships as dialectical relationships (*i.e.*, as relationships that are constitutive, interactive, and that lead to or involve developmental transformation)"). Importantly, however, the dialectical process does not "preclude a formal analyses," thus condemning judges to replace traditional methods of decision-making. *Id.* at 27.

254. *Id.* at 29 (noting additionally that "formal analyses which establish categories of analysis from the thinker's own perspectives tend to remain relatively impermeable" in contrast).

255. LANGER, *supra* note 21, at 198.

256. *Id.*

257. *Id.* at 199.

258. While, in total, Professor Basseches identified twenty-four methods of thinking Dialectically, he highlighted nine particular Meta-formal approaches within the larger group. This section focuses on Meta-formal principles for the following reason: Not only do they "most clearly reflect[ ] the meta-systematic level of . . . dialectical thinking," they "enable the thinker to describe (a) limits of stability of forms; (b)

the multiple ways we can limit ourselves by failing to recognize transitions, and especially inconsistencies and incompatibilities, between different types of thought structures. For example, one of Basseches's research subjects observed the way people often point out contradictions in theories to show why the theories inevitably fail. The subject noted how this type of criticism is less optimal than using a different method to critique the theory because relying on a flawed theory leaves the potential for further contradiction. Accordingly, to achieve more consistent results in one's criticisms of a contradictory theory, the critic, after recognizing the flaw, should instead synthesize the two opposing views and find a more "inclusive" way to represent the contradiction.[259] Basseches denotes this activity as "Understanding the Resolution of Disequilibrium or Contradiction in Terms of a Notion of Transformation in Developmental Direction"[260] (hereinafter Disequilibrium Schema).

The rest of this subsection examines portions of Professor Basseches's interviews with research subjects. To test what he calls the Disequilbrium Schema, Basseches asked a research subject to share his views about philosophical paradoxes, like the one that the Greek mathematician Zeno had identified, *circa* 400 B.C. Zeno's paradoxical theory against movement can best be described by the Race Course:

> Starting at point *S* a runner cannot reach the goal, *G*, except by traversing successive "halves" of the distance, that is, subintervals of *SG*, each of them *SG/2n* (where *n* = 1, 2, 3, . . .). Thus, if *M* is the midpoint of *SG*, he must first traverse *SM*; if *N* is the midpoint of *MG*, he must next traverse *MN*; and so forth. Let us speak of *SM*, *MN*, *NO*, . . . as *the Z-intervals* and of traversing any of them as *making a Z-run*. The argument then comes to this:
> [*F*1] To reach *G* the runner must traverse all *Z*- intervals (make all the *Z*-runs).
> [*F*2] It is impossible to traverse infinitely many intervals (make infinitely many *Z*-runs).
> [*F*3] Therefore, the runner cannot reach *G*.
> But why would Zeno assert [*F*2]? Probably because he made the following further assumption:
> [*F*4] The completion of an infinite sequence of acts in a finite time interval is logically impossible.

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relationships among forms; (c) movements from one form to another (transformation); and (d) relationships of forms to the process of form-construction or organization." BASSECHES, *supra* note 232, at 76. While this Article highlights three of these schemata, each of the nine offers a significant tool with which judges can enhance their decision-making. *See id.* at 74 tbl.1. (labeling schemata).

259. *Id.* at 126.

260. *Id.*

This assumption has enormous plausibility.[261]

After discussing philosophical theories, the research subject in this particular inquiry made the following comments about Zeno's Paradox, which satisfied the criteria of the Disequilibrium Schema described above:

> [SUBJECT]: [T]ake a classic paradox like [Z]eno's paradox, you know, where you have the paradoxical conclusion that there is no motion . . . . [T]he classic skeptic's response is to walk across the room. Now, in one sense, yeah, that person is right, that does refute the paradox, I mean, shows you that the conclusion is false. On the other hand, the paradox seemed to arise by rather straightforward reasoning, involving our usual conceptions of space and time and motion; and so, to me, the *deep response to this paradox, you know, is then to articulate the concepts of space, time and motion* and *to define the logic in such a way that the paradoxes can no longer be drawn—that is, the contradiction can no longer be drawn—from them*[262]. . . . So, in other words, there was a tension between the facts of the real world namely, that there is motion—and the way the Greek philosophers were describing that motion. The two won't go together because when you put them together you did get a contradiction, right? So then the theoretical problem, you know, which forced Aristotle ultimately to formulate a highly sophisticated physical theory, was to find a way of getting around this.
> [BASSECHES]: SO WOULD YOU SAY THAT THE GUY WHO WALKED AROUND THE ROOM—THAT THAT SOLUTION WAS INADEQUATE?
> [SUBJECT]: Yeah, that's sort of failing to, or refusing to accept . . . to face a certain reality because that same skeptic . . . I mean, he is right, there is motion, but *he is going to go on using language which generates the paradox, rather than trying to do better and get deeper into the world and our way of expressing the world, in order to avoid that contradiction.*[263]

Basseches emphasized certain sentences with italics because they represent the Disequilibrium Schema in two ways. First, they recognize a contradiction between the "skeptic's response" and the "deep response."[264] Second, they "describ[e] the deep response as a movement to a more inclusive (more developed) form which integrates a language for describing the physical world, a logic, *and the observed facts of motion*: [as evident in the subject's prescription] to articulate the concepts of space, time, and motion and to define the logic in such a way that the

261. Gregory Vlastos, *Zeno of Elea*, *in* 7 THE ENCYCLOPEDIA OF PHILOSOPHY 369, 372 (Paul Edwards ed., 1967).

262. Basseches uses italics in a passage to indicate instances of dialectical thinking.

263. BASSECHES, *supra* note 232, at 127.

264. *Id.*

paradoxes can no longer be drawn."[265] As demonstrated below, these observations also apply to the legal analyses employed by judges.[266]

To Professor Basseches, two additional schemata, besides the Disequilibrium Schema, relate particularly to the task of judicial decision-making.[267] Judges' foremost concern should be to display the analytical characteristics of the schema titled "Criticism of Formalism Based on the Interdependence of Form and Content" (hereinafter Criticism of Formalism Schema),[268] which also relates to the schema known as "Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness" (hereinafter Multiplication Schema).[269] The examples cited below illuminate these two Meta-Formal tools.

In the first case, the Criticism of Formalism Schema deals with the "effort to describe relationships and movements of particulars as governed by rules or laws which can be stated at a general or universal level, with no reference to the content of the particulars."[270] In the legal realm, we encounter this phenomenon whenever a judge identifies formal rights, such as statutory rights, requiring the application of standardized analytical procedures.[271] An example of this might include applying a subsection of the Uniform Commercial Code and working through each provision, only to arrive at some preordained point. This type of formality, however, is susceptible to criticism when the legal questions deal not with a clearly defined statute, but rather with a

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265. *Id.* at 128.

266. *See infra* Part IV.B.3.A (describing Justice Scalia's analysis of the passage of time in *Printz*).

267. *See* Interview with Michael Basseches (Apr. 3, 2001).

268. BASSECHES, *supra* note 232, at 142.

269. *Id.* at 146.

270. *Id.* at 142. Basseches further notes how: "In the sphere of logic, one finds statements such as 'If *p* is true, then *not-p* is false.' This statement is meant to apply to any proposition which may be substituted for *p*, regardless of its content." *Id.* *But cf.* EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3 (1949) (recognizing that legal reasoning is the kind "in which the classification changes as the classification is made [and] [t]he rules change as the rules are applied."). Professor Levi's description of the "moving classification system" suggests that the legal reasoning process can develop valid classifications even where specifics appear to be absent. *Id.* at 4. What seems indisputable is the increased level of attention that the interpreter must devote to situations where classifications move easily—a requirement upon which Basseches seems to focus his attention with the Criticism of Formalism Schema.

271. According to Basseches, these are "statements of formal rights which cannot be violated and formal procedures which must be followed no matter what one's particular purpose might be." *Id.* at 142. *See also id.* at 142-43 (noting how these outcomes are supported by the following inferences:

> [G]eneral laws and rules (form) govern relationships and movements of particulars (content) which exist separately from the general statements themselves. These pre-existing particulars are considered to confirm (in the case of theories and facts) or conform to (in the case of rules and behaviors) the laws by acting in accordance with them, or to disconfirm or violate them by acting in discordance with them. Formalism appeals to impartiality as justification, claiming either that impartial rules should be obeyed because they are fair, or that theoretical generalizations are justified by the conformity to them of impartially collected facts.).

