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UNDERSTANDING THE PERSON BENEATH THE ROBE: PRACTICAL METHODS FOR NEUTRALIZING HARMFUL JUDICIAL BIASES

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I. INTRODUCTION[1]

This article presents hands-on self-awareness techniques for use by judges, arbitrators, members of commissions, and other legal decision-makers who are confronted with complex cases. All too often, these judges are expected to make the "right" decisions without knowing how to accomplish this task.[2] While judges, no doubt, are

1. After much consideration, the *Review* and the author decided to address judges in the masculine tense, such as "he." Use of the masculine tense should include reference to female judges as well. However, use of alternating terms or only "she" would be confusing as referenced in this article.

2. For example, former Chief Justice William Rehnquist noted that a good judge has an obligation: "He or she must strive constantly to do what is legally right, all the more so when the result is not the one Congress, the President or 'the home crowd' wants." Ruth Bader

capable of applying the law to a case, this is only one aspect of righteous behavior. This article is concerned with the related expectation that judges are capable of rendering fair and impartial decisions. No matter how much training they receive, judges can only avoid biases that are known to them.[3] Even when they desire to render a "fair" decision, subconscious influences can cloud their decisions and impede their legal reasoning.[4] Consequently, in many circumstances, for judges to be fair, they must be capable of identifying subconscious influences on their behavior and they must neutralize the effects of such impulses.[5] This article offers a variety of practical exercises from numerous disciplines that will allow judges to look beneath their robes at human beings with real experiences who cannot help but feel emotions when reviewing aspects of the cases before them.

An increasing number of studies report that judges are continuously reaching biased decisions.[6] The theories of legal reasoning

Ginsburg, *Reflections on Judicial Independence*, TRIAL, May 1999, at 46, 46. *But cf.* Stephen M. Feldman, *The New Metaphysics: The Interpretive Turn in Jurisprudence*, 76 IOWA L. REV. 661, 662 (1991) ("We demand the impossible—absolute objectivity—to avoid the catastrophic—unconstrained subjectivity.").

3. *See* Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations*, 116 PSYCHOL. BULL. 117, 119, 130 (1994) (explaining that awareness of unwanted mental processes is necessary before one can eliminate them). *Cf.* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 820 (2001):

> 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.

Cf. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 36-37 (1998) ("[Judges'] opinions do not include all the reasons which actually influenced the judge's decision. Naturally, judges leave out reasons of which they are not consciously aware . . . .").

4. *See* Jerome Frank, *Justice and Emotions*, *in* HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 53, 55 (George H. Williams & Kathleen M. Sampson eds., 1984) [hereinafter JUDGE'S HANDBOOK] (describing behavioral impulses that impede a judge's decision-making, including "unconscious sympathies for, or antipathies to, some of the witnesses, lawyers or parties in a case before him").

5. *E.g.*, ALLAN C. HUTCHINSON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION 198 (2000) (stating the widely-held expectation that judges must "work hard to bring . . . biases and convictions to articulate consciousness so that they can be better understood and interrogated"); LYNN HECHT SCHAFRAN & NORMA J. WILKER, GENDER FAIRNESS IN THE COURTS: ACTION IN THE NEW MILLENNIUM 31 (State Justice Institute 2001) ("What judges can and must do is recognize [suspect] elements in their own thinking and consciously try to counter their influence by rendering fair and impartial decisions.").

6. *See infra* Part II.A.

championed by law schools and bar associations prevent judges from recognizing their biases because the theories implicitly support the notion that any judge can apply the same method of reasoning to arrive at an unbiased decision, regardless of emotional attachments or similarities to previous cases.[7] Moreover, state bars and court systems mistakenly assume that judges are capable of being impartial solely because they were elected or appointed to a prestigious position.[8] But none can deny that judges are only human, similar to decision-makers in other professions whose decisions are routinely influenced by subconscious and unwanted behavioral impulses.[9]

Although the new studies challenge the perspective that judges are infallible and demand interventions to help judges gain awareness of their belief systems, the myths of legal reasoning still limit the impact of these disturbing findings.[10] Court commissions constantly proclaim that they must eliminate bias from the courts, but they fail to suggest particular methods to achieve this objective.[11] While some

7. Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1031-33 (2002) (discussing theories addressed by legal scholars, especially Richard Wasserstrom's theory of justification). In short, these theories hold that "[j]udges customarily do not employ their preferences directly; they take on views of judicial conduct which demand they behave as judges, and not as they otherwise would." JOEL LEVIN, HOW JUDGES REASON: THE LOGIC OF ADJUDICATION 28 (1992). Consequently, "[j]udges' opinions while off the bench, or their random thoughts while presiding and deliberating, are of little importance. The dynamics of the judicial role are shaped by the nature of the conflicts brought before judges." *Id.* at 29.

