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Judicial Decisionmaking, Empathy, and the Limits of Perception

Nicole E. Negowetti

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JUDICIAL DECISIONMAKING, EMPATHY, AND THE LIMITS OF PERCEPTION

Nicole E. Negowetti*

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I. INTRODUCTION

This Article explores the effects of a judge’s prior assumptions, values, and experiences on judicial decisionmaking.¹ There is now a

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1. There is much literature regarding juries, biases, and group dynamics; however, “[i]n the day-to-day operation of the legal system, judges are much more important than juries.” Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 781 (2001) [hereinafter Guthrie, *Inside the Judicial Mind*]. Judges decide roughly as many cases at trial as juries do, they determine the outcome of roughly seven times as many cases as juries by ruling on dispositive motions, and they often play an active role in settling cases. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127 n.7 (1992). Even cases ultimately resolved by juries are regulated by judges. They determine what evidence juries will be allowed to hear and interpret and instruct juries on the law they are to apply. Despite its importance, far less attention has been devoted to sources of judicial error and bias. *Id.* See Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 4 (1994) (noting with surprise that “few studies analyze the manner and method of the judiciary’s decision-making process”). This Article focuses on judges’ decisionmaking. “[T]his topic—implicit bias and its role on the judiciary—is a topic on the horizon and is likely to become an area of significant discussion and study in the very near future.” John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1, 10 (2010).

broad consensus that the impact of past experiences and prior assumptions, even those of which we are not conscious, can have great power in directing all humans' present perceptions, judgments, feelings, and behaviors.² However, the notion that judges are subject to the effects of cognitive shortcuts remains controversial because of the implications to our justice system and the rule of law. I challenge the assumption and aspiration of neutrality in judging and propose an approach in line with emerging research from cognitive science. If judges premise their decisionmaking on the notion that there is some objective and universal perspective, they are ignoring fundamental principles of cognition. As Judge Cardozo wrote, "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."³

Cognitive science has revealed that many of our patterns of acting and thinking are not governed by reason, but rather are ingrained, unconscious, or triggered by our autonomic nervous system.⁴ Decisions based on what we believe to be careful, neutral, and logical reasoning, may actually be guided by unexamined and often unseen frameworks of thinking.⁵ There is substantial experimental evidence suggesting that human perception is selective.⁶ Underlying our thinking is a complex system of unconscious judgments of people, places, and situations, of which we are unaware. Humans create blueprints based on prior experiences to evaluate new situations, people, and ourselves. We rely on mental shortcuts, which psychologists often refer to as "heuristics" or "schemas," to make complex decisions.⁷ Reliance on these heuristics facilitates sound and efficient judgment most of the time, but it can also create cognitive illusions that produce erroneous and biased judgments.⁸ Because much of our thinking occurs on a subconscious level, we are often unaware of the actual causes of our own behavior, thinking, emotions, perceptions, and biases.⁹ "Just as certain patterns of visual

2. ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 211 (1999).

3. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).

4. Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225, 1238 (2004).

5. Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 S. CAL. L. REV. 1103, 1217 (2004).

6. Nugent, *supra* note 1, at 7.

7. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974).

8. *Id.* Chris Guthrie et al., *Judging by Heuristic Cognitive Illusions in Judicial Decision Making*, 86 JUDICATURE 44, 44 (2002).

9. Timothy D. Wilson & Nancy Brekke, *Mental Contamination and Mental Correction:*

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."¹⁰

It is human nature to desire and believe that we act free of prejudices and biases. For judges, it is also a matter of professional identity to be impartial arbiters of problems presented for resolution. "Few would admit to making biased decisions, especially ones motivated by negative biases."¹¹ For example, most, if not all, judges believe that they are fair and objective and that they have decided cases in a manner that is in harmony with the facts and pertinent legal issues involved.¹²

The public's notion of justice through a fair and unbiased system also relies upon the "impartiality" of judges, defined by the American Bar Association's Model Code of Judicial Conduct as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge."¹³ These expectations of impartiality are reflected in the rules governing judges. There is an expectation, a mandate, that judges shed their biases when they take the bench. For example, Canon 2 of the American Bar Association's Model Code of Judicial Conduct requires that "[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice."¹⁴ 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."¹⁵ Model Code Rule 2.2 directs that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."¹⁶ A comment accompanying this rule adds that "[a]lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves

Unwanted Influences on Judgments and Evaluations, 116 PSYCHOL. BULL. 117, 121 (1994).

10. *Id.*

11. Irwin & Real, *supra* note 1, at 10.

12. Nugent, *supra* note 1, at 5. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009) [hereinafter Rachlinski, *Unconscious Racial Bias*] (reporting that 97 percent of judges in an educational program rated themselves in the top half of the judges attending the program in their ability to "avoid racial prejudice in decisionmaking").

13. MODEL CODE OF JUD. CONDUCT Terminology at 4 (2007).

14. MODEL CODE OF JUD. CONDUCT R. 2.3(A) (2007).

15. 28 U.S.C. § 455(b)(1) (2005).

16. MODEL CODE OF JUD. CONDUCT R. 2.2 (2007).

or disapproves of the law in question.”¹⁷

However, as recent studies have demonstrated, even highly qualified judges inevitably rely on cognitive decisionmaking processes that can produce systematic errors in judgment. “Judges, it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systematic errors in judgment.”¹⁸ Indeed, judges, like everyone else, are the product of their race,¹⁹ ethnicity, nationality, socioeconomic status, gender,²⁰ sexuality, religion, and ideology. Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.²¹ However, this ideal does not coincide with the findings of behavioral scientists, whose research has shown that the human mind is a complex mechanism, and regardless of conscious or avowed biases and prejudices, most people, no matter how well educated or personally committed to impartiality, harbor some unconscious or implicit biases.²² Through a blind faith in their impartiality, judges may gain a false sense of confidence in their decisions.²³ They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs, and predilections.²⁴ A federal district

17. MODEL CODE OF JUD. CONDUCT R. 2.2 cmt. [2] (2007).

18. Guthrie, *Inside the Judicial Mind*, *supra* note 1, at 778; *see also* Jeffrey J. Rachlinski, *Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61 (2000) (noting that judges are susceptible to various biases). Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420, 420 (2007) (“[D]espite their fancy titles, their magisterial robes, and their elevated stature in the courtroom, judges are human. And like all humans, judges err.”); *see generally* Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).

19. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009) (finding that black judges and white judges perceive racial harassment differently, which means that decisionmaking process is not completely objective; judges bring their personal experiences or lack of experience to bear when deciding cases).

20. Neil A. Lewis, *Debate on Whether Female Judges Decide Differently Arises Anew*, N.Y. TIMES, June 3, 2009, <http://www.nytimes.com/2009/06/04/us/politics/04women.html> (analyzing Justice Ginsburg’s arguments in a Supreme Court case involving the appropriateness of the strip search of a thirteen-year-old girl by school authorities; her experience as a female influences her interpretation of the issues and brings a new perspective that would not have been expressed in her absence).

21. Nugent, *supra* note 1, at 5.

22. *Id.* (citing Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 153-60 (D. Kahneman et al. eds., 1982)).

23. Nugent, *supra* note 1, at 5.

24. *Id.* *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897) (noting that the basis for judicial decisionmaking often “lies [in] inarticulate and

court judge explained how his self-confidence in colorblindness was shaken after he received the results of the Implicit Association Test (“IAT”)²⁵ that measures implicit racial bias.

I was eager to take the test. I knew I would “pass” with flying colors. I didn’t. Strongly sensing that my test performance must be due to the quackery of this obviously invalid test, I set out to learn as much as I could about both the IAT and what it purported to measure: implicit bias. After much research, I ultimately realized that the problem of implicit bias is a little recognized and even less addressed flaw in our legal system. . . . I have discovered that we unconsciously act on implicit biases even though we abhor them when they come to our attention. Implicit biases cause subtle actions, . . . [b]ut they are also powerful and pervasive enough to affect decisions about whom we employ, whom we leave on juries, and whom we believe. Jurors, lawyers, and judges do not leave behind their implicit biases when they walk through the courthouse doors.²⁶

An understanding of how humans comprehend the world—how we process new information and how our underlying values, beliefs, and experiences translate new experiences²⁷—necessarily informs our understanding of how judges make decisions. Thus, this Article is a challenge to the myth “that a judge puts on that robe and he says, ‘I am unbiased; I’m going to call the balls and strikes based on where the pitch is placed, not on whose side I’m on. I don’t take sides in the game.’”²⁸

unconscious judgment”).

25. See *infra* Part II.

26. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL’Y REV. 149, 150 (2010).

27. “The application of cognitive science to law rests on the following assumption: Law is a human creation of human minds dwelling in human bodies, in human societies, operating within human cultural practices. And so, to understand how law works, one must know how all these aspects of human experience and thought work.” Mark Johnson, *Law Incarnate*, 67 BROOK. L. REV. 949, 951 (2002).