"theoretical law."[272] For example, in the case of a constitutional principle, such as the prohibition against Congress compelling states to enact a federal scheme,[273] while

> a formalist may claim that [the law's] validity is demonstrated by facts which conform to it [,]. . . if sets of stimulus conditions, response classes, or positive reinforcements are not particulars which exist prior to the law, but are rather defined by the experimenter . . ., there is every reason to believe that another law could be formalized which would apply *equally well* to the same events but which would conceptualize those events using different categories.[274]

To guard against this threat, the transitional thinker must instead adopt an outlook that reflects the Criticism of Formalism—a perspective that envisions form and content as being "interdependent." The legal theorist must recognize her own role in developing the very categories that ultimately comprise the "universal statement" to which she is appealing. In the following excerpt, the subject mindfully comments on an instance in which a music aficionado interpreted a meaning in a composer's work of which the composer was not yet aware:

> [SUBJECT]: I'm saying that if you start off with the notion that there is *a* conceptual framework involved and that a perception of that framework is either closer to or further from being accurate, depending on whether it agrees with the conceptual model, you've got problems. There has to be the interaction between what?—the conceptual, and what?—the perceptual source.[275]

Here, the subject identified a problem that relates to "a single abstract 'conceptual' *form* to which different listeners' perceptions of the composition (substantive content) conform more or less accurately."[276] The subject stressed the need for interdependence by "saying that the way the composer or an analyst conceptualizes the piece should *depend* on what listeners hear and that unanticipated perceptions should be viewed as sources of conceptual enrichment, rather than as inaccuracies. (What listeners hear clearly *depends* on how the piece was

272. BASSECHES, *supra* note 232, at 143.

273. The Court developed this rule in the recent case of *New York v. United States*, 505 U.S. 144 (1992), where it deemed unconstitutional any attempt by Congress to "commandeer[] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 176 (citing *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981)).

274. BASSECHES, *supra* note 232, at 143. With this observation, Basseches validates the notion that such mindless thinking can potentially keep a person from achieving the better or best answer by confining them to a state of theoretical indeterminacy.

275. *Id.* at 144-45.

276. *Id.* at 145.

conceptualized.)."[277] In a legal sense, judges should make similar distinctions in their analyses by synthesizing alternative theories and expanding them, rather than limiting themselves by endorsing only one of multiple approaches.

In the final instance, the Multiplication Schema complements the Criticism of Formalism in that it "treat[s] a large problem as a *whole* by viewing the whole from several vantage points (either from within or without the whole) at one time."[278] Basseches provides the example of evaluating hospitals in America, an objective that can include each of the following considerations: (1) the quality of "healthcare delivery," (2) the "organizational structure" of the hospital, (3) the historical economic developments of the hospital in relation to America's changing corporate structure, and (4) the experiences of staff members in the hospital.[279] Evidently, by comparing and contrasting these several perspectives, an evaluator will enjoy a more informed decision-making process. Albeit this schema is hardly complex, the challenge becomes acknowledging the one-sidedness of any perspective[280] and balancing it with others to generate more accessible outcomes. The subject who epitomized this schema responded to a question requiring him to distinguish "the nature of education in general,"[281] as opposed to the nature of education at his small private college:

> [BASSECHES]: WELL, I GUESS THE FIRST QUESTION HAS TO DO IN A BROADER SENSE WITH WHAT EDUCATION IS ABOUT, AND THEN THE SECOND . . .
> [SUBJECT]: For the broader sense, I throw up my hands in despair. The only way I could deal with that question would be to disaggregate it. . . . *I would start to try to pick out centers. It seems to me you have to cut that cake up so many different ways and you start talking about the different sections, primary, secondary; the considerations such as ethnicity, social class, parental background; whether it is education geared specifically towards occupational preparation or whether it is more general.* This is all off the top of my head. I think before you can view the question of education in America you have to start making these kinds of discriminations . . . .
> [BASSECHES]: SO YOU DON'T THINK YOU COULD SAY SOMETHING ABOUT WHAT EDUCATION IS ABOUT . . . ?

277. *Id.*

278. BASSECHES, *supra* note 232, at 147.

279. *Id.*

280. *Id.* at 149. This result implicates a three step process: acknowledging (1) "the limits of abstraction," (2) the necessary one-sidedness of perspectives, and (3) " the essential importance of the concrete." *Id.*

281. *Id.* at 149.

[SUBJECT]: *Not meaningfully. I could certainly say something.* I'm pretty glib. But I don't think I could say anything that either you or I would be very impressed with.[282]

In the excerpt above, the subject's reference to picking out centers indicated analysis of multiple perspectives, while his unwillingness to speculate regarding the unknown indicated a preference for concreteness (evident in the assumption that "the subject is suggesting that what he would say at a general level would not be meaningful because it would be so abstract").[283] The subsections below will apply these three most prevalent schemata, as described above, to the reasoning adopted by the Supreme Court in *Printz v. United States*.[284]

2. *Printz*'s Appeal to the Dialectical Schemata

Because the systems of analysis discussed above work best when judges apply them willingly,[285] it would be deceptive to pretend that any particular judicial opinion demonstrates influenced decision-making or that any particular method of psychological analysis would have caused a different result.[286] However, judicial opinions criticized by scholars for being inconsistent may be valuable as analytical tools to hypothesize how a particular method of self-analysis might have assisted the judges who wrote those opinions.

Printz is useful for demonstrating the hypothetical benefits of the analytical approaches presented because scholars with divergent viewpoints have criticized the numerous inconsistencies present in the opinion.[287] Foremost among these inconsistencies is the seemingly biased interpretation of historical materials considered by the Justices in rendering their decision.[288] Some of these commentaries essentially

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282. BASSECHES, *supra* note 232, at 149-50.

283. *Id.* at 150.

284. 521 U.S. 898 (1997).

285. *See infra* Part V (explaining that judges need to apply theories on their own initiative).

286. *See supra* text accompanying note 191 (expressing doubt into the ability to show what Justices are thinking based solely on analysis of their written opinions).

287. *See* Neil Colman McCabe, *"Our Federalism," Not Theirs: Judicial Comparative Federalism in the U.S.*, 40 S. TEX. L. REV. 541, 553 (1999) (referring to *Printz's* reasoning as "an aberration"); Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. L. REV. 199, 202, 210 (1997) (noting the "ad hoc" nature of the decision for which Justice Scalia is accused of having "sidestepped th[e] obvious issue"); Martin S. Flaherty, *Part II: Are We to be a Nation? Federal Power vs. "States' Rights" in Foreign Affairs*, 70 U. COLO. L. REV. 1277, 1284, 1289 (1999) (calling *Printz* "[t]he Court's most far reaching exercise in sovereignty federalism" and "disjointed"); Gene R. Nichol, *Justice Scalia and the* Printz *Case: The Trials of an Occasional Originalist*, 70 U. COLO. L. REV. 953, at 962, 967 (1999) (describing the *Printz* opinion as a "mischaracterization of history and intention" and "thin").

288. Much of this commentary focused on Justice Scalia's use of THE FEDERALIST, which I will

suggest that the Justices exhibited mindlessness.[289] Professor Evan Caminker's observation that Justice Scalia succumbed to a process-based bias apparently reflects the second type of dangerous bias where interpreters automatically default to a rigid analytical system without comparison.

> [*Printz*] is particularly striking because of the analytical route the Court took to its doctrinal destination; all but the most unreflective formalists should find its reasoning process troubling.... My concern here is not with arbitrating this dispute at a high level of abstraction .... My concern is rather with maintaining the integrity of each [interpretive] approach, which requires that each is . . . skillfully applied and invoked only when appropriate. Where foundational sources of text, structure, and history provide scant guidance, interpretive formalism can easily become an exercise in undirected choice from among competing conceptions and formulations—choice that seems arbitrary because it appears neither dictated by the underlying sources, nor counseled by articulated purposes, values, or consequences.[290]

The question involved is one of "process." As another author recognizes: "*Printz* could not have been more straightforward about the constitutional sources it relied on for the result it reached."[291] Instead of the sources used, the trouble apparently rests in the mechanics of the Justices' analyses.