8. This view is inherent in traditional notions of "judicial temperament," which has been required of judicial appointees and applicants. Maurice Rosenberg, *The Qualities of Justices—Are they Strainable?*, *in* JUDGE'S HANDBOOK, *supra* note 4, at 5, 23-24. One bar association defined the term judicial temperament as "a condition of courtesy, dignity, patience, tact, humor, and a personality free from arrogance, pomposity, irascibility, prejudice and ability to listen and keep an open mind." *Id.* Although few humans can meet the tall order, organizations promote the fiction of judicial temperament because, for the most part, they "have no systematic set of criteria to evaluate or rate judicial performance." *Id.* at 7.

9. Seamone, *supra* note 7, at 1029 (citing sources for the proposition that "judges are human beings, and as a result, are motivated by influences originating beyond the scope of their immediate comprehension").

10. *See infra* Part II.B (discussing the limited effectiveness of the courts' existing methods of debiasing).

11. For example, a major goal of the National Association of State Judicial Educators is to "[p]reserve the judicial system's fairness, integrity, and impartiality by eliminating bias and prejudice." National Association of State Judicial Educators, Principles and Standards of Judicial Branch Education 4 (2003), http://nasje.unm.edu (follow "Principles & Standards" hyperlink). To accomplish this objective, the Association has suggested that "[a]ll curricula should include, as appropriate, access and fairness issues including the effects of bias and stereotypes on conduct and decision-making." *Id.* at 11. However, these ambitions fail to address the longstanding problem of effectively conveying useful information to the judges exposed to such training. *See* MASS. SUPREME JUDICIAL COURT, COMM'N TO STUDY RACIAL AND

jurisdictions implement an occasional daylong workshop or brown bag lunch, these voluntary sessions focus mainly on sensitivity training, limited group brainstorming, or they merely provide the legal definitions of different types of judicial bias.[12] All too often, the facilitators of these educational workshops assume that judges are able to automatically correct errors in their decision-making simply by being alerted to common biases exhibited by other judges.[13] The problems with these solutions are the lack of specific instructions to gain awareness of subconscious negative influences, the lack of methods to limit the harmful effects of such influences, and the lack of reliable indicators that a technique has successfully neutralized the bias.[14]

To address the biases influencing practicing attorneys, legal scholars have made more headway by drawing on disciplines outside of the law to increase lawyers' self-awareness and improve their relationships with clients.[15] These strides have occurred mainly with the application of mindfulness meditation and psychodrama techniques at voluntary workshops and educational institutions. At law schools and local bar associations, many attorneys now sit together through guided meditation and receive credit or hours for continuing legal education.[16] In workshops for litigators, attorneys similarly learn to dramatize their most feared experiences in court or with clients, much like patients who act out their feelings in therapeutic settings.[17] But

ETHNIC BIAS IN THE COURTS, EQUAL JUSTICE: ELIMINATING THE BARRIERS 163-64 (Sept. 1994) (final report) [hereinafter MASSACHUSETTS REPORT] (explaining that most educational programs have been instituted piecemeal and that the state lacked a "comprehensive plan for education" in many areas); CAL. JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS, at EXEC. SUMMARY 39 (Mar. 23, 1990) (draft report) [hereinafter CALIFORNIA REPORT] (recognizing that judges are resistant to usual programs of bias education and they require "innovative and creative teaching techniques").

12. *E.g.*, CALIFORNIA REPORT, *supra* note 11, at EXEC. SUMMARY 40 (criticizing the prevailing "model of voluntary education" in judicial programming on bias and prejudice).

13. *See infra* Part II.B (discussing debiasing checklists).