28. *Sessions Says He’s Looking for Judicial Restraint*, NAT’L J. (May 7, 2009), <http://www.nationaljournal.com/njonline/sessions-says-he-s-looking-for-judicial-restraint-20090507>. In his confirmation hearing Chief Justice Roberts famously stated that “[j]udges are like umpires. Umpires don’t make the rules, they apply them. . . . They make sure everybody plays by the rules, but it is a limited role.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 5 (2005). Perhaps judges are more like umpires, or referees than Chief Justice Roberts realized. A recent study demonstrates that referees are not exempt from implicit biases. See Joseph Price & Justin Wolfers, *Racial Discrimination Among NBA Referees* (Nat’l Bureau of Econ. Research, Working Paper No. 13206, 2007), available at <http://www.nber.org/papers/w13206.pdf> (finding that “more personal fouls are called against players when they are officiated by an opposite-race refereeing crew than when officiated by an own-race crew. These biases are sufficiently large that we find

While Judge Posner asserts that no “knowledgeable person actually believed or believes that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires,”²⁹ and scholars generally acknowledge that “we are all realists now,”³⁰ the script of judicial dispassion, or detachment, remains entrenched in Western jurisprudence.³¹

The idea that a good judge is able to insulate her decisionmaking from any emotional influence is deeply rooted in European Enlightenment notions of rationality and objectivity, to which emotion was thought to be opposed. As Thomas Hobbes declared in 1651, the ideal judge was portrayed as one who was “divested of all fear, anger, hatred, love, and compassion.”³² Judicial dispassion was claimed to be a “fundamental tenet of Western jurisprudence” because emotionless judging was perceived as necessary to the democratic structure and the “process of taming the self-interested passions of the public.”³³

As Erwin Chemerinsky explains, a view of judicial decisionmaking as purely rational is appealing because

[i]f judges just applied the law in a formalistic way, then results would be a product not of the human beings in the robes, but of the laws themselves. The identity of the judges would have little effect, so long as the individuals on the bench had the intelligence and honesty to faithfully carry out their duties.³⁴

“[T]oo often we are content to believe that bias and prejudice do not

appreciable differences in whether predominantly black teams are more likely to win or lose, based on the racial composition of the refereeing crew.”). See also Erwin Chemerinsky, *Seeing the Emperor’s Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1069 (2006) (“An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by. An umpire’s views should not make a difference in how plays are called; a Supreme Court Justice’s views make an enormous difference.”).

29. RICHARD A. POSNER, *HOW JUDGES THINK*, 78 (2008) [hereinafter POSNER, *HOW JUDGES THINK*].

30. Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 410 (2012). See, e.g., Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 467 (1988) (“All major current schools of thought are, in significant ways, products of legal realism.”).

31. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1488 (2011).

32. THOMAS HOBBS, *LEVIATHAN* 242 (Dutton 1950) (1651) (quoted in Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 40 (1998)).

33. Maroney, *supra* note 31, at 1488.

34. Chemerinsky, *supra* note 28, at 1071. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 181 (1987) (defining legal formalism as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative”).

operate in the sacred sphere of our courts. In the struggle for fairness, such contented disbelief is a very dangerous thing, particularly for judges whose very role it is to be unbiased and fair.”³⁵ However much we may understand on an intellectual level that judges are mere humans, we have a tendency to believe that somehow the process of becoming a judge effects a substantial transformation, and that judges become different from the rest of us. At least implicitly, we impute near-magical properties to the acts of taking an oath and donning a black robe, as if they somehow eliminate one’s susceptibility to all the foibles, biases, and petty jealousies that are the stuff of day-to-day life. “Jerome Frank called this “the myth about the non-human-ness of judges.”³⁶ However, in light of recent decisionmaking studies, this myth is being debunked.³⁷ Cognitive science explains that judicial decisionmaking is subject to a complex array of influences, both conscious and unconscious.

To illustrate how cognitive shortcuts and biases affect decisionmaking, put yourself in the position of a trial judge and consider these three scenarios:

1. Just before 11:00 p.m. on a weekday night, a police officer attempts to pull over a car traveling at seventy-three miles per hour on a road with a fifty-five-mile-per-hour speed limit.³⁸ The driver of the speeding car initiates a high-speed chase lasting six minutes and nine miles, reaching speeds in excess of eighty-five miles per hour, and side-swiping another car in the parking lot of a closed shopping mall.³⁹ During the chase, which was videotaped by a police in-car camera, police officers blocked off intersections to protect other motorists and to prevent the fleeing driver from entering residential neighborhoods,⁴⁰ video⁴¹ of the chase reflects that it did not pass any pedestrians, sidewalks, or residences.⁴² The pursuit ended when a deputy rammed into the driver’s rear bumper, causing him to spin out of control and crash.

35. Nugent, *supra* note 1, at 3.

36. Chad M. Oldfather, *Judges As Humans: Interdisciplinary Research and the Problems of Institutional Design*, 36 HOFSTRA L. REV. 125, 127 (2007) (quoting JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 147 (1949)); see *United States v. Ballard*, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting) (pointing out that “dispassionate judges” are “mythical beings” like “Santa Claus or Uncle Sam or Easter bunnies”).

37. Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 193 (2012).

38. *Scott v. Harris*, 550 U.S. 372, 374 (2007).

39. *Id.* at 375.

40. *Id.* at 392-93 (Stevens, J., dissenting).

41. *Scott*, 550 U.S., Video Resources,

http://www.supremecourtus.gov/opinions/video/scott_v_harris.rmvb.

42. *Scott*, 550 U.S. at 393 (Stevens, J., dissenting).

The driver suffered a broken neck that left him a quadriplegic.⁴³

Was the deputy's use of deadly force to terminate the high-speed chase reasonable, so as to defeat a claim under 42 U.S.C. § 1983?⁴⁴

2. On a daily basis, the plaintiff and other female employees encountered pictures of nude or partially clad women displayed by male coworkers in common work areas.⁴⁵ One male coworker regularly made vulgar and obscene comments, and specifically remarked of the plaintiff, "All that bitch needs is a good lay," and called her "fat ass."⁴⁶ Unlike male salaried employees, the plaintiff did not receive free lunches, free gasoline, a telephone credit card, or entertainment privileges, was not permitted to take male customers to lunch, nor was she invited to the company's weekly golf matches.

Was the harassment experienced by the plaintiff sufficiently severe or pervasive so as to alter the terms of her employment and create an abusive working environment?⁴⁷

3. On your way home from work in December, you pass by your town's municipal building and notice a nativity scene and a lighted menorah.

Does this display reflect the town's endorsement of religion?

In reaching your conclusions about these situations, you may have struggled with questions such as *When is a use of deadly force "reasonable"?*, *What makes a work environment "abusive"?*, and *What does it mean for a town to "endorse" religion?* These sorts of questions, as challenging as they may be, are encumbered in the law with an additional layer of difficulty. That is, the law often requires a judge's determination not of her own answers to these types of questions, but her assessment of how a "reasonable person" would answer them. In certain contexts, such as rulings on motions for summary judgment or judgment notwithstanding the verdict, judges must determine whether *any* reasonable person could reach a particular conclusion.

Is it possible that a "reasonable person's" evaluation of the above scenarios would differ from your own? Is it possible to fathom the perspective of a reasonable person, let alone distinguish it from your

43. *Id.* at 375-76.

44. *See id.* at 376.

45. *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 623-24 (6th Cir. 1986) (Keith, J. dissenting).

46. *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 423 (E.D. Mich. 1984).

47. *See* Judge D. Brock Hornby, U.S. District Court for the District of Maine, Draft Pattern Jury Instructions for Cases of Employment Discrimination (Disparate Treatment) 28 § 2.3 (2009).

own?

The reasonable person is the “common law’s most enduring legal fiction.”⁴⁸ In the context of negligence and criminal law, the reasonable person invokes a standard of ordinariness or normalcy.⁴⁹ In discrimination and sexual harassment cases, the reasonable person can be understood as a neutral standard to correct for a judge’s own beliefs and attitudes.⁵⁰ As described by Dean Prosser, the reasonable person standard has been carefully crafted to formulate one standard of conduct for society:

The standard of conduct which the community demands must be an external and objective one, rather than the individual judgment, good or bad, of the particular actor; and it must be, so far as possible, the same for all persons, since the law can have no favorites. . . .

The courts have gone to unusual pains to emphasize the abstract and hypothetical character of this mythical person. He is not to be identified with any ordinary individual, who might occasionally do unreasonable things; he is a prudent and careful person, who is always up to standard. . . . [H]e is rather a personification of a community ideal of reasonable behavior, determined by the jury’s social judgment.⁵¹

Despite its ubiquity in the law, critics have long asked whether the reasonable person standard is “simply a vehicle for judicial discretion.”⁵² As Professor Alafair Burke commented, “absent statistical evidence establishing the empirical reality, all decision-makers—whether Supreme Court [J]ustices, law professors, or jurors—are tempted to substitute their own judgment of reasonableness both for the majority’s and for what is normatively ‘right.’”⁵³ Put similarly, Linda Krieger and Susan Fiske have written, “[i]n discrimination cases, as elsewhere, judges are constantly using ‘intuitive’ or ‘common sense’ psychological theories in the construction and justification of legal doctrines and in their application to specific legal disputes.”⁵⁴ These theories stem in part

48. Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1233 (2010). See Victoria Nourse, *After the Reasonable Man: Getting over the Subjectivity/Objectivity Question*, 11 NEW CRIM. L. REV. 33, 34 (2008) (calling the “reasonable man” an “anthropomorphic institutional heuristic”).

49. Moran, *supra* note 48, at 1236.

50. *Id.* at 1237.

51. PROSSER & KEETON, TORTS (5th ed.), § 32, at 173-75.

52. Moran, *supra* note 48, at 1234.

53. Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1052 (2005).

54. Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1006 (2006).

from judges' racial and gender identities and experiences.⁵⁵ As of 2010, federal judges were 77 percent male and more than 80 percent white.⁵⁶ Fifty-one of the 165 active judges currently sitting on the thirteen federal courts of appeals are female (about 31 percent).⁵⁷ Approximately 30 percent of active U.S. district court judges are women.⁵⁸ In state high courts, 87 percent of judges are white.⁵⁹ In state trial courts, 86 percent of judges are white.⁶⁰ Although juries may be more diverse, judges can—and often do—overtake jury verdicts or make pretrial rulings that prevent plaintiffs from taking their cases to a jury. Therefore, understanding judicial decisionmaking is the key to understanding the outcome of particular cases and the development of law.

In Part II, this Article will explore the cognitive science research regarding decisionmaking and implicit bias to reveal how each of us develops values, intuitions, and expectations below the level of our consciousness that powerfully affect both our perceptions and our judgments. Although there are many types of cognitive biases and heuristics involved in decisionmaking, for purposes of this Article, I focus on implicit biases towards various social groups. “[E]xplicit” biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate.⁶¹ By contrast, “implicit” biases are attitudes and stereotypes that are not consciously accessible through introspection and are more likely to emerge during stressful situations or when someone is forced to make a decision in a short amount of time. Many of these biases are pervasive and not in line with our beliefs. If we find out that we have them, we may indeed reject them as inappropriate.⁶²

Part III will summarize recent studies regarding judges, cognitive illusions, and implicit bias to demonstrate that a judge's past

55. *Id.* at 1004 (discussing growing scholarly concern with “uncontrolled application of . . . subtle ingroup preferences”).

56. Calculations are based on data from the Biographical Directory of Judges, Federal Judicial Center, U.S. Courts, <http://www.uscourts.gov/JudgesAndJudgeships/BiographicalDirectoryOfJudges.aspx> (last visited Oct. 25, 2013).

57. *Id.*

58. *Id.*

59. ABA Standing Committee on Judicial Independence, *National Database on Judicial Diversity in State Courts*, ABA (June 2010), <http://apps.americanbar.org/abanet/jd/display/national.cfm>.

60. *Id.*

61. Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1132 (2012) [hereinafter Kang, *Courtroom*].

62. *Id.*

experiences, prior assumptions, and resulting cognitive schemas, or cognitive shortcuts, do influence her decisionmaking, whether or not she is aware of it. Certainly, attempting to analyze what sort of process is “really” going on when a judge makes a determination is “a confounding and complicated endeavor.”⁶³ “Deciding any given case likely requires a judge to rely on a combination of different abilities and knowledge including a firm understanding of rules of law, statutes, and precedent; an appreciation for legal theory and policy; and an incorporation of common sense and judgment informed by an empathetic understanding of context.”⁶⁴ Although cognitive science cannot provide a comprehensive understanding of how judges make decisions,⁶⁵ it does explain one piece, albeit a very important one, of the process. My aim is to shed some light on one aspect of judicial decisionmaking and offer a theory of how to improve upon those decisions by recognizing and then countering implicit biases that have been demonstrated to corrupt judgment.⁶⁶

In light of the cognitive science research, Part IV proposes the tool of judicial empathy to mitigate the inevitable implicit biases each judge brings to the bench. I join the scholars who argue that empathy, perspective-taking, or actively imagining the world from another’s vantage point, is a valuable part of decisionmaking.⁶⁷ Empathizing does not necessarily mean ruling in one’s favor; rather, it demonstrates a judge’s consideration of both parties’ perspectives, appreciation for their situation, and understanding of the decision’s lasting impact.

Part V discusses judicial empathy in the context of Fourth

63. Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2109 (1989).

64. *Id.* See POSNER, HOW JUDGES THINK, *supra* note 29, at 117. Posner argues that when confronted with legal questions lacking determinative answers judges need to consult “good judgment,” which he defines as “an elusive faculty best understood as a compound of empathy, modesty, maturity, a sense of proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality and common sense.”

65. See LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 2 (1997) (“Judicial behavior presents a complex puzzle.”).

66. See Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 992 (2008) (“[W]e believe that implicit bias is a serious problem and that it is exceedingly important for the law to attempt to address implicitly biased behavior.”). See also *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (1987), *aff’d in relevant part* 490 U.S. 228 (1989). (“Unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.”).

67. *E.g.*, Professor Susan Bandes has been prolific in exhorting the value of empathy in judicial decisionmaking. See Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 10 (2011) [hereinafter Bandes, *Moral Imagination*]. See also, Catherine Gage O’Grady, *Empathy and Perspective in Judging: The Honorable William C. Canby, Jr.*, 33 ARIZ. ST. L.J. 4 (2001).

Amendment, discrimination, criminal, and Establishment Clause cases in which courts apply reasonableness standards. As Professor Robin West argues, “the ability to understand the goals of others is of the essence of the art of judging.”⁶⁸ The cases discussed in Part V illustrate that a judge’s work requires a capacity to understand the challenges faced by a wide range of potential litigants from across the spectrum of our society.⁶⁹ Judges who make no attempt to exercise empathy and “are likely to assume that their own perspective is universal, rather than to make the imaginative effort to understand what motivates others,” are “mind-blind.”⁷⁰ Judges who are unable to assess problems from any vantage point other than their own may not be capable of administering justice equally and impartially.

The United States Supreme Court has held that “[a] fair trial in a fair tribunal is a basic requirement of due process.”⁷¹ Fundamental to the notion of a fair trial and tribunal is the principle that a judge shall apply the law impartially and free from the influence of any personal biases.⁷² However, judges disserve themselves and the system if they presume that bias and prejudice do not enter the decisionmaking process to some degree. As Jerome Frank observed, “to recognize the existence of such prejudices is a part of wisdom.”⁷³ A discussion of implicit bias and empathy is significant because “[s]o long as we cling to half-truths about the judicial function, we render irrelevant otherwise important questions about judges and judging, and we forgo pursuit of ‘the needed corrective of an ideal of impossible objectivity.’”⁷⁴

68. Robin West, *Law and Fancy*, 95 MICH. L. REV. 1851, 1857 (1997).

69. See O’Grady, *supra* note 67, at 5-6 (describing the process of incorporating empathy in decisionmaking).

From disgruntled employees to disenfranchised schoolchildren, from World War II vets to homosexual government workers, Canby listens to them and hears them. That is not to say that the poor or disenfranchised always receive Canby’s favorable vote—they do not. But it does mean that he will attempt seriously to appreciate the human context of their situation while applying legal rules and principles to the task of deciding their dispute. He appreciates the importance of their perspective and he seems to understand that an important part of his job is to try, to the best of his ability, to imagine their situations.

Id. at 5-6.

70. Bandes, *Moral Imagination*, *supra* note 67, at 9-10.

71. *In re Murchison*, 349 U.S. 133, 136 (1955) (the Constitution requires that hearings take place before an impartial tribunal); *Tumey v. Ohio*, 273 U.S. 510, 512 (1926) (“A trial before a tribunal financially interested in the result of its decision constitutes a denial of due process of law.”).

72. Nugent, *supra* note 1, at 3.

73. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 414 (1949).

74. CARDOZO, *supra* note 3, at 168-69.

II. COGNITION AND DECISIONMAKING

Scientists who study human reasoning across a range of cognitive domains such as learning, decisionmaking, and social cognition, have increasingly converged on the idea that reasoning occurs via a “dual process.”⁷⁵ According to such approaches, people employ two cognitive systems.⁷⁶ System 1 is rapid, intuitive, and error-prone; System 2 is more deliberative, calculative, slower, and often more likely to be error-free.⁷⁷ Many implicit mental processes function outside of one’s conscious focus and are rooted in System 1, including implicit memories, implicit perceptions, implicit attitudes, and implicit stereotypes.⁷⁸ System 1 mental processes affect social judgments, but operate without conscious awareness or conscious control.⁷⁹ “These implicit thoughts and feelings leak into everyday behaviors such as whom we befriend, whose work we value, and whom we favor— notwithstanding our obliviousness to any such influence.”⁸⁰ Thus, “actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”⁸¹ According to Nobel Prize-winning economist and psychologist Daniel Kahneman,

When asked what you are thinking about, you can normally answer. You believe you know what goes on in your mind, which often consists of one thought leading in an orderly way to another. But that is not the only way the mind works, nor indeed is that the typical way. Most impressions and thoughts arise in your conscious experience without your knowing how they got there. You cannot trace how you came to the belief that there is a lamp on the desk in front of you, or how you detected a hint of irritation in your spouse’s voice on the telephone, or how you managed to avoid a threat on the road before you

75. See generally, DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

76. *Id.*

77. *Id.* at 20-22; Jolls & Sunstein, *supra* note 66, at 975.

78. Jolls & Sunstein, *supra* note 66, at 974.

79. Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 467 (2010). Implicit social cognition (“ISC”) is a field of psychology that examines the mental processes that affect social judgments but operate without conscious awareness or conscious control. See generally Kristin A. Lane, Jerry Kang & Mahzarin Banaji, *Implicit Social Cognition and Law*, in 3 ANN. REV. LAW & SOC. SCI. 427 (2007). The term was first used and defined by Anthony Greenwald and Mahzarin Banaji. See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCHOL. REV. 4 (1995).