Certain of the Justices' commentaries in *Printz* seem ripe for analysis under the Disequilibrium, Criticism of Formalism, and Multiplication Schemata identified by the DS Framework,[292] even though numerous

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explore in depth below. *See infra* Part IV.B.3 (describing the Court's use of THE FEDERALIST). However, the criticisms of *Printz* to which I am referring not only addressed the dangers scholars normally note are inherent in relying on THE FEDERALIST, they went beyond these common complaints. *See generally* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 201 (1996) ("Within the language of the Constitution, as it turned out, there was indeterminacy enough to confirm that both Federalists and Antifederalists were right in predicting how tempered or potent a government the Convention had proposed."). Instead, the critics attacked the Justices' specific analytical decisions—attacks which defied the notion that the Federalist Papers are historically indeterminate and noting that the case should have been clear cut. *See* Nichol, *supra* note 287, at 963 ("At bottom, Justice Scalia's federalism analysis constitutes little more than a bow to his constituents, a wave to the crowd. We know we are supposed to support states' rights. Yet we are not told what that means."); McCabe, *supra* note 287, at 554 ("The *Printz* majority's invocation of federalism without a coherent and convincing explanation of the theory raises the question of whether federalism is nothing but a convenient 'device for permitting activist (conservative) judges to impose their policy preferences from the bench.'").

289. *See* discussion *supra* Part III.B (discussing Langer's theory of mindfulness).

290. Caminker, *supra* note 287, at 200-02.

291. Flaherty, *supra* note 287, at 1285.

292. The applicability of the DS Framework is suggested by three factors in the case. First, members of the Court found two extremely different meanings in the same historical materials. *See infra* notes 331

analytical shortcomings in this Supreme Court decision have been raised.[293] While these connections between the analyses adopted by the Justices and the DS Framework may be somewhat tangential, the existence of any linkage to the psychological theory offers essential insight into the value and practical utility of such methods in aiding judges. Rather than criticizing the opinion with sweeping absolutes, such as "right" or "wrong" or "good" or "bad," the use of the examples below questions what the Framework might have suggested to the Justices if they had had the opportunity to consult it.

The *Printz* case involved a determination of whether Congress could require a local law enforcement official to enact an interim federal plan for conducting background checks on purchasers of handguns.[294] Citing the recent case of *New York v. United States*,[295] which outlawed "direct[] comp[ulsion of states] to enact or enforce a federal regulatory program,"[296] law enforcement officers from two states attacked the provision on constitutional grounds because of the federal law's

and 334-341 and accompanying text (describing the Court's battle over Alexander Hamilton's writings in No. 27 of THE FEDERALIST). While this is surely not the first time the Court has viewed the same facts in mysteriously different ways, we shall see that *Printz* displays mindlessness and eligibility for the resolution of bias with the DS framework. *See* WRIGHTSMAN, *supra* note 19, at 52-55 (describing the startling differences between Justice Marshall and Justice Rehnquist's analysis of the very same facts in *Ake v. Oklahoma*, 470 U.S. 68 (1985), and using these diverging interpretations to suggest that judges' "values serve as filters for the way that 'facts' are perceived"). Second, members of the Court applied different analytical frameworks. *See infra* text accompanying notes 331 and 334-341 (comparing analyses); *see* Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1061, 1645 (2000) ("[T]he dueling opinions in *Printz* dramatize the extent to which political theory has replaced text and original understanding by parsing the abstract discussions in *The Federalist* as carefully as a tax opinion might parse the Internal Revenue Code."). Third, Justice Scalia wrote for the majority in a way some might argue defied the very principles for which he is supposed to stand when applying his unique brand of Originalist interpretation. *Compare* Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) (finding repugnant judicial opinions "rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean"), *and* Zoltnick, *supra* note 16, at 1378 (noting how Justice Scalia sees the Constitution as "dead" to eliminate the potential that judges will use it to advance their own values), *with* Nichol, *supra* note 287, at 968 (1999) (noting that Scalia made "no effort . . . to tie the judge-made principle to" either "text" or "particular tradition" and that "[t]he fur would have flown" had Scalia been "asked to write a dissent to his own opinion"); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1521-22 (1998) (using Scalia's own reference to Harold Leventhal, who said "the trick [in using legislative history] is to look over the heads of the crowd and pick out your friends," to cast doubt on his "creat[ion] [of] a constitutional limit on the national government where none appears on the face of the Constitution") (alteration in original).

293. *See supra* notes 287, 288, and 292 (identifying criticisms).

294. *See* Printz v. United States, 521 U.S. 898, 902 (1997) (describing aspects of the Brady Handgun Violence Protection Act that "required the Attorney General to establish a national instant background-check system" by 1998 in an effort to keep guns away from convicted criminals).

295. 505 U.S. 144 (1992).

296. *Id.* at 176.

expansion of their existing local duties.[297] A number of states and political organizations filed supplemental amicus briefs.[298]

The officers argued that the powers Congress had exercised were reserved to the states and that various constitutional provisions prohibited the federal legislature's interference with those powers.[299] The government responded that the burdens imposed by Congress were minimal and represented a tradition of "cooperative federalism" that the founders of the nation sought to promote.[300] These views raised a serious historical question that involved the practices adopted by the first Congress to enact a huge body of federal laws.[301]

Given this apparent respect for cooperation between states and the federal government, two possible historical models potentially resolved this dilemma. On the one hand, the alternative championed by Justice Scalia and the majority held that it was implicit in every historical instance that states still had a choice regarding whether or not to comply with congressional "requests."[302] On the other hand, Justice Stevens

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297. The officers also addressed a number of negative repercussions stemming from the requirement to conduct these investigations. Sheriff Jay Printz, for example, complained that the Act required him to "pull[] deputies off patrol and investigation duties" for time intervals ranging from an hour to several days. Brief for the Petitioner at *3, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478. Further administrative burdens included the fact that the officers "ha[d] no mechanism for carrying out the duties assigned by § 922(s) and no budget provision authorizing the expenditures." *Id.* Sheriff Mack identified a closely related dilemma: "To the extent [that Mack] attempted to perform the Federal duties, he incurred civil liability. Under Arizona law, a county official who expends funds in excess of statutory authority is personally liable for their refund." Brief for the Petitioner at *4, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503.

298. *See Printz*, 521 U.S. at 901-2 (noting the participation of several states and organizations).

299. Specifically, they argued that (1) Congress had no power to compel state compliance under Article I § 8 of the Constitution, Petitioner's Brief at *9, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; (2) that the commands violated the Tenth Amendment, Petitioner's Brief at *7, *Printz* (No. 95-1503), *available at* LEXIS 1995 U.S. Briefs 1503; (3) that Article II of the Constitution requires the President to appoint federal officers to faithfully execute federal laws, Petitioner's Brief at *15, *Printz* (No. 95-1478), *available at* LEXIS 1995 U.S. Briefs 1478; and (4) that Congress's requirements were not permissible as an extension of its enumerated powers, such as regulation of commerce. *Id.* at *4.

300. Respondent's Initial Brief at *2, Printz v. United States, 521 U.S. 898 (1997) (No. 95-1478 and 95-1503), *available at* LEXIS, 1995 U.S. Briefs 1478. The government added that the obligations of local officers did not constitute the compulsion outlawed by *New York v. United States*, *id.* at *7, and that the requirements imposed by Congress were less burdensome than more demanding requirements that the Court had upheld in the past. *Id.* at *3 (citing FERC v. Mississippi, 465 U.S. 742 (1982), as upholding a more burdensome demand on states than the interim Brady Act provisions).

301. Notably, the newly formed Congress called on state officials to execute necessary adjudicative tasks, including the transportation of fugitives to their respective overseers, *see* Act of Feb. 12, 1793, Ch. 7 § 1, 1 Stat. 302, the determination of the condition of seafaring vessels, *see* Act of July 20, 1790, ch. 29 § 3, 1 Stat. 132, and the enforcement of federal laws dealing with immigration. *See* Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103 (addressing the maintenance of citizenship applications by states).