14. *Id.*

15. *See infra* Parts IV & VI (discussing mindfulness meditation and psychodrama, respectively, as practiced with attorneys).

16. Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1, 3, 38-45 (2002) (describing programs at Yale, Columbia, and seven other law schools, for example).

17. *See generally* Dana K. Cole, *Psychodrama and the Training of Trial Lawyers: Finding the Story*, 21 N. ILL. U. L. REV. 1, 21-23 (2001) (describing the evolution of standard instructional methods incorporating psychodrama at Gerry Spence's Trial Lawyer's College); James D. Leach et al., *Psychodrama and Trial Lawyering*, TRIAL, Apr. 1999, at 40 (describing

word of these techniques has hardly spread to judges.[18] Few scholars have ventured to tailor these unconventional methods to the unique problems experienced by judges.[19] Because of the myths surrounding legal reasoning, judges who need these alternative methods even more than attorneys, due to the solitary and insulated nature of their profession, have the least support to modify and improve their decision-making.[20]

The techniques presented in this article are not necessarily forms of self-help. At first blush the names of some of the techniques may seem intimidating. One might hear the term "psychodrama" and imagine judges in psychiatric wards.[21] Similarly, he might consider "mindfulness meditation," and find it impossible to resist images of Eastern religion or a yogi leading lotus-positioned judges through intense meditation and chanting.[22] He might also recall recent cases in which courts have challenged the reliability of many consciousness-raising exercises in the context of witnesses' recovered memories.[23]

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the benefits of psychodrama, particularly role reversal, as therapy for attorneys).

18. *See infra* Part II.B (describing the dominant method of debiasing by checklist, which can actually harm judges more than help them).

19. While experts sometimes facilitate stress reduction workshops for judges, these common interventions deal mainly with physical and known conditions. *See*, *e.g.*, Isaiah M. Zimmerman, *Stress: What it Does to Judges, and How it Can be Lessened*, *in* JUDGE'S HANDBOOK, *supra* note 4, at 117, 129-30 (offering a judicial burnout prevention plan incorporating exercise, rest, and healthy eating). Exercising and eating right, which is usually the recommendation of the experts, will probably do very little to combat racial stereotypes, for example. While some scholars suggest proactive and innovative interventions, only a small number of educational programs have begun to implement such methods of education. *See infra* pp. 121-122.

20. *See infra* Part II (describing the prevailing myth that legal reasoning methods will assist judges). Note the pleas of one judge who desired more effective training:

> [O]ne of the things is to do studies and get the word out there that we judges need some education, we need to better understand what we are doing when we preside over trials. . . . [T]he system is so rigid and resistant to change, and if anybody can change the system and make it better, it's judges. We have the authority. We decide what goes on in our courtroom [and] [u]nfortunately, so many judges are motivated to do what they do because of appellate review.

The Appearance of Justice: Juries, Judges and the Media Transcript, 86 J.CRIM. L & CRIMINOLOGY 1096, 1123 (Spring 1996).

21. *Cf.* Cole, *supra* note 17, at 38 (describing a stigma related to the fact that mental health professionals regularly use the technique with "severely traumatized clients").

22. *Cf.* Riskin, *supra* note 16, at 27 (discussing connections between mindfulness meditation and the Buddha's teachings).

23. Julie M. Kosmond Murray, Comment, *Repression, Memory, and Suggestibility: A Call for Limitations on the Admissibility of Repressed Memory Testimony in Sexual Abuse Trials*, 66 U. COLO. L. REV. 477, 510-11 (1995) (discussing cases, such as *Mateau v. Hagen*, No. 91-2-08053-4 (Wash. King Cty. Sup. Ct. 1991), in which courts doubted the reliability of

While the varied techniques discussed below have assisted all types of people from savants to psychiatric patients, in the context of judging, the proposed techniques are preventive in nature. They do not presume the existence of a judicial flaw. They exist as forms of fairness insurance or decisional enhancement akin to methods of creative thinking in the context of business decision-making. While no judge is presumed biased, these techniques can ensure fairness in two distinct ways. First, the techniques are tools the judge can use if there is a rare occasion when harmful subconscious influences are actually present. Second, knowledge of and experience with these methods can help any judge become more aware of his unique way of drawing on personal experience. Because, by their nature, subconscious influences are unpredictable, the few hours it would take to learn these methods far outweigh the costs of ignoring their existence.