80. Kang & Lane, *supra* note 79, at 467-68.

81. Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006).

became consciously aware of it.⁸²

Implicit bias can be understood in light of existing analyses of System 1 processes.⁸³ Implicit biases are unconscious mental processes based on implicit attitudes or implicit stereotypes that are formed by one's life experiences and that lurk beneath the surface of the conscious.⁸⁴ They are automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly in the relevant tests, that people have no time to deliberate.⁸⁵ It is for this reason that people are often surprised to find that they show implicit bias. Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.⁸⁶ Although System 2 articulates judgments and makes choices, it often endorses or rationalizes ideas and feelings that were generated by System 1.⁸⁷ It is also "not a paragon of rationality," but is limited by available knowledge based on past experiences.⁸⁸

Implicit biases are rooted in the fundamental mechanics of the human thought process, where people learn at an early age to associate items that commonly go together and to logically expect them to inevitably co-exist in other settings: "thunder and rain, for instance, or gray hair and old age."⁸⁹ The tendency to associate related concepts with each other and the ability to answer questions such as "What is it?," "How does it work?," "Why is it here?," and "What will it do?"⁹⁰ is understood through categories and "cognitive structures" called

82. KAHNEMAN, *supra* note 75, at 4.

83. Jolls & Sunstein, *supra* note 66, at 975.

84. *Id.*

85. *Id.*

86. *Id.*

In a post-civil rights era, in what some people exuberantly embrace as a post-racial era, many assume that we already live in a colorblind society . . . that [we] have learned well from Martin Luther King, Jr. and now judge people only on the content of their character, not by their social categories. In other words, we see through colorblind lenses. This convenient story is, however, disputed. . . . We now have accumulated hard data, collected from scientific experiments, with all their mathematical precisions, objective measurements, and statistical dissections—for better and worse. The data force us to see through the facile assumptions of colorblindness.

Kang & Lane, *supra* note 79, at 519-20.

87. KAHNEMAN, *supra* note 75, at 415 (explaining that "You may not know that you are optimistic about a project because something about its leader reminds you of your beloved sister, or you dislike a person who looks vaguely like your dentist.").

88. *Id.*

89. Mahzarin R. Banaji et al., *How (Un)Ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 58.

90. Chen & Hanson, *supra* note 5, at 1131.

schemas.⁹¹ These schemas are “mental blueprints” that allow an individual to understand new people, circumstances, objects, and their relationships to each other by using an existing framework of stored knowledge based on prior experiences.⁹² To simplify the complex flood of information from the world, we tend to categorize objects, people, and occurrences into groups, types, or categories—that is, into schemas—so that we can treat non-identical stimuli as if they were equivalent. Humans sort objects, people, and occurrences according to similarities in their essential features, forming natural mental categories about “kinds” or “types” of guns, men, women, parties, etc. Schemas allow us to structure and give coherence to our general knowledge about people and the social world, providing expectations about typical patterns of events and behavior and the range of likely differences between people and their characteristic attributes.⁹³ Put another way, these mental blueprints sort our experiences and acquired knowledge of the world and organize them into categories that function like containers.⁹⁴ But for these containers, our ideas would be scattered like marbles on the floor.⁹⁵

Schemas are cognitive shortcuts allowing us to comprehend new situations and ideas without having to draw inferences and to understand relationships for the first time.⁹⁶ When we see or think of a concept, the schema is activated unconsciously. The schema brings to mind other information that we associate with the original concept. “We may automatically infer people’s character from their behavior, automatically experience affective reactions to a variety of objects, automatically behave in line with traits cued by recent experiences, and automatically engage in a variety of other mental processes as well.”⁹⁷ For example, if an individual is introduced as a professor, a “professor schema” may be activated and we might associate this person with wisdom or authority, or past experiences of a professor.

“Schemas influence every feature of human cognition, affecting not only what information receives attention, but also how that information

91. *Id.* (quoting Shelley E. Taylor & Jennifer Crocker, *Schematic Bases of Social Information Processing*, in 1 SOCIAL COGNITION: THE ONTARIO SYMPOSIUM 89, 114-15 (E. Tory Higgins et al. eds., 1981)).

92. Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994).

93. Nugent, *supra* note 1, at 10.

94. Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 265 (2009).

95. *Id.* at 265.

96. *Id.*

97. KUNDA, *supra* note 2, at 265-88.

is categorized, what inferences are drawn from it, and what is or is not remembered.”⁹⁸ People have schemas for everything, including schemas for ourselves (self-schemas), for other people (people schemas), roles people assume (role schemas),⁹⁹ and event schemas, or scripts, which help us to understand how a process, or event, occurs.¹⁰⁰ Self-schemas contain our knowledge and expectations about our own traits.¹⁰¹ Person schemas represent knowledge structures about characteristics, behaviors, and goals of other individuals.¹⁰² We classify individuals based on their characteristics and the inferences we make based on those traits.¹⁰³ Role schemas help to organize our knowledge about “the set of behaviors expected of a person in a particular social position, and like person schemas, role schemas help us to make sense of and predict people’s characteristics and behaviors.”¹⁰⁴ When we encounter a person, we classify that person into numerous social categories, such as gender, (dis)ability, age, race, and role.¹⁰⁵ For example, people develop racial schemas which trigger implicit and explicit emotions, feelings, positive or negative evaluations, and thoughts or beliefs about the racial category, such as generalizations about their intelligence or criminality.¹⁰⁶ Because our individual experiences create our schemas, each person’s script for a particular situation may be different. People consciously and unconsciously draw on their knowledge, creating different cognitive frames that produce “different information” about the same event.¹⁰⁷ Scripts not only function as cognitive shortcuts that provide meaning to a set of events, but they also reinforce traditional cultural and societal

98. Chen & Hanson, *supra* note 5, at 1131.

99. *Id.* at 1133.

100. *Id.* at 1137. Scripts are in some ways like recipes—helping us interpret both the things we see and the things we do not see. If we observe a person paying a bill and leaving a restaurant, a restaurant script triggers a knowledge of earlier events that have happened: The customer has ordered, been served, and eaten food. *Id.* at 1139.

101. *Id.* at 1134.

102. *Id.* at 1135.

103. *Id.*

104. *Id.* at 1137.

105. Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1499 (2005) [hereinafter Kang, *Trojan Horses*].

106. *Id.*

107. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1118 (2008) (explaining how white and black observers would perceive differently a scenario in which an African-American family is seated near the back of the restaurant and for ten minutes, the parents attempt to get the waiter’s attention to ask for menus and to order food). Professor Robinson predicts that white participants would likely state that they did not consider that the placement of the family’s table might have a racial correlation, while black observers might fill in the informational gaps with the assistance of a schema, such as, “fancy restaurants in suburbs are likely to be a site of discrimination against black customers.” *Id.* at 1118-19.

values. When an individual's cognitive mind unconsciously selects a script within which to interpret the situation, that individual's judgments will be based on the assumptions derived from the social knowledge embedded in the script rather than on the unique characteristics of the particular situation.¹⁰⁸

For example, studies have proven perceptual differences of certain situations among racial groups and between men and women. One such study was conducted by the Heldrich Center for Workplace Development at Rutgers University which interviewed 3,000 employees on various workplace equality issues.¹⁰⁹ Half of the African-American respondents said that "African-Americans are treated unfairly in the workplace," while just 10 percent of white respondents agreed with that statement.¹¹⁰ Thirteen percent of nonblack people of color shared this perception.¹¹¹ There is also evidence from polls, while mixed, which generally suggests that men and women perceive discrimination differently. For example, in 2005, 45 percent of women (and 61 percent of men) said women had equal job opportunities.¹¹²

Understanding "biases" as automatic cognitive shortcuts reveals that the term need not have a pejorative connotation, but rather, "can be either favorable or unfavorable."¹¹³ Our decisions are influenced by "a long litany of biases," most of them unrelated to gender, ethnicity, or race.¹¹⁴ For example, we are inclined to "anchor" numbers, judgments, or assessments that we have been exposed to and use them as a starting point for future judgments, regardless of their accuracy.¹¹⁵ We also suffer from "hindsight bias" and look back at events to overestimate the predictability of those events given our current knowledge.¹¹⁶ A self-serving bias inclines us to make inflated judgments about ourselves, our abilities, or our beliefs.¹¹⁷

108. Berger, *supra* note 94, at 299.

109. Robinson, *supra* note 107, at 1107 (citing K.A. Dixon, Duke Storen & Carl E. Van Horn, John J. Heldrich Ctr. for Workplace Dev., Rutgers Univ., *A Workplace Divided: How Americans View Discrimination and Race on the Job* 5 (2002), http://www.heldrich.rutgers.edu/uploadedFiles/Publications/Work_Trends_020107.pdf).

110. *Id.*

111. *Id.*

112. See Jeffrey M. Jones, *Gender Differences in Views of Job Opportunity*, GALLUP POLL NEWS SERVICE (Aug. 2, 2005), <http://www.gallup.com/poll/17614/Gender-Differences-Views-Job-Opportunity.aspx>.

113. *Id.* at 951.

114. Kang, *Courtroom*, *supra* note 61, at 1128.

115. *Id.*

116. *Id.*

117. KAHNEMAN, *supra* note 75, at 436-37.

One type of bias is affected by our attitudes and stereotypes regarding social categories, such as genders, ethnicities, and races.¹¹⁸ An attitude is an association between some concept, such as a social group, and a positive or negative valence.¹¹⁹ Prejudice can be defined as an association between social objects developed from memory and positive or negative valence.¹²⁰ Similarly, stereotypes are associations developed from experience between concepts, such as social groups, and attributes.¹²¹ In each case, the associations are automatically accessed in the presence of objects.¹²²

As with other schemas, stereotypes can facilitate the rapid categorization of people and allow us to “save cognitive resources.”¹²³ As Daniel Kahneman and his long-time collaborator, Amos Tversky, observed in their early work on heuristics, intuitive thinking is “quite useful.”¹²⁴ Some behavioral scientists suggest that schemas allow judges in an overburdened legal system to identify important facts and distinguish relevant from irrelevant information.¹²⁵ Without the use of schemas, each new case would demand significantly more of a judge’s attention and time.¹²⁶

However, researchers explain that “the price we pay for such efficiency is bias in our perceptions and judgments,”¹²⁷ and intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system. It will be extremely difficult for the individual to deviate from what the script has taught her about the world because the outcome suggested by the script will seem to be a natural result of precedent events.¹²⁸ There is evidence that people pay more attention to information that is consistent with a stereotype and less attention to stereotype-inconsistent information, that

118. Kang, *Courtroom*, *supra* note 61, at 1128.

119. *Id.*

120. Laurie A. Rudman, *Social Justice in Our Minds, Homes, and Society: The Nature, Causes, and Consequences of Implicit Bias*, 17 SOC. JUST. RES. 129, 133 (2004).