302. *See, e.g.*, *Printz*, 521 U.S. at 917 (noting how "President Wilson did not commandeer the services of state officers, but instead requested" their assistance).

supported the government's assertion that the historical materials represented instances of a long tradition of "cooperative federalism,"[303] in which states would clearly benefit from the opportunity to execute the federal laws in a manner sensitive to local concerns,[304] which negated the burdens of complying with the government's orders.

Justice Scalia gained the support of Justices Rehnquist, Kennedy, and Thomas, who resolved the historical question by refuting Justice Stevens's position."[305] Justice O'Connor, who concurred with the *Printz* majority, strayed further from it by advocating that the Tenth Amendment spoke directly to the issue at hand.[306] In the final analysis, the decision expanded *New York*'s holding by outlawing not only compulsion of states to enact a federal regulatory program, but also "conscription" to enforce one temporarily.[307]

3. *Printz*'s Mindless Analyses

That the *Printz* majority and dissent offered contrasting approaches to interpreting historical documents does not, in itself, indicate the existence of mindlessness, even though some scholars have insinuated as much.[308] Nor does this mean that *Printz* was wrongly decided, no matter how mindless the Justices may have appeared in their analyses. Instead, this section highlights how judges in similar positions might use the DS Framework to alert themselves to moments in the decision-making process where they have not fully explored an issue.

The four instances of mindlessness suggested by *Printz* occur in (1) the way Justice Scalia conceived differences in conceptions of legal obligations based on modern meanings, (2) Justice Scalia's and Justice Stevens's reliance on modern secondary sources to explain the meaning

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303. *Id.* at 960 (Stevens, J., dissenting); Respondent's Initial Brief at *2, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 ("The challenged provisions of the Brady Act continue the extremely valuable and constitutionally sound tradition of 'cooperative federalism' in the law enforcement arena . . . .").

304. *See generally* Respondent's Initial Brief, *Printz* (No. 95-1478), *available at* LEXIS, 1995 U.S. Briefs 1478 (describing the benefits of "cooperative federalism").

305. *Printz*, 521 U.S. at 917.

306. *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring) ("The Brady Act violates the Tenth Amendment to the extent that it forces States and local law enforcement officers to perform background checks on prospective handgun owners and to accept Brady Forms from firearms dealers.").

307. *See* Caminker, *supra* note 287, at 205 (noting "compulsion"/"conscription" distinction).

308. To one commentator, *Printz* resembled the noted film NIGHT OF THE LIVING DEAD (Columbia TriStar Entertainment 1990), in which constitutional meanings arose from their textual coffins and compelled Justice Scalia to adopt a different analysis. *See* Eskridge, *supra* note 292, at 1516 (observing how "[t]he dead Constitution that Scalia describes in the Tanner Lectures came alive in *Printz* because Scalia cobbled together a constitutional limit from several sources . . . .").

of original historical materials, (3) Justice Scalia's and Justice Souter's deference to the notoriety and popularity of certain Framers as determinants of the Framers' meanings in specific writings, and (4) Justice Scalia's and Justice Stevens's treatment of constitutional questions on which the writings of the Framers' remained silent. It appears that examples one and two defy the Disequilibrium Schema, example three negates the Criticism of Formalism Schema, and example four implicates the Multiplication Schema.

a. Time Distinctions and the Lack Thereof

At one point in *Printz*, Justice Scalia adamantly distinguished the present legal system from the one the Framers knew. The issue arose because Justice Stevens's opinion referenced a 1790 statute that required state courts to "appoint an investigative committee of three persons 'most skillful in maritime affairs'" to determine whether a ship was worthy of travel.[309] Justice Stevens analogized this process to "an expert inquisitorial proceeding, supervised by a judge but otherwise more characteristic of executive activity."[310] Justice Scalia consequently responded to Stevens in a lengthy footnote, pointing out the fact that Stevens impermissibly tried to use modern concepts associated with "contemporary regulatory agencies"[311] to make his point—concepts that clearly did not apply to the time period in question:

> The dissent's assertion that the Act of July 20, 1790 . . . caused state courts to act "like contemporary regulatory agencies" . . . is cleverly true—because contemporary regulatory agencies have been allowed to perform adjudicative ("quasi-judicial") functions. . . . It is foolish, however, to mistake the copy for the original, and to believe that 18th-century courts were imitating agencies, rather than 20th-century agencies imitating courts. The Act's requirement that the court appoint "three persons in the neighbourhood . . . most skillful in maritime affairs" to examine the ship and report on its condition certainly does not change the proceeding into one "supervised by a judge but otherwise more characteristic of executive activity" . . .; *that requirement is not significantly different from the contemporary judicial practice of appointing expert witnesses, see, e.g., Fed. Rule. Evid. 706.*[312]

309. *Printz*, 521 U.S. at 951 (Stevens, J., dissenting) (citing Act of July 20, 1790, ch. 29, § 3, 1 Stat. 132-33).

310. *Id.* (Stevens, J., dissenting) (rejecting Scalia's observation that these requirements were merely "adjudicative in nature").

311. *Id.* at 950-51 (Stevens, J., dissenting).

312. *Id.* at 908 n.2 (emphasis added).

In response to the passage above, the Disequilibrium criteria would caution against observations similar to Justice Scalia's. After recognizing a contradiction, namely that Justice Stevens misapplied a theory (*i.e.*, that executive duties required of judges in the 1700s were the same as those required in the 1990s), Scalia then attempted to apply his correct interpretation of judges' roles in the 1700s by referencing Rule 706 of the Federal Rules of Evidence. The trouble with his application of the Federal Rules is the fact that they did not come into existence until 1974.[313] Furthermore, until that time, each state had developed its own rules regarding selection of expert witnesses or blue ribbon panels of jurors, which would negate the notion that pre-1974 expert witness provisions have any bearing on the maritime proceedings of 1790.[314] Scalia, much like the traditional skeptic who walked across the room to disprove Zeno's paradox, used the very misgiving he had identified in Stevens's approach (improper time comparisons) to point out the correct mode of interpretation.[315]

The Disequilibrium Schema would counsel one in Justice Scalia's position not to terminate his analysis early on, even if his initial understanding of the premises supporting the Federal Rules analogy were legitimate from an argumentative standpoint. With the aid of this Schema, a decision-maker in Justice Scalia's position should probably complete the analysis only after finding examples that applied at the time period in question so as not to negate his own point.

b. Reliance on Secondary Sources

The historical questions posed in *Printz* required the Justices to consult a great many sources of law developed by the first Congress. But, in a number of instances, Justices quoted modern secondary sources simultaneous with the originals, as if they had the same persuasive weight. In one example, Justice Scalia authoritatively cited a book written in 1948 in a paragraph featuring nothing but statutes from the

313. *See generally* H.R. REP. NO. 650 (1974) (exploring the historical development of the Federal Rules of Evidence).

314. *See* Mark Lewis & Mark Kitrick, Kumho Tire Co. v. Carmichael: *Blowout From the Overinflation of* Daubert v. Merrell Dow Pharmaceuticals, 31 U. TOL. L. REV. 79, 80 (1999) (observing that "[c]ourts [in the mid-1800s] did not employ a generally agreed upon test for admissibility, causing inconsistency and unpredictability in the admission of expert witness testimony").

315. *See supra* text accompanying notes 263-265 (describing flaws in the skeptic's approach to disproving Zeno's paradox). Even if this statement seems logical for the purpose of demonstrating how Stevens's example is similar to the modern practice of appointing expert witnesses, the form of the argument apparently resembles the same problem observed in Basseches's interview with the subject who referred to Zeno.

1700s.[316] In yet another instance, Justice Stevens introduced a historical theory proposed in a 1993 law review article to explain the meaning of references in the Federalist Papers regarding states' administrative capabilities.[317] These quotations raise a number of concerns about the legitimacy of *Printz*'s outcome. At one point, Justice Stevens attacked Justice Scalia for thinly supporting certain propositions with no more than the "speculation" of a footnote in a law review article.[318]

The trouble with authoritative citations to secondary sources derives partly from considerations about the role of the historian and his potential biases.[319] It is sometimes unavoidable that certain judges will

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316. *See Printz*, 521 U.S. at 909-10 (citing Justice White for the proposition that "Georgia refused to comply with [a] request").