The proposed methods are amenable to the profession of judging because they require the participation of judges alone, rather than the guidance of a coach or mental health practitioner, for example. Judges can complete the exercises from the solitude of their chambers or other private and comfortable places. Furthermore, the methods are designed to meet the time constraints regularly faced by judges. None of the methods require more than thirty-minutes time when applied to any specific case.

The lack of a self-checking mechanism for judges is a significant problem because their decisions influence the lives of parties in a case, the parties' families, the parties' attorneys, and society at large, not to mention the judges themselves. To provide necessary guidance, Part II of this article begins with a single definition of bias rather than the numerous alternatives courts attempt to address piecemeal.[24] While "judicial bias" can be defined in a number of ways,[25] this article recognizes that all of the definitions address the *symptoms* of a biasing process rather than the biasing *process* itself. The reasons why the judge predetermines the outcome of a case, bases a decision on the way a party looks, or looks beyond the facts presented by the parties, are all encompassed in a single explanation: the judge has stopped evaluating information prematurely while mak-

clinical techniques including "psychodrama, age regression, guided imagery, visualization, trance work, and bioenergetics").

24. *See infra* Part II.C (describing the process of "unhealthy satisficing").

25. *Id.*

ing a decision.[26] Accordingly, the common solution to all variations of judicial bias is to provide judges with methods that permit them to consider a greater number of alternatives when doing their jobs.

Part III begins by exploring the characteristics of self-awareness before addressing techniques to identify and neutralize specific biases. Just like medical professionals, judges can use a form of diagnosis to determine whether specific techniques are more suitable than others.[27] For judges, self-awareness is best understood in the context of phenomenology. The phenomenological approach to researching any question demands that the researcher observes a phenomenon first-hand before reaching conclusions or finalizing theories.[28] To conduct this type of research, phenomenologists must recognize their own assumptions and set them aside before commencing any scholarly inquiry.[29] While phenomenology is different from judging in the way judges must rely on settled precedents rather than treating each new case as if none existed before, judges are still expected to set aside many of their personally held beliefs and experiences in the same manner as the phenomenologist.

In texts that describe the process of conducting phenomenological research, this process has been explored in great depth. Authorities have described self-awareness in terms of seven components of the researcher's "life-world." This Part explains these seven categories in detail and links each one to particular problems noted by judges.[30] For example, one component of the life-world is "project."[31] This component deals with the judge's motivation for hearing a certain type of case. Consideration of the project component asks the judge to estimate where a case falls along the spectrum of types of cases he

26. *Id.*

27. *Id.* at 129 (comparing common problems of judges to those of radiologists).

28. *See generally* BARNEY G. GLASSER & ANSELM L. STRAUSS, THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH (1967) (describing experimental processes); DON IHDE, EXPERIMENTAL PHENOMENOLOGY: AN INTRODUCTION (1977) (describing experimental processes). When conducting such research, "[t]he phenomenological stance is more difficult to come by . . . it [normally] demands the unlearning of much that we have learned, abandoning habits of thought deeply engrained in our consciousness." HELMUT R. WAGNER, PHENOMENOLOGY OF CONSCIOUSNESS AND SOCIOLOGY OF LIFE-WORLD: AN INTRODUCTORY STUDY 9 (1983).

29. *See infra* Part III.D (discussing the concept of "phenomenological bracketing" or "epoché").

30. *See generally* Peter Ashworth, The Phenomenology of the Lifeworld and Social Psychology (unpublished manuscript, on file with the author); *see also* Part III.C (applying the dimensions of the life-world to judges).

31. Ashworth, *supra* note 30, at 21-22.

would and would not want to hear in an ideal world.[32] If the judge feels as though the present dispute is not the type of case that motivated him to become a judge, this negative disposition may cause automatic thoughts and other unintended reactions. This Part directs judges to diagnose their ability to be impartial by searching for cues or sensations of discomfort in each of the seven life-world categories. If judges who easily lose interest in cases or overlook details place these symptoms within the category of project, they will have an arsenal of techniques available to address such influences.