121. *Id.*; Kang, *Courtroom*, *supra* note 61, at 1128.

122. Rudman, *supra* note 120, at 133.

123. Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 367 (Daniel T. Gilbert et al. eds., 4th ed. 1998). *See also* C. Neil Macrae & Galen V. Bodenhausen, *Social Cognition: Thinking Categorically About Others*, 51 ANN. REV. PSYCHOL. 93, 96 (2000) (“In attempting to make sense of other people, we regularly construct and use categorical representations to simplify and streamline the person perception process.”).

124. Tversky & Kahneman, *supra* note 7, at 1124.

125. Nugent, *supra* note 1, at 10.

126. *Id.*

127. *Id.* at 11.

128. Berger, *supra* note 94, at 265.

people seek out information that is consistent with the stereotype, and that people are better able to remember information that is consistent with the stereotype.¹²⁹

Stereotypes are resistant to change because our perceptions become impervious to new information.¹³⁰ When we discover evidence that supports our desired conclusions, we readily accept it, but when we come across comparable evidence that challenges our desired conclusions, we “work hard to refute it.”¹³¹ “[W]e see what we expect to see. Like well-accepted theories that guide our interpretation of data, schemas incline us to interpret data consistent with our biases.”¹³² Furthermore, because people are naïve realists in the sense that they generally assume that they see the world as it is in objective reality, a person will assume that other objective perceivers will share her views about oneself and the world.¹³³ When other people do not share someone’s views, one first questions whether the people lack essential information and, having ruled out that possibility, one concludes that others must be biased.¹³⁴

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases.¹³⁵ In one study, Uhlmann and Cohen had participants choose either a candidate, “Gary” or “Lisa,” for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organizational skills but weak interpersonal skills.¹³⁶ Half the participants were primed to view themselves as objective and the other half were left alone as a control group.¹³⁷ This was done by asking participants to rate their own objectivity.¹³⁸ More than 88 percent of the participants rated themselves as above average on objectivity.¹³⁹ Those in the control condition gave the male and female candidates statistically indistinguishable hiring

129. Fiske, *supra* note 123, at 371.

130. Nugent, *supra* note 1, at 11 (citing RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 113-38 (1980)).

131. KUNDA, *supra* note 2, at 230.

132. Kang, *Trojan Horses*, *supra* note 105, at 1515.

133. *Id.*

134. *Id.*

135. Kang, *Courtroom*, *supra* note 61, at 1173.

136. *Id.*

137. *Id.* (citing Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: Effects of Self-Perceived Objectivity on Hiring Discrimination, 104 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 210-11 (2007)).

138. Uhlmann & Cohen, *supra* note 137, at 210-11.

139. *See id.* at 209.

evaluations.¹⁴⁰ However, those who were manipulated to think of themselves as objective evaluated the male candidates more highly.¹⁴¹ The result was not because of any difference in the candidates' merit. Instead, the discrimination was a result of disparate evaluation, in which "Gary" was rated as more interpersonally skilled than "Lisa" by those primed to think of themselves objective.¹⁴² Ironically, it seems that thinking of oneself to be objective leads one to be more susceptible to biases.¹⁴³

Regardless of conscious and explicit desires for unbiased decisionmaking, implicit biases "can produce behavior that diverges from a person's avowed or endorsed beliefs or principles."¹⁴⁴ Today, the overwhelming majority of judges in America explicitly reject the idea that race or gender should influence litigants' treatment in court, but even the most egalitarian among us may harbor invidious mental associations.¹⁴⁵ For example, most white adults are more likely to associate African-Americans than white Americans with violence,¹⁴⁶ and most Americans are more likely to associate women with family life than with professional careers.¹⁴⁷

A now-famous example of social cognition research on implicit racial bias comes from Mahzarin Banaji, Anthony Greenwald, and their colleagues, who began using the IAT in the 1990s.¹⁴⁸ The IAT pairs an attitude object, such as a racial group, with an evaluative dimension, good or bad, and tests how response accuracy and speed indicate implicit and automatic attitudes and stereotypes.¹⁴⁹ For example, in one task,

140. *See id.* at 210-11.

141. *See id.* at 211.

142. *Id.*

143. Kang, *Courtroom*, *supra* note 61 at 1173. People also view others as being more biased than themselves by the ideology of their political in-groups. Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 TRENDS IN COGNITIVE SCI. 37 (2007).

144. Greenwald & Krieger, *supra* note 81, at 951.

145. *See* Kang, *Trojan Horses*, *supra* note 105, at 1512-14 (reviewing the evidence on implicit invidious associations).

146. *See id.* at 1515 n.117.

147. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1072 (2006) ("[S]eventy-five percent of men and women do not associate female with career as easily as they associate female to family.").

148. Anthony Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1478 (1998); Greenwald & Banaji, *supra* note 79.

149. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354-355 (2007) (citing Mahzarin Banaji, *Implicit Attitudes Can Be Measured*, in THE NATURE OF REMEMBERING: ESSAYS IN HONOR OF ROBERT G. CROWDER 117, 123 (2001)).

participants are told to quickly pair together pictures of African-American faces with positive words from the evaluative dimension.¹⁵⁰ The strength of the attitude or stereotype is determined by the speed at which the participant pairs the words.¹⁵¹ The results from hundreds of thousands of IATs taken on the IAT project's website expose systematic implicit racial biases.¹⁵²

In general, results of the IAT reveal that:

- Implicit biases are pervasive. They appear as statistically “large” effects that are often shown by majorities of samples of Americans. . . .
- People are often unaware of their implicit biases. Ordinary people, including the researchers who direct this project, are found to harbor . . . implicit biases . . . even while honestly . . . reporting that they regard themselves as lacking these biases.
- Implicit biases predict behavior. . . . [T]hose who are higher in implicit bias have been shown to display greater discrimination. . . .¹⁵³

There is increasing evidence that implicit biases, as measured by the IAT, predict behavior in the real world.¹⁵⁴ Among the findings from various laboratories are that implicit bias predicts the rate of callback interviews;¹⁵⁵ implicit bias predicts awkward body language which could influence whether folks feel that they are being treated fairly or courteously;¹⁵⁶ implicit bias predicts how we read the friendliness of

150. *Id.* at 345.

151. *Id.*

152. Clear evidence of the pervasiveness of implicit bias comes from Project Implicit, a research website operated by research scientists, technicians, and laboratories at Harvard University, Washington University, and the University of Virginia. *About Us*, PROJECT IMPLICIT, <http://www.projectimplicit.net/about.php>.

153. Bennett, *supra* note 26, at 153. Empirical evidence from other social science studies also shows that implicit bias is pervasive in our society. See e.g. Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

154. Jerry Kang, *Implicit Bias: A Primer for Courts, Prepared for the National Campaign to Ensure the Racial and Ethnic Fairness of America's State Courts*, 1, 4 (2009), http://www.americanbar.org/content/dam/aba/migrated/sections/criminaljustice/PublicDocuments/unit_3_kang.authcheckdam.pdf [hereinafter Kang, *Primer*].

155. Dan-Olof Rooth, *Implicit Discrimination in Hiring: Real World Evidence*, 5 (Inst. for the Study of Labor, Discussion Paper No. 2764, 2007) (based on implicit stereotype in Sweden that Arabs are lazy).

156. Allen R. McConnell & Jill M. Leibold, *Relations Among the Implicit Association Test, Discriminatory Behavior, and Explicit Measures of Racial Attitudes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 435 (2001).

facial expressions;¹⁵⁷ implicit bias predicts more negative evaluations of ambiguous actions by an African-American;¹⁵⁸ and implicit bias predicts more negative evaluations of agentic (i.e., confident, aggressive, ambitious) women in certain hiring conditions.¹⁵⁹

III. HOW JUDGES MAKE DECISIONS

A recent approach to studying judicial decisionmaking proposes an “intuitive-override” model of judging that applies key insights from cognitive science, as explained in Part I.¹⁶⁰ This model posits that judges generally make intuitive decisions, which occur spontaneously and involve decisions that are made automatically, effortlessly, and quickly.¹⁶¹ Judges can sometimes override their intuition with deliberative thought processes, which occur through controlled processing and involve decisions that are rule-governed and made slowly with great effort.¹⁶² The relationship between intuitive thought processes and deliberative thought processes is complicated, and judicial decisionmaking can certainly be seen to involve both types of thought processes.¹⁶³ Although it may seem that judges, by virtue of their educations, experience, and commitment to impartiality, are immune from implicit biases, a new study suggests that “people with none of these bias blind spots were attenuated by measures of cognitive sophistication such as cognitive ability or thinking dispositions related to bias. If anything, a larger bias blind spot was associated with higher cognitive ability.”¹⁶⁴

In a groundbreaking series of studies on judicial decisionmaking, two law professors and a United States magistrate judge studied whether

157. Kurt Hugenberg & Galen V. Bodenhausen, *Facing Prejudice: Implicit Prejudice and the Perception of Facial Threat*, 14 PSYCHOL. SCI. 640 (2003).