317. *See id.* at 945-46, 946 n.4 (Stevens, J., dissenting) (quoting Beer).

318. In the majority opinion, Justice Scalia doubted the dissenters' theory that requiring certain "discrete ministerial tasks specified by Congress" was permissible and did not amount to compulsion because the requirement would not "diminish the accountability" of state officials. *Id.* at 929-30. Scalia heightened his criticism by claiming that, were this practice to grow, Congress would be able to take credit for all of the states' toil. In this respect "even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects." *Id.* at 930. To support this claim, Scalia cited a footnote in the *Vanderbilt Law Review*. Although he did not quote or paraphrase the citation, the footnote, after citing the District Court's opinion in *Printz* for the proposition that the Brady Act "both absorbs government resources that the states might direct elsewhere and confuses the lines of political accountability," read in its entirety:

> The Brady Act raises at least three accountability issues: (1) the lack of federal funds to support the Act's mandates may force local law enforcement agencies to cut other essential services, leading voters to blame local officials for those cuts; (2) voters opposed to gun control may identify the Act with the local officials charged with administering it, and blame those officials for the statute's enactment; and (3) citizens may blame law enforcement officers for erroneous applications of the Act. Although the Act specifically exempts local officers from civil liability for erroneous determinations, 18 U.S.C. § 922(s)(7), it does not shield them from popular criticism or electoral retaliation for those decisions.

Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1580 n.65 (1994) (citing Printz v. United States, 854 F. Supp. 1503, 1514-15 (1994)). Justice Stevens attacked the quote as unfounded: "The Court cites no empirical authority to support the proposition, relying entirely on the speculations of a law review article. This concern is vastly overstated." *Printz*, 521 U.S. at 957 n.18 (Stevens, J., dissenting). Seemingly, Scalia would have been better off citing the actual district court opinion, which he might very well have done had he been sensitive to the concerns about secondary sources mentioned in this section.

In another instance, Justice Scalia neglected to provide a pinpoint citation for one of the works he referenced, as if hoping to appease critics wishing to call his bluff with a catchall citation. *See Printz*, 521 U.S. at 923 (referencing generally a 1994 article). Yet, the Justices were not the only ones to fall prey to this practice. *See, e.g.*, Petitioner's Reply Brief at *10, *Printz* (No. 95-1478), *available at* 1996 WL 650918 (citing a 1983 article from the *Washington University Law Quarterly* to drive home the point that "The Framers intended that voluntary cooperation between the States and the federal government would be integral to federalism").

319. Often, scholars note the predominance of confusing language used even after the writing of the Constitution, the clarity of which represented only a temporary respite. *See* PETER M. TIERSMA, LEGAL LANGUAGE 45-46 (1999) (noting how "American legal language came to resemble the statutes of King George III" even though individuals like Thomas Jefferson "seriously considered abolishing the entire

encounter difficulties when interpreting the writings of historians who have interpreted the Framer's meanings from their original writings. This dilemma arises because the historian adds his own interpretation to the finished product.[320] In *Printz*, two specific references highlight the danger of over-reliance on these more modern sources, even more than the examples illustrated above.

First, as Justice Stevens debated with Justice Scalia the issue of whether an early act addressing Selective Service registration equated to a request or compulsion of state officers, he attempted to impeach the portion of the secondary work Scalia cited. Stevens did this by citing seemingly contrary information written by that same author in the same piece.[321] Of key importance, the note to which Stevens referred only spanned a few short pages. Because it is difficult to imagine that Justice Scalia overlooked or intentionally avoided information contrary to his main proposition, some other explanation is necessary to explain why his opinion failed to take this information into account.[322]

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existing system of laws" for the purpose of clarity). The law became so confusing that states like "Massachusetts forbad lawyers from serving in [their] legislature and required that parties in court represent themselves rather than engage an attorney." *Id.* at 43. Given the confusion that existed then, the likelihood that judges now will face a great deal of indeterminacy is no understatement.

Other scholars turn not only to the laws and statutes of earlier years but to the changing role of judges to confirm such doubts. *See* Susanna Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 159 (1998) (noting how judges' roles transformed from "romantic" figures "whose judgements were, at once, emanations of [their] own mind[s] [as well as] expressions of the 'rule of law'" and the way the objective of self-analysis gave way to notions of legal realism); *See* DENNIS E. MITHAUG, SELF-REGULATION THEORY: HOW OPTIMAL ADJUSTMENT MAXIMIZES GAIN 32 (1993) (explaining how the 1900s transformed the process of justification: "The relationship between factfinding and theory building reversed positions. Top-down Aristotelian deduction of the past gave way to bottom-up inductive inquiry of the present."). Although the newer inductive system demanded "the development of systematic searches, selections, uses, and reuses of solutions to achieve prescribed goals" it suggests that the prior body of decision-making still rests on the more abstract principles. *Id.* at 40 (emphasis omitted).

Without recommending any specific process, Professor Louis E. Wolcher stated the need for methodological self-consciousness to resolve historical dilemmas. Under his model, the goal would be "neither a privileging of structure over subject, nor subject over structure, but rather a privileging of *the historian's own part in the process of reconstructing the past.*" Louis E. Wolcher, *The Many Meanings of "Wherefore" in Legal History*, 68 WASH. L. REV. 559, 572 (1993) (emphasis added). For Wolcher, this would be the only way to overcome the challenge of determining whether writers' accounts related to the "extralegal life changes," autonomous of legal ones or not. *Id.*

320. Depending upon how many historians the most current author references, this process of removal from the initial interpretation of meaning could continue infinitely. *See* William N. Eskridge, Jr., *Textualism and Original Understanding: Should the Supreme Court Read The Federalist but Not Statutory Legislative History?* 66 GEO. WASH. L. REV. 1301, 1310 (1998) (observing how "sources still being published" about the Framers increase the indeterminacy of their understandings).

321. *See Printz*, 521 U.S. at 953 n.13 (1997) (Stevens, J., dissenting) ("Indeed, the very commentator upon whom the majority relies noted that the 'President *might*, under the act, have issued orders directly to every state officer, and this would have been, for war purposes, a justifiable Congressional grant of all state powers into the President's hands.'" (citation omitted).

322. Here, such conduct raises issues similar to Justice Brennan's use of George Orwell's work in *Riley*.

In a similar vein, Justice Souter attacked Justice Scalia's use of Clinton Rossiter's commentaries about particular Framers. Here, when Scalia commented that Madison's view prevailed over Hamilton's, giving him reason to discount Hamilton's statements, Souter replied citing Rossiter for the proposition that there was no prevailing view among the Framers since the writers of the Federalist Papers had a unified voice:

> This, indeed, should not surprise us, for one of the Court's own authorities rejects the "split personality" notion of Hamilton and Madison as being at odds in The Federalist, in favor of a view of all three Federalist writers as constituting a single personality notable for its integration:
> "*In recent years* it has been popular to describe Publius [the nominal author of The Federalist] as a 'split personality' who spoke through Madison . . . ."[323]

The most striking thing about the paragraph above is not merely the contrast between the Justices' interpretations of the Framers' meanings. More importantly, the highlighted portion of the excerpt above indicates that Justice Souter shifted his analysis to discussions of modern conceptions of the meanings of original documents. In effect, in both examples, the Court began to battle over the historians' views of the original matter, rather than the original matter, which substantially detracted from the Court's interpretive capacity.

It is the Criticism of Formalism Schema that can potentially assist judges facing these kinds of dilemmas. This Schema enables judges to distinguish the ways in which authors' interpretations evidence historical meanings and the author's own meanings simultaneously. Criticism of Formalism provides this capability because it focuses on "assertion[s] of interdependence."[324] By employing this schema, judges could avoid having to rely solely on a scholar's account merely because the author utilized reliable sources in developing the scholarship. Instead, the judge would question how those sources helped to create the depiction that she found compelling when evaluating the facts of the case. This Schema would prompt the judge to consult those very materials to gain a better understanding by implementing the author's rationale, but not the author's verbatim result.