Parts IV to VIII introduce judges to specific theories from the disciplines of clinical psychology, drama, creative thinking, and critical thinking. While the varied disciplines have traditionally involved different professionals, from businessmen to medical doctors, certain techniques that enhance their self-awareness and limit their biases will transcend the differences between professions and help everyone who applies them. For example, therapists have recognized that techniques in psychodrama allow patients to realize their own impressions of other people and how those people correspondingly see the patients.[33] Scholars in business decision-making and creative thinking have proposed the same methods in non-clinical settings to achieve similar results.[34] This article grasps on to the most effective techniques from numerous disciplines and applies them to the common problems faced by judges on a daily basis. Unlike any of the existing curricula for judicial debiasing, the following sections provide step-by-step instructions on the implementation of every method introduced. Rather than theorizing that specific methods will assist all judges in a uniform way, this article proceeds from the assumption that judges must trust their own intuition when using methods of self-awareness; it offers many techniques with the expectation that individual judges will find some exercises more appealing than others.[35]

32. For example, is a particular case before the judge associated with those cases that the judge enjoys hearing, or ones that the judge would rather avoid? For further discussion of this component of awareness as it applies to judges, see *infra* Part III.C.6.

33. *E.g.*, ROBERT J. LANDY, DRAMA THERAPY: CONCEPTS, THEORIES AND PRACTICES 141 (1994) ("The role reversal provides breathing space through a shift in perspective. The protagonist who is too closely identified with his role, and thus too much the actor, achieves distance as he takes on the role of the other and becomes an observer of himself.").

34. *E.g.*, JACQUELYN WONDER & PRISCILLA DONOVAN, WHOLE-BRAIN THINKING: WORKING FROM BOTH SIDES OF THE BRAIN TO ACHIEVE PEAK JOB PERFORMANCE 105 (1984) (describing the "inside out" process, which directs a person to become another person).

35. As Fred L. Miller explained in his method to meditation, "you may not like all these techniques, or even half of them. If you like one, however, then that's the one for you[!]"

Such an orientation will assist judges who have different experiences and decision-making styles.

II. DEFINING "JUDICIAL BIAS" FROM A PRACTICAL STANDPOINT

Society expects judges to display professionalism by checking their emotions at the courthouse door and being impartial as they review and decide cases.[36] A number of regulations which govern judicial conduct codify these expectations:

- Canon 3 of the American Bar Association's Code of Judicial Conduct requires that "[a] judge shall perform judicial duties without bias or prejudice."[37]
- The United States Code requires a federal judge to disqualify himself from the bench "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding."[38]
- Documents, such as the Proposed Ohio Judicial Creed, attest: "I know that a judge must not only be fair but also give the appearance of being fair."[39]

These mandates require judges to take affirmative steps to eliminate bias and partiality; they must scrutinize their own decisions[40] and make themselves aware of subconscious influences on their decision-making.[41]

While these mandates to "know thyself" may represent our desires for model judges, we cannot take them literally because they set impossible goals. As long as judges are human, they are subject to

FRED L. MILLER, HOW TO CALM DOWN: THREE DEEP BREATHS TO PEACE OF MIND 42 (2002).

36. ROBERT E. KEETON, KEETON ON JUDGING IN THE AMERICAN LEGAL SYSTEM § 1.1, at 6 (1999) ("The judge is not free to make the choice he or she would personally prefer, if it conflicts with . . . manifested community standards.").

37. MODEL CODE OF JUDICIAL CONDUCT § 3B(5) (1990) [hereinafter JUDICIAL CODE].

38. 28 U.S.C. § 455(b)(1) (2005).

39. JUDICIAL RESPONSIBILITY COMMITTEE, OHIO SUPREME COURT COMM'N ON PROFESSIONALISM, PROPOSED JUDICIAL CREED (June 26, 2000).

40. *E.g.*, ARK. CODE OF JUDICIAL CONDUCT Canon 3(B)(5) cmt., *available at* http://courts.state.ar.us/rules/jcon3.html (last visited Oct. 7, 2005) ("A judge must be alert to avoid behavior that may be perceived as prejudicial.").

41. "The conscientious judge will, as far as possible, make himself aware of his biases . . . and by that very self-knowledge, nullify their effect." *In re* J.P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943); *accord* Liteky v. United States, 510 U.S. 540, 562 (1994) (Kennedy, J., concurring).