158. Laurie A. Rudman & Matthew R. Lee, *Implicit and Explicit Consequences of Exposure to Violent and Misogynous Rap Music*, 5 GROUP PROCESSES & INTERGROUP REL. 133 (2002).

159. Laurie A. Rudman & Peter Glick, *Prescriptive Gender Stereotypes and Backlash Toward Agentic Women*, 57 J. SOC. ISSUES 743 (2001).

160. Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007) [hereinafter Guthrie, *Blinking*].

161. *Id.* at 3, 7.

162. *Id.* at 7-8.

163. *See id.* at 2-3 (“Judges surely rely on intuition, rendering a purely formalist model of judging clearly wrong, yet they also appear able to apply legal rules to facts, similarly disproving a purely realist model of judging.”).

164. Richard F. West et al., *Cognitive Sophistication Does Not Attenuate the Bias Blind Spot*, 103 J. PERSONALITY SOC. PSYCHOL. 506 (2012) (concluding that “[t]he cognitive primitiveness of some of the processes causing the bias blind spot might be consistent with the failure of intelligence to attenuate the bias.”).

trial court judges primarily engage in deliberative judging or intuitive decisionmaking.¹⁶⁵ The results of a three-question Cognitive Reflection Test (“CRT”) to 252 Florida trial court judges¹⁶⁶ suggest that judges rely heavily on their intuition, not only when they confront generic problems like the problems included in the CRT, but also when they face typical functions of their jobs, such as awarding damages, assessing liability based on statistical evidence, and predicting outcomes on appeal.¹⁶⁷ Other studies¹⁶⁸ by the same authors suggest that even though judges are experienced, well-trained, and highly motivated decision-makers, they are influenced by cognitive blinders, such as anchoring, hindsight bias, and self-serving bias, when deciding traditional problems from the bench.¹⁶⁹

In another study, Guthrie and his co-authors questioned whether “judges, who are professionally committed to egalitarian norms, hold [the] same implicit biases” as most other Americans.¹⁷⁰ Based on their study involving 133 elected and appointed judges from various jurisdictions, the authors found “that judges harbor the same kinds of implicit biases as others; that these biases can influence their judgment; but that given sufficient motivation, judges can compensate for the influence of these biases.”¹⁷¹

Similarly, a recent law review article concludes that implicit bias causes judges and jurors to unknowingly misremember case facts in racially biased ways.¹⁷² This article draws upon a wide array of studies into implicit social cognition, human memory, and legal

165. See Guthrie, *Blinking*, *supra* note 160.

166. The CRT’s three questions are: (1) A bat and a ball cost \$1.10 in total. The bat costs \$1.00 more than the ball. How much does the ball cost? (2) If it takes five machines five minutes to make five widgets, how long would it take one hundred machines to make one hundred widgets? (3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes forty-eight days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? *Id.* at 10.

167. *Id.* at 27.

168. See Guthrie, *Inside the Judicial Mind*, *supra* note 1, at 786. In an empirical study designed to determine whether five common cognitive illusions (anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases) would influence the decisionmaking processes of a sample of 167 federal magistrate judges, although the judges appeared somewhat less susceptible to two of these illusions (framing effects and the representativeness heuristic) than lay decision-makers, each of the five illusions tested had a significant impact on judicial decisionmaking.

169. Guthrie, *supra* note 18, at 430-40.

170. Rachlinski, *Unconscious Racial Bias*, *supra* note **Error! Bookmark not defined.**, at 1195.

171. *Id.*

172. Levinson, *supra* note 149, at 391-95.

decisionmaking.¹⁷³ The researcher conducted an empirical study “to examine whether people’s recollections of legal stories are shaped by the race of the actors in the stories.”¹⁷⁴ He found that systematic and implicit stereotype-driven memory errors affect legal decisionmaking and that the nature of group deliberations appears unlikely to alter this phenomenon.¹⁷⁵

In another recent study, researchers tested whether judges’ personal backgrounds affect their case outcomes.¹⁷⁶ Researchers analyzed 522 motions for summary judgment decided by 431 federal district court judges in employment civil rights cases.¹⁷⁷ The study concluded that when judges hear cases brought by plaintiffs who are of “the same minority status as the judge, the cases survive motions for summary judgment at a much higher rate. . .”¹⁷⁸ There was “a 47.28 percent difference between white and minority judges who adjudicate claims involving minority plaintiffs, and roughly a 50 percent difference between white and minority judges who adjudicate claims involving white plaintiffs.”¹⁷⁹

The findings suggest that judges possess a set of beliefs or opinions that predispose them to rule in accordance with those beliefs or opinions.¹⁸⁰ The danger of implicit biases affecting decisions is greatest in the “open areas” in judging, where the law does not clearly compel a result and a judge cannot predictably find an answer in the law. Thus, a judge then has a “blank slate” to make a choice, to fill the open area.¹⁸¹ In these areas a judge decides how the facts of a case fit together or decides what effect an existing rule should have in a new context. Thus, when a trial judge listens to conflicting testimony in a hearing, the manner in which the judge processes that testimony and resolves testimonial conflicts will be influenced by the blinders the judge possesses. Similarly, a trial judge’s personal experiences and

173. *Id.*

174. *Id.* at 390.

175. *Id.* at 391-95.

176. Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 318-19 (2012).

177. *Id.* at 333.

178. *Id.* at 343. “For example, when a white judge decides a case involving a white plaintiff, the plaintiff’s case (or some portion of it) has a 40 percent predicted probability of surviving a motion for summary judgment. When a white judge adjudicates a case involving a minority plaintiff, however, the predicted probability of the plaintiff’s case surviving summary judgment drops to roughly 34.43 percent.” *Id.*

179. *Id.* at 344.

180. *Id.* at 340.

181. POSNER, *HOW JUDGES THINK*, *supra* note **Error! Bookmark not defined.**, at 9.

182. Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their*

perspectives will likely influence her application of uncertain law to conflicting facts”¹⁸² The researchers concluded that “[e]ven if judges have no bias or prejudice against either litigant, fully understand the relevant law, and know all of the relevant facts, they might still make systematically erroneous decisions under some circumstances simply because of how they—like all human beings—think.”¹⁸³ While not explicitly discussing implicit bias, Guthrie and his co-authors observed, “[I]ntuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system,” and that intuitive associations, for example, of African-Americans with violence, “seem to reflect automatic, intuitive judgments, while active deliberation limits such biases.”¹⁸⁴ “[I]t may well be that the more unclear the law or the facts are, the more likely it will be that judge’s decisions will be influenced by the judge’s blinders.”¹⁸⁵ As Judge Bennett explains, “[t]hese findings are deeply troubling not only for our legal profession, but also for society as a whole. While I was surprised by the results of my own IAT, these general findings show that virtually none of us, despite our best efforts, is free from implicit bias.”¹⁸⁶

In most cases that reach the highest levels of our judicial system, there is “no escape from choice in judging.”¹⁸⁷ “The way a judge looks at the world, as informed by her experiences and affinities, can and will be a part of the choices she makes in these moments, along with her knowledge of doctrine and the support it lends to one choice or another, her “situation sense” about the case, and a number of other factors.”¹⁸⁸ “Discretion-free” judging, devoid of the influence of one’s identity or experiences, is implausible, in a profession populated by human beings, and not machines.”¹⁸⁹ Judges across the centuries have explained that when judging entails “construing or extending law,”¹⁹⁰ a judge invokes

182. Rodney J. Uphoff, *On Misjudging and Its Implications for Criminal Defendants, Their Lawyers and the Criminal Justice System*, 7 NEV. L.J. 521, 531 (2007).

183. Guthrie, *Inside the Judicial Mind*, *supra* note 1, at 829.

184. Guthrie, *Blinking*, *supra* note 160, at 31.

185. Uphoff, *supra* note 182, at 531.

186. Bennett, *supra* note 26, at 153-54. “The findings of real-world consequence are disturbing for all of us who sincerely believe that we do not let biases prevalent in our culture infect our individual decisionmaking. Even a little bit.” Kang, *Primer*, *supra* note 154.

187. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 LA RAZA L.J. 87, 91 (2002).

188. Kathryn Abrams, *Empathy and Experience in the Sotomayor Hearings*, 36 OHIO N.U. L. REV. 263, 270 (2010) [hereinafter Abrams, *Empathy and Experience*].

189. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 14 (2009).

190. CARDOZO, *supra* note 3, at 140.

her “individual sentiment of justice,”¹⁹¹ and experiences a hunch¹⁹² or intuition.¹⁹³ Judge Cardozo identified one’s “compelling sentiment of justice” as one of the guideposts that might “come to the rescue of the anxious judge, and tell him where to go” when the law fails fully to do so.¹⁹⁴ He explained that one’s ability to make the close calls—“to know when one interest outweighs another”—comes “from experience and study and reflection; in brief, from life itself.”¹⁹⁵ Justice Holmes agreed, famously stating that “[t]he life of the law has not been logic: it has been experience.”¹⁹⁶ For Justice Thurgood Marshall, a “personal history of exposure to the indignities and dangers of racism” resulted in his “vision of justice.”¹⁹⁷ Justice Alito also acknowledged the role of experience in adjudication during his confirmation hearing.