See supra note 204 (suggesting that Brennan omitted the portion of the text he quoted that would have eviscerated the persuasiveness of his claim).

323. *Printz*, 521 U.S. at 973 n.2 (Souter, J., dissenting) (citing CLINTON ROSSITER, ALEXANDER HAMILTON AND THE CONSTITUTION 58 (1964) (emphasis added)).

324. *See supra* note 263 (describing flaws in the critic's approach).

c. Deference to the Personal Reputations of the Federalists

At two separate points of the *Printz* decision, Justices resorted to a method of interpretation that I call "popularity weighting." This method consists of weighting a Framer's popularity in the same way that one might weight a particular historian's conception of meaning. My concern is that this process detracts from the Justices' mindful analyses. In the first instance, Justice Scalia refuted Justice Souter's assertion that No. 27 of *The Federalist* should be read to uphold the requirement that states comply with the orders of Congress, stating that

> [e]ven if we agreed with JUSTICE SOUTER'S reading of The Federalist No. 27, it would still seem to us most peculiar to give the view expressed in that one piece, not clearly confirmed by any other writer, the determinative weight he does. That would be crediting the most expansive view of federal authority ever expressed.... Hamilton was "from first to last the most nationalistic of all nationalists in his interpretation of the clauses of our federal Constitution."[325]

The preceding analysis invokes a number of questions, the most pressing of which is, what does Hamilton's reputation for being a nationalist have to do with the issue at bar?[326] The answer seems to be nothing, as is evident from Souter's response to this criticism. But the net effect of the squabble resulted in diverting the attention of the Justices from the legal questions involved in the dispute.[327]

Before departing from this example, we should note that two phenomena are occurring here. At the most basic level, Justice Scalia relied upon the assumption that Hamilton was a nationalist, although he elected not to define that term in the context of his opinion.[328] On another level, Scalia's comment that a valid Framer's opinion must reflect a collective view rather than an individual one seriously undermines his own view. This mandate sets the interpretive bar so

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325. *Printz*, 521 U.S. at 915-16 n.9 (citing two more recent historical pieces by Rossiter and Farrand to confirm Hamilton's reputation).

326. As one of *Printz*'s critics put it:

> Justice Scalia's reliance on Clinton Rossiter [1964] and Farrand's *Records of the Federal Convention* [1911] at best supports the commonly known proposition that Hamilton was comparatively far more nationalistic than most of the other Founders, *not* that his views on the commandeering of state executive officials failed to "prevail."

Flaherty, *supra* note 287, at 1292 n.91 (1999) (citation omitted).

327. For commentary regarding Justice Souter's off-topic response, see *infra* note 331 and accompanying text.

328. *See* Nichol, *supra* note 287, at 967 (finding preposterous the assumption that simply because Hamilton was "Nationalistic" one is naturally to "suppose[] his views should be dismissed out of hand").

high that it, taken to its natural limit, would deny reliance on any of the materials written by the Federalists and would potentially undercut the Originalism that Justice Scalia holds so near and dear to his heart.[329] In other words, by requiring that multiple voices confirm the content of any opinion in *The Federalist Papers*, Scalia would be condemning that interpretive practice to reliance on multiple voices, each of which represent different political and value-based influences—a pitfall of Originalism that the theory's critics castigate the most emphatically.[330] We must ask ourselves then, if such a precarious interpretation on Scalia's part can reasonably be understood to indicate anything other than a mindless state. Perhaps it does not.

An even more compelling example of the dangers of mindless constitutional interpretation is present in Justice Souter's response to Scalia, which heightened the existing state of mindlessness to an unprecedented level. In a passage clearly intended to rebut Scalia's attacks, Souter focused attention on the words Hamilton used in *The Federalist* No. 27. Souter specifically remarked:

> The Court reads Hamilton's description of state officers' role in carrying out federal law as nothing more than a way of describing the duty of state officials "not to obstruct the operation of federal law," with the consequence that any obstruction is invalid. But I doubt that Hamilton's English was quite as bad as all that. Someone whose virtue consists of not obstructing administration of the law is not described as "incorporated into the operations" of a government or as an "auxiliary" to its law enforcement. One simply cannot escape from Hamilton by reducing his prose to inapposite figures of speech.[331]

Justice Souter's use of the vague term "bad" in combatting the majority's interpretation of Hamilton's grammar, without further explanation of what was actually "bad" about Scalia's interpretation, had little judicial value. Even more troubling was his failure to ground his reasoning in the meanings of the words as Hamilton would have understood them.

The Criticism of Formalism Schema would have addressed both instances of mindlessness. With respect to Scalia's reference to

329. *See* McCabe, *supra* note 287, at 544 (noting how, in *Printz*, "Scalia's use of The Federalist Papers as proof supports a conclusion opposite to his").

330. *See* Flaherty, *supra* note 287, at 1309 (discussing problems associated with understanding collective intent based on the writings of one Framer).

331. *Printz*, 521 U.S. 898, 972-73 n.1 (1997) (Souter, J., dissenting) (citation omitted) (citing Hamilton's writings and trying to prove invalid Justice Scalia's comparison between "auxiliaries" and "nonobstructors"). *Id.* at 973 n.2.

Alexander Hamilton, the Schema would compel several questions: (1) who measured Hamilton's level of popularity; (2) how did that person conduct such an evaluation; and (3) what types of secondary sources were used to arrive at that conclusion? Justice Scalia's analysis makes no mention of these underlying questions; nevertheless, as a result of his remark, there is real danger that future legal practitioners will cite these references for their authoritative weight whenever Hamilton's nationalistic reputation furthers their cause. Because of the precedential force of Scalia's opinion, future judges will have little incentive to engage in the analysis that Scalia neglected. Likewise, with respect to Souter's pithy remark regarding Hamilton's use of grammar, the Criticism of Formalism Schema would urge him to explore the possible meanings of words and standards of grammar that characterized Hamilton's era before interpreting Hamilton's intentions.

d. Ultra-Narrow Interpretations of Silence

This final subsection will focus on Justice Scalia and Souter's dispute over the meaning of a passage written by Alexander Hamilton in No. 27 of *The Federalist Papers*. Scalia's response, in particular, shows us how he considered only one potential interpretation among a number of competing possibilities.[332] Unlike the Criticism of Formalism Schema,

332. This is not to say that the case only featured one such instance. In fact, Justice Scalia blithely asserted his interpretation on multiple occasions. *See, e.g.*, Nichol, *supra* note 287, at 967-68 ("Even if the dissenters are wrong that the Framers clearly indicated a belief in the acceptability of the federal use of state actors, that, of course, does not mean, without more, that they clearly rejected the practice."); *id.* at 966-67 (pointing out the following drawbacks regarding Scalia's historical analyses:

> Justice Scalia's response to [a] litany of counter-examples is somewhat out of character for such a forceful advocate. The listed examples, he writes, "do not necessarily" conflict with his proffered constitutional rule; they do not "necessarily imply" or provide "clear support" or "clearly confirm" or "conclusively" determine the "precise issue" before the Court. It is possible, he seems to say, to find at least some ambiguity in the cascade of historical practices offered to contradict his new constitutional rule. (Admittedly, the "possible ambiguity" claim grows tiresome after seven or eight uses.) The reader of the opinion is almost left with the impression that Justice Scalia is playing a game of cat and mouse, ending by saying "you can't force me to admit that history is on your side—sure, it's true, but I'll never admit it.).

See also McCabe, *supra* note 287, at 551 ("In the end, Scalia more or less admitted his approach in *Printz* was somewhat 'formalistic,' although he effectively said 'same to you,' when the dissenters accused him of 'empty formalistic reasoning of the highest order.'") (citation omitted).