[W]hen a case comes before me involving, let’s say, someone who is an immigrant . . . I can’t help but think of my own ancestors because it wasn’t that long ago when they were in that position. And so it’s my job to apply the law. It’s not my job to change the law or to bend the law to achieve any results, but I have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather.¹⁹⁸

He also stated,

When I have cases involving children, I can’t help but think of my own children . . . When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account.¹⁹⁹

Similarly, Justice Ruth Bader Ginsburg drew from her experience as a

191. *Id.*

192. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929). 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.” JEROME FRANK, *LAW AND THE MODERN MIND* 104 (1930).

193. POSNER, *HOW JUDGES THINK*, *supra* note 29, at 107.

194. CARDOZO, *supra* note 3, at 43.

195. *Id.* at 113.

196. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1963).

197. Vicki C. Jackson, *Remembering Justice Thurgood Marshall: Thoughts from His Clerks*, 1 GEO. J. ON FIGHTING POVERTY 8, 11 (1993).

198. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) [hereinafter *Alito Confirmation Hearing*].

199. *Id.*

female when writing her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*,²⁰⁰ in which she noted that women who have been in the workforce understand that it can often take a period of years before one recognizes that one is being underpaid in relation to one's colleagues.²⁰¹

The danger of schematic thinking is that a judge “cannot easily distinguish between what ‘the law says’ and what [he] believes. . . .”²⁰² 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.”²⁰³ Because perception is subjective and influenced by a multitude of factors, when making a decision judges often face difficulty identifying the accurate and relevant facts.²⁰⁴ For example, judges may unconsciously process only that information that conforms to their preexisting cultural and social biases.²⁰⁵ Consequently, biased judicial decisionmaking 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.”²⁰⁶ As Judge Kozinski explained,

We all view reality from our own peculiar perspective; we all have biases, interests, leanings, instincts. These are important. Frequently, something will bother you about a case that you can't quite put into words, will cause you to doubt the apparently obvious result. It is important to follow those instincts, because they can lead to a crucial issue that turns out to make a difference. But it is even more important to doubt your own leanings, to be skeptical of your instincts. It is frequently very difficult to tell the difference between how you think a case should be decided and how you hope it will come out. It is very easy to take sides in a case and subtly shade the decision-making process in favor of the party you favor, much like the Legal Realists predict. My prescription is not, however, to yield to these impulses with

200. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (Ginsburg, J., dissenting). Congress responded to this decision with the Lilly Ledbetter Fair Pay Act of 2009, which amended Title VII to provide that 180-day statute of limitations for filing claims based on pay discrimination resets with each new discriminatory paycheck. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of Titles 29 and 42 of the United States Code).

201. *Ledbetter*, 550 U.S. at 645.

202. John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237, 262 (1987).

203. *Id.*

204. Nugent, *supra* note 1, at 6.

205. *Id.*

206. Leubsdorf, *supra* note 202, at 266.

abandon, but to fight them. If you, as a judge, find yourself too happy with the result in a case, stop and think. Is that result justified by the law, fairly and honestly applied to the facts? Or is it merely a bit of self-indulgence?²⁰⁷

As Judge Posner explains, using intuition is inevitable and “compelled by the institutional structure of adjudication.”²⁰⁸ Judges make hundreds, if not thousands, of judicial decisions in the course of a year, and they have not the time before or after casting votes to engage in “elaborate analytical procedures.”²⁰⁹ They make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts that sometimes cause illusions of judgment. Appellate judges read parties’ briefs, discuss the case with law clerks, listen to oral arguments, and immediately after, briefly discuss the case with their colleagues, and take a tentative vote that usually turns out to be final.²¹⁰ Given the time constraints, which are more severe for trial judges, at every stage of the decisionmaking process, “a judge’s reasoning is primarily intuitive.”²¹¹ Even though a judicial opinion can serve as a check on these intuitions, by explaining how the judge arrived at the decision, it is an “imperfect check” because the vote deciding the legal issue is cast before the opinion is written and most judges do not treat the vote as a hypothesis to be proven by research.²¹² Rather, the research is a search to support the conclusion.²¹³ We know that perceptions based upon intuition, personal background, or previous experiences “are unreliable grounds” for judicial decisionmaking.²¹⁴

For example, when deciding motions to dismiss, trial judges must be aware of how their schemas and heuristics operate. In deciding whether to dismiss a complaint under Rule 12(b)(6), a district judge must decide whether the pleadings contain “enough facts to state a claim to relief that is plausible on its face.”²¹⁵ Thus, a claim is facially

207. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 997-98 (1993).

208. POSNER, HOW JUDGES THINK, *supra* note 29, at 110.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* This search for support for a pre-determined conclusion is evidence of the well-documented confirmation bias which is a tendency for a person to search for information that “confirms, rather than contradicts one’s initial judgment . . .” *Id.* at 111.

214. *Id.* at 75.

215. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). In *Conley v. Gibson*, the Supreme Court

“plausible” only when a plaintiff pleads sufficient facts to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct.²¹⁶ In any civil case in federal court, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”²¹⁷ Instead, the plaintiff must support legal conclusions with “well-pleaded factual allegations.”²¹⁸ These allegations must be taken as true, but, even then, scrutinized to see whether “they plausibly give rise to an entitlement to relief.”²¹⁹ Whether such facts give rise to a plausible claim for relief is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”²²⁰

Applying this standard, in *Ashcroft v. Iqbal*, the Court dismissed Javid Iqbal’s *Bivens* action against John Ashcroft, the former Attorney General, and Robert Mueller, Director of the FBI.²²¹ Iqbal, a Muslim Pakistani, who was held in a maximum security facility and locked-down for twenty-three hours a day,²²² alleged that they specifically selected him as a person of “high interest” on the basis of race, religion, and national origin in violation of his First and Fifth Amendment rights.²²³ He further alleged that both Ashcroft and Mueller willfully and maliciously knew of, condoned, and agreed to subject Iqbal to this discriminatory treatment.²²⁴ Because Iqbal alleged invidious discrimination, he had to “plead sufficient factual matter to show that

interpreted this language as preventing the dismissal of a complaint under Rule 12(b)(6), “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In *Twombly*, the majority instead announced that pleadings must contain “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. The Court instructed that a claim has facial “plausibility” only when a plaintiff pleads sufficient facts to allow the court to draw the reasonable inference that the defendant is liable for the alleged misconduct. *Id.* Two years later in *Ashcroft v. Iqbal*, the Court emphasized that the plausibility standard of *Twombly* governs the pleading standard “in all civil actions and proceedings in the United States district courts.” *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (quoting FED. R. CIV. P. 1) (internal quotation marks omitted).

216. *Iqbal*, 556 U.S. at 679.

217. *Id.* at 683.

218. *Id.* at 679.

219. *Id.*

220. *Id.* at 678.

221. *Id.* at 668. A *Bivens* suit is a judicially crafted cause of action against federal agents for violation of constitutional rights. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 392-95 (1971). Although judicially crafted, many of its doctrinal defenses track those of 42 U.S.C. § 1983.

222. *Iqbal*, 556 U.S. at 668. Iqbal eventually pled guilty to crimes related to fraudulent immigration documentation and was deported. *Id.*

223. *Id.* at 667.

224. *Id.* at 669.

[Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.”²²⁵ The Court concluded that it was far more plausible that Ashcroft and Mueller’s motivation was a benign or neutral motivation to hold immigration violators in secure conditions until they could be identified or cleared as potential terrorists.²²⁶ The Court recognized that the detention “would produce a disparate, incidental impact on Arab Muslims,”²²⁷ but that alone did not make discriminatory motive more plausible than a neutral alternative.

Professor Darrell A. H. Miller criticizes *Iqbal* for “invit[ing] judges to determine plausibility based upon their own experience, rather than forcing them to do the hard work to imagine themselves in the scenario presented within the four corners of the complaint.”²²⁸ Jerry Kang and his esteemed co-authors also condemn the plausibility standard for entitling district court judges to make a decision based only on “minimal facts that can be alleged before discovery” and which may not be sufficient “to ground that judgment in much more than the judge’s schemas.”²²⁹ Whether a judge can accurately assess whether an event is plausible may have much to do with whether, and how, the judge has experienced the event alleged.²³⁰

IV. AN EMPATHETIC APPROACH TO JUDICIAL DECISIONMAKING

As discussed above, research on human cognition proves that judges bring various influences, such as age, gender, generation,

225. *Id.* at 676-77.

226. *Id.* at 683.

227. *Id.* at 682.

228. Darrell A. H. Miller, *Iqbal and Empathy*, 78 UMKC L. REV. 999, 1011 (2010).

229. Kang, *Courtroom*, *supra* note 61, at 1162. Kang and his co-authors recognize that it may not be possible to test whether explicit or implicit biases influence how actual judges decide motions to dismiss actual cases. However, they point to preliminary data about dismissal rates pre- and post-*Iqbal* to support their hypothesis that *Iqbal*’s plausibility standard poses a risk of increasing the impact of implicit biases at the Rule 12(b)(6) stage for race discrimination claims than other claims because judges are likely to have stronger biases that plaintiffs in the former type of case have less valid claims than those in the latter. *Id.* at 1162-63.