Additionally, in one example, Justice Scalia noted that although the power to commandeer was "highly attractive" to Congress, Congress did not use the power as much as it could have. *Printz*, 521 U.S. at 905. Scalia thus concluded: "[I]f . . . earlier Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist." *Id.* One commentator appropriately notes the following: "By the end of this discussion, what began as a potential 'reason to believe' transmogrified into a dispositive rationale. . . ." Flaherty, *supra* note 287, at 1290. In contrast to these simpler examples,

which would have encouraged Scalia to explore the many sources that compromised his initial interpretations of a formalistic theory, the Multiplication Schema is appropriate to critique this instance of interpretation because it would require any judge in the same position to dig deeper than the single perspective embraced by Justice Scalia. The following passage by Hamilton led Scalia and Souter to two completely opposed conclusions:

> It merits particular attention . . . that the laws of the Confederacy, as to the *enumerated* and *legitimate* objects of its jurisdiction, will become the SUPREME LAW of the land; to the observance of which all officers, legislative, executive, and judicial, in each State, will be bound by the sanctity of an oath. Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and will be rendered auxiliary to the enforcement of its laws.[333]

To the *Printz* Court, the meaning of the word "magistracy" was the key issue.[334] If the word pertained to all civil servants, including the functionaries of a state's executive branch, then the provision seemingly permitted the action sought by the gun control legislation. If, however, the word applied only to judges, the provision would not necessarily permit the desired compulsion. For Justice Souter, the first view constituted the only viable alternative, as he confirmed: "[I]t is The Federalist that finally determines my position."[335] Grasping tightly onto the sentence referencing "[l]egislatures, [c]ourts, and [m]agistrates," Souter proclaimed it evident that magistrates included more than judges in Hamilton's interpretation.[336]

Justice Scalia adhered to the contrary view that magistrates meant judges only.[337] Furthermore, he attacked Souter's analysis, noting how Hamilton and Justice Souter simply presumed that it "flowe[d] automatically" from the reference to complying with the laws of the Confederacy that state officers are "incorporated" into federal service

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the excerpt featured above provides the clearest indication of the type of pervasive mindlessness that can be avoided with the DS Framework.

333. THE FEDERALIST NO. 27, at 162 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

334. *See* David M. Sprick, *Ex Abundanti Cautela (Out of An Abundance of Caution): A Historical Analysis of the Tenth Amendment and the Constitutional Dilemma Over "Federal" Power*, 27 CAP. U. L. REV. 529, 568-69 (1999) (observing the determinative value of this question to the outcome of the case).

335. *Printz*, 521 U.S. at 971 (Souter, J., dissenting).

336. *Id.* Some say that Souter's distinction here had the effect of "rendering Justice Scalia's opinion indefensible." Sprick, *supra* note 334, at 569.

337. *Printz*, 521 U.S. at 907 (proclaiming that historical sources "establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state *judges* to enforce federal prescriptions").

and made "auxiliary" to the government.[338] In a detailed footnote, Scalia presented an alternative theory showing why the argument based on "automatic" flow was mistaken:

> Both the dissent and JUSTICE SOUTER dispute that the consequences are said to flow automatically. They are wrong. The passage says that (1) federal laws will be supreme, and (2) all state officers will be oathbound to observe those laws, and thus (3) state officers will be "incorporated" and "rendered auxiliary." The reason the progression is automatic is that there is not included between (2) and (3): "(2a) those laws will include laws compelling action by state officers." It is the mere existence of all federal laws that is said to make state officers "incorporated" and "auxiliary."[339]

Justice Souter loudly voiced his discontent with Scalia's characterization of his analysis, attacking, *inter alia*, Scalia's view that state duties "not to obstruct the federal law" were their only obligations in carrying out the laws.[340] He further assaulted the inferences underlying Scalia's model, accusing Scalia of creating the straw man notion of "automatic" flow and then assigning this fabricated conception to Souter and Alexander Hamilton without providing a scintilla of support.[341]

Critics have labeled Scalia's behavior in a number of contrasting ways. To some, Scalia's analysis embodies many positive attributes associated with judicial restraint.[342] To others, Scalia's interpretation evidenced unfounded "conclusive reliance on negative inference."[343] Still more argue that Scalia relied on Hamilton "affirmatively"[344] to establish and support the majority's position, while others suggest that Scalia merely grafted *Printz*'s considerations onto arguments that he had

338. *Id.* at 912 n.4.

339. *Id* (emphasis omitted).

340. *Id.* at 972-73 n.2. It is said that Souter was not the only Justice to criticize Scalia in this way. *See* Jeffrey Rosen, *Dual Sovereigns*, NEW REPUBLIC, July 28, 1997, at 17 (observing Justice Stevens who "remarked spontaneously that Justice Scalia's opinion reminded him of Justice Douglas's opinion in the Griswold Contraceptives case of 1965, which extrapolated a right to privacy from the Constitution's 'penumbras' and 'emanations'").

341. *See Printz*, 521 U.S. at 972 n.1 ("[N]either Hamilton nor I use the word 'automatically'; consequently, there is no reason on Hamilton's view to infer a state officer's affirmative obligation without a textual indication to that effect.").

342. *See* John F. Manning, *Textualism and Original Understanding: Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1363 (1998) (noting that Scalia's actions were calculated and suggesting that his opinion "consciously seeks to assign *The Federalist* only such weight as its analysis merits"). On this view, Scalia is merely responding to the government and Justice Souter "defensive[ly]." *Id.*

343. Flaherty, *supra* note 287, at 1290.

344. *See* Eskridge, *supra* note 292, at 1520 (noting how "Scalia's opinion . . . affirmatively relied on *The Federalist* to establish" the majority's position).

formerly asserted less successfully in other cases.[345] These varied conclusions suggest an almost infinite number of possibilities for using the lessons from *Printz* to improve judicial decision-making.

Amid the din of confusion, the Multiplication Schema rises to the occasion as a reasoned and instructive evaluative criterion. While Scalia's analysis may have been based on a legitimate study of history and the texts composed by the Framers, critics rightly challenge his one-sidedness in interpreting the requirement that all magistrates be judges and then failing to consider other alternatives. Scalia's decision to embrace a singular theoretical resolution highlights the need for the Multiplication of Perspectives as a Concreteness-Preserving Approach to Inclusiveness.

The greatest benefit of this cognitive approach in the context of the *Printz* decision would have been that reliance on this schema might have rebutted the notion that silence in *The Federalist* No. 27 could only mean one thing: that the idea of state compulsion had to be directly indicated with the word "compulsion." The problems inherent in this analysis will surely resurface whenever the Court adjudicates an issue related to compulsion. The meaning of the original text has demonstrably changed; no longer will *The Federalist* No. 27 stand for the more inclusive concepts that it had prior to *Printz*. Whereas, before the case, Hamilton's commentary might have provided guidance to states about resolving dilemmas in complying with federal mandates, *The Federalist* No. 27 is reduced to a justification why Congress cannot compel state governments to act—a meaning that will be forever intertwined with *Printz*'s precedential value.

Even in light of apparent instances of mindlessness, however, it is hardly fair to claim that *Printz* was wrongly decided.[346] The better observation is that *Printz* left several questions unanswered while it wasted time on mindless banter. While one author concludes that "we are left in the dark as to the broader meaning of *Printz*,"[347] others point to more specific examples of remaining uncertainty about *Printz*'s holding.[348]

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345. *See* Ralph A. Rossum, *The Irony of Constitutional Democracy: Federalism, the Supreme Court, and the Seventeenth Amendment*, 36 SAN DIEGO L. REV. 671, 737 (1999) (noting that Scalia "sugarcoat[ed]" the separation-of-powers argument "directly from his dissent in *Morrison v. Olson*" in *Printz*).

346. Given a virtual cornucopia of explanations for the majority opinion, how would one prove conclusively the correctness of the ruling?