230. *Id.* As Professor Jessie Hill wrote of Justice Kennedy in *Iqbal*: “[Y]ou can almost read between the lines to hear him saying, ‘I have never been a victim of discrimination, and I certainly cannot imagine folks like John Ashcroft and Robert Mueller, folks just like me, engaging in illegal discrimination against Muslims in the wake of 9/11. . . .’” Miller, *supra* note 228, at 1008 (quoting Posting of Jessie Hill to Prawfs Blog, <http://prawfsblawg.blogs.com/prawfsblawg/2009/05/some-belated-thoughts-on-twombly-iqbal-and-sotomayor.html> (May 31, 2009, 15:18 EST)) (“It seems to me that plausibility as a legal standard—though it surely makes appearances elsewhere in the law— inherently calls on the judge to make judgments based on life experiences.”).

religion, and values with them to the decisionmaking process.²³¹ Research supports that judges' early lives, their experiences both on and off the bench, and their professional careers instill in them certain ideas, beliefs, and attitudes about issues and people. These unconscious influences tell judges how to define situations and encourage decisions consistent with their beliefs or attitudes.²³² Cognitive science teaches us that one's own experience is the unconscious starting point for decisionmaking. In light of the hidden influences that cause us to sometimes "believe what we want to believe because we want to believe it," judges should be vigilantly suspicious of their judgments,²³³ particularly those made within the open space of the law. Although reliance on ingrained schema is difficult to overcome, implicit biases caused by categories and schemas may be mitigated or even eliminated²³⁴ by first recognizing that race, gender, sexual orientation, and other social categories may be influencing decisionmaking, "relying less mindlessly on a given schema, and scrutinizing more thoroughly the particular situation."²³⁵ In other words,

The way to guard against the risk of personal subjective judgments is not to deny the limits of one's starting point, but to acknowledge them, and to then seek to glimpse the points of view of others. This at least protects against self-delusion about the impact of personal perspective; it may also afford insights broadening the judge's understanding of the problem at issue. Increasing the self-consciousness of the judge in the act of judgment may also enlarge the judge's ability to understand other human beings. This means attending to the parties and those likely to be in their situations in the future.²³⁶

Reliance on categories and schemas are mitigated through mindful thinking. The critical components of mindful thinking include: the "creation of new categories," "openness to new information," and "awareness of more than one perspective."²³⁷ As explained below, empathy is a tool and capacity that accomplishes these goals.

"The function of empathy is to help one understand and relate to

231. Nugent, *supra* note 1, at 6.

232. *Id.* at 19-20. See Uphoff, *supra* note 182, at 522.

233. KUNDA, *supra* note 2, at 212.

234. Chen & Hanson, *supra* note 5, at 1229.

235. *Id.*

236. Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 52 (1988).

237. Chen & Hanson, *supra* note at 5, at 1235 (quoting ELLEN LANGER, MINDFULNESS 61-79 (1989)).

another person.”²³⁸ Thus, empathy is perspective-taking,²³⁹ it is a tool to overcome the limitations of experience. In exercising empathy, “individuals can choose to actively imagine themselves in the position of another as compensation for a lack of previous experience.”²⁴⁰ The capacity to understand what others are thinking or feeling is a cognitive capacity that is an essential tool for life in our social world.²⁴¹ In its most severe form, a lack of empathy may be characterized as “mind-blindness—an inability to accurately infer, or perhaps even to recognize, the existence of others’ thoughts and feelings.”²⁴²

While the mention of empathy in connection with Supreme Court nominations ignited a concern about liberal-leaning overreaching, empathy is void of judgment. As Dr. Michael Franz Basch, a psychotherapist and prominent scholar on the topic of empathy, observes:

Empathy is first and foremost a capacity. Strictly thinking, it is value-free. Empathic thinking . . . is a function that the human brain at a certain level of development is potentially capable of performing, no more and no less. This is often not understood, and empathy becomes confused with altruism and other-directedness, though it need not be employed in the service of either goal. . . . What one does with the insight provided by empathic understanding remains to be determined by the nature of the relationship between the people involved and the purpose for which the empathic capacity was engaged by its user in the first place.²⁴³

As Martha Nussbaum observes, empathy is neither a good nor a bad thing.

Empathy by itself . . . is ethically neutral. A good sadist or torturer has to be highly empathetic to understand what would cause his or her victim maximal pain. Nor, I believe, is empathy always necessary for

238. *Id.*

239. Frederique de Vignemont & Tania Singer, *The Empathetic Brain: How, When and Why?*, 10 *TRENDS IN COGNITIVE SCI.* 435, 435 (2006). (With cognitive perspective taking, one “represents the mental states of others, including affective states, without being emotionally involved.”); *see also* Stephanie D. Preston & Frans B. M. de Waal, *Empathy: Its Ultimate and Proximate Bases*, 25 *BEHAV. & BRAIN SCI.* 1, 4 Table 2 (2002) (referring to this phenomenon as “cognitive empathy” or “true empathy” or “perspective-taking”).

240. Miller, *supra* note 228, at 1010.

241. Bandes, *Moral Imagination*, *supra* note 67, at 9.

242. *Id.*

243. Susan A. Bandes, *Empathetic Judging and The Rule of Law*, 2009 *CARDOZO L. REV. DE NOVO* 133, 136-37 (2009) [hereinafter, Bandes, *Empathetic Judging*] (citing Michael Franz Basch, *Empathic Understanding: A Review of the Concept and Some Theoretical Considerations*, 31 *J. AM. PSYCHOANALYTIC ASS'N* 101, 119, 123 (1983)).

compassion: we can have compassion for the sufferings of non-human animals without being able to put ourselves inside their minds.²⁴⁴

Empathy is commonly defined as “[t]he power of projecting one’s personality into (and so fully comprehending) the object of contemplation.”²⁴⁵ It is “an imaginative reconstruction of another person’s experience.”²⁴⁶ While “empathy” is often used interchangeably with the terms “love” or “sympathy,”²⁴⁷ it actually encompasses specific psychological experience.²⁴⁸ “‘Empathy’ is a term derived from the German word *Einfihlung* which describes aesthetic perceptions.”²⁴⁹ Because translations of *Einfihlung* sometimes used the word “sympathy,” the meanings of “sympathy” and “empathy” are often confused.²⁵⁰ As originally interpreted, “empathy” referred to a physical reaction, such as the instinct to grimace when someone else hurts herself.²⁵¹ This meaning expanded to include the concept of feeling emotions, such as anger, fear, joy, love, from others.²⁵²

“Empathy is not a dissolution of ‘ego boundaries’ or absorption of self by other—it is a means of relating to another or making another intelligible.”²⁵³ It is an “imaginative experiencing of the situation of another.”²⁵⁴ Empathy helps us understand “that others are separate from us, with separate mental states, desires, beliefs, and perceptions.”²⁵⁵ Thus, to understand another person’s perspective requires a judge to “stand in the shoes”²⁵⁶ of the other person, that is, to think, feel, and

244. Martha Nussbaum, *Reply to Amnon Reichman*, 56 J. LEGAL EDUC. 320, 325 (2006).

245. OXFORD ENGLISH DICTIONARY (2d ed. 1989), available at <http://www.oed.com>.

246. MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS 301-02 (2001).

247. Daniel Batson, one of the most influential researchers in this field, recently wrote a chapter, in which he explains that “empathy” has been used to refer to “eight related but distinct phenomena.” C. Daniel Batson, *These Things Called Empathy: Eight Related But Distinct Phenomena*, in THE SOCIAL NEUROSCIENCE OF EMPATHY 3-15 (Jean Decety & William Ickes eds., 2009).

248. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) (identifying three basic phenomena captured by the word “empathy”: “(1) feeling the emotion of another; (2) understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other; and (3) action brought about by experiencing the distress of another (hence the confusion of empathy with sympathy and compassion).”). For purposes of this Article, I adopt the second common definition.

249. *Id.*

250. *Id.*

251. *Id.* at 1579-80.

252. *Id.* at 1580.

253. *Id.* at 1581.

254. *Id.*

255. Bandes, *Empathetic Judging*, *supra* note 243, at 138.

256. Martha Minow describes empathy as capable of being generated by an act of the

understand what that person would think, feel, and understand.²⁵⁷ It requires one to become “an intelligent reader of that person’s story.”²⁵⁸ “Perspective taking requires getting beyond one’s own literal or psychological point of view to consider the perspective of another person who is likely to have a very different psychological point of view.”²⁵⁹ Overcoming one’s limited viewpoint is therefore the essence of accurate perspective-taking.²⁶⁰

Although it is an essential capacity, empathy is not easy to accomplish.²⁶¹ Successfully performing this “particular feat of mental gymnastics” requires a person to actively think about another person’s mental state and then try to experience or infer the other person’s perceptions.²⁶² One’s own perspective is the default position that is immediately and automatically activated, whereas reasoning about another’s perspective is typically slow, deliberate, and difficult.²⁶³ Thus, perspective-taking can be incomplete or inaccurate because we are likely to experience it most easily toward those with whom we identify most readily.²⁶⁴ When judges face litigants from backgrounds with which they are familiar and comfortable, their perspective-taking on behalf of such litigants is so natural it is unlikely to be truly empathetic.²⁶⁵ For example, justices often identify most readily with governmental officials, including other judges. Justice Rehnquist, discussing why judges have afforded themselves absolute immunity from civil rights suits while denying it to so many other government officials, suggested that:

If one were to hazard an informed guess as to why such a distinction in treatment between judges and prosecutors, on the one hand, and other

imagination, such as imaginatively placing yourself in someone’s shoes. *See generally* Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987). *See* Minow & Spelman, *supra* note 236, at 51 (“Taking the perspective of another involves both a cognitive effort to see the world from the vantage point of someone else and a willingness to try to understand what she feels about what she sees from that vantage point.”).

257. *See* Bandes, *Empathetic Judging*, *supra* note 243, at 137.

258. Martha C. Nussbaum, *Cultivating Humanity in Legal Education*, 70 U. CHI. L. REV. 265, 270 (2003).

259. Nicholas Epley & Eugene M. Caruso