347. Caminker, *supra* note 287 at 202.

348. *See* Nichol, *supra* note 287, at 961-62 (describing a virtual laundry list of cases in which the federal government may still compel states to serve certain federal functions even in light of *Printz*); McCabe, *supra* note 287, at 550 (noting Scalia's "assumption" that law enforcement agents were "state executive branch officials" and recognizing contrary statutes in Texas, for example, that consider sheriffs

V. JUDICIAL MINDFULNESS IN PRACTICE

Part IV, above, introduced the workings of a judicial self-help process. The tough question now is *how much* help does the model actually provide? The proposed model of judicial mindfulness does not enable a judge to emerge with an understanding of every single behavioral influence that affects him. Nor does the model enable him to travel back in time and know the true meanings of the Framers. Yet, we should still recognize the benefits of the model. If the two methods I propose above—using negative practice and transitional thinking—comply with Langer's general theory, then judges can potentially decrease the bias underlying their decisions by fifty percent, if they are currently operating mindlessly.[349] Even if the model only improved decisional accuracy five percent, the model would still be extremely beneficial for judges since indeterminate law more than likely weights potential theoretical solutions equally.[350]

We can critique the proposed model further by analyzing it with a criterion that characterizes effective self-help methods in general: the ease with which judges can implement the process. If judicial mindfulness withstands this test, the theory will stand as a practical approach to increasing the accuracy of judicial decision-making.

For any self-help model to work, the people who use it must understand it. More importantly, they must also be committed to the process.[351] At one level, it makes sense for judges to know that certain debiasing processes exist. Awareness is naturally the first step.[352] But

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to be members of the judiciary); Caminker, *supra* note 287, at 202 ("[T]he Court left open the possibility that particular constitutional provisions outside of Article I, Section 8 might still authorize congressional commandeering, but the Court provided little guidance for determining when this would be so.").

349. *See* Chanowitz & Langer, *supra* note 226, at 1051 (describing results of *Mindfulness* training).

350. *See supra* notes 39-41 and accompanying text (defining and explaining legal indeterminacy). Also note that judges will be more informed regarding which influences they need to subtract from an analysis, fulfilling Professor Schroeder's call, more than eight decades ago, for a process where judges are "knowing [of] the present action, and the immediate stimulus from without, [so that] as if by a process of subtraction, [they] may uncover the contributing motive from within, which is the product of past experience." Schroeder, *supra* note 190, at 90.

351. *See* CARL E. THORESEN & MICHAEL J. MAHONEY, BEHAVIORAL SELF-CONTROL 9 (1974) ("To exercise self-control the individual must understand what factors influence his actions and how he can alter those factors. . . . [t]his understanding requires that the individual in effect become a sort of personal scientist."); Schroeder, *supra* note 190, at 96 (requiring that judges "habitually check[]" themselves for biases).

352. HILL, *supra* note 249, at 21 ("One method to improve decisions, is simply to make decision makers aware of the nature of limitations of biases of which they may not be aware. By simply becoming informed of innate biases and perception distortions, the decision maker can take the steps to correct them . . . *But awareness alone does not create a system.*") (emphasis added); Cohen, *supra* note 183, at B9 ("The first

without actually attempting the practices regularly, the "knowing-doing" gap will remain an impediment to the attainment of judicial mindfulness.[353] Because judges are overloaded, if not overwhelmed, with a growing docket of cases, they need a simple program that allows for quick implementation, a requirement I call the judicial economy of self-help.[354] Judicial mindfulness passes this test because it comports with the general requirements of effective self-help models.[355] Judges only have to use negative practice once to create a baseline for evaluating their behavioral inclinations regarding the Constitution, for example. Given the simplicity of this first step, the only real challenge becomes achieving transitional thought in relation to problem cases as they arise. To meet this challenge, judges might simply create a self-monitoring chart implementing Professor Basseches's examples from the Dialectical Schemata with the results gained from the exercise interpreting the Constitution in a personal way. Because these requirements are minimal in comparison to clinical self-help programs, which require frequent consultation with mental health professionals, judges should be able to use these tools in their chambers as they review cases.

hurdle is to get judges to admit they are subject to the same psychological hiccups as everyone else."); *cf.* Jonathan Baron & Rex Brown, *Toward Improved Instruction in Decision Making to Adolescents: A Conceptual Framework and Pilot Program*, *in* TEACHING DECISION MAKING TO ADOLESCENTS 95, 107 (Jonathan Baron & Rex Brown eds., 1991) (recognizing that "simply warning . . . of the existence of a bias does not usually help" those affected by it).

353. In explaining this dilemma, Professors Lowenstein and Thompson point out studies indicating that a large proportion of people have faulty conceptions of the way that thermostats operate. They compare the causes of the problem to classes they have taught in which students of negotiation were still unable to implement the theories they learned immediately following instruction. Jeffrey Lowenstein & Leigh Thompson, *The Challenge of Learning*, NEGOTIATION J., Oct. 2000, at 400, 401, 404. While the advanced students in such negotiation classes surely benefited from the luxury of having directed instruction and feedback from the instructors, the success of the self-awareness methods described in this Article is totally contingent upon the judge himself. *See id.* at 403-405 (describing a number of benefits when the learning process is facilitated in classroom settings and explaining the unpredictable value of these methods even as applied in supervised conditions).

354. *See* MITHAUG, *supra* note 319, at 32 (observing that "problem solvers use the least expensive method to gain the minimal amount of information necessary to decide").

355. *See* MICHAEL J. TANSEY & WALTER F. BURKE, UNDERSTANDING COUNTERTRANSFERENCE FROM PROJECTIVE IDENTIFICATION TO EMPATHY 87 (1989) (noting that productive self-checking processes create frameworks for answering the following questions: "What am I experiencing?", "Why am I feeling this way?", "How did this come about?" or "What purposes might this serve for the [litigants or their counsel] to arouse this experience within me?"); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 58 (1994) (noting that, "[a]t a minimum, judges should mentally list potential biases that may permeate their decision-making process [and] review and add to the list daily.").

VI. CONCLUSION

This Article has shown that two types of cold bias—one involving the judge's past traumatic experiences and the other relating to his interpretation of ambiguous terms or words—can negatively influence judges by causing them to interpret the law in a hasty manner without fully exploring alternative channels of interpretation. Either type of bias can limit the utility of the judge's legal determination to the needs of an ever-changing society. While the bias does not corrupt the legitimacy of the materials upon which the judge relies to achieve his final judgment, the bias impedes the process that the judge implements to interpret such materials. In response to these harmful biases, this Article identified certain methods of self-awareness that psychologists have used to solve similar dilemmas in decision-making in a non-legal context. Although these methods have apparently been neglected by the legal community based on doubts about the utility of psychological approaches in aiding legal analyses, they offer a number of important analytical tools to the American judiciary.

While this Article may be the first to adopt Ellen Langer's concept of mindfulness as a judicial objective, judges should have little difficulty embracing the idea. It promotes many of the standards to which judges are held accountable within their own profession. The greater difficulty comes, however, with adopting psychological methods like Michael Basseches's Dialectical Schemata as a legal approach. The problem arises because, regardless of effectiveness of the DS Framework in pointing out specific analytical problems, the Framework was never intended to critique legal decision-making, specifically—a way of thinking that is distinguishable from all others.

This Article urges the legal academy to experiment more with the notion of transitional thinking as a method for judges to check and address their own biases. With enough experimentation in this field, judges should ultimately use psychologically tested models as checks against their natural thought processes when reaching decisions. The general debiasing framework proposed by Wilson and Brekke provide a foundation upon which new advances in transitional thinking can be built.

While this proposal has certain costs in that it requires legal ethicists to promote the system and adapt it to administrative constraints on the courts, these demands are realistic when compared to expensive anonymous training sessions and the risks related to confused legal outcomes.

The recommendation to experiment further with transitional thinking comes not only because the system helps us identify better approaches

to dealing with hard cases like *Printz v. United States*[356]—approaches that scholars, not to mention the *Printz* Justices themselves, were unable to resolve with traditional analytical methods—but also because judges can implement analyses under the framework without devoting incredible amounts of time and energy to learning and implementing the system. While judicial mindfulness may not be the panacea to improve *all* legal analyses, it offers practical tools that will potentially improve legal decision-making in a number of sensitive analytical areas that limit the judicial role or permit unchecked legal outcomes, such as where the law is indeterminate.

In sum, judicial mindfulness recognizes those judges who have realized the need for greater self-awareness in their decision-making. As one such jurist put it: "'Why do I make the decisions I do?' I make them because I have to. But I can do better."[357]

356. *See* Eskridge, *supra* note 320, at 1309 n.53 (calling *Printz* a "hard constitutional case[ ]"); Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, 574 ANNALS 158 (2001) (same).

357. HILL, *supra* note 249, at 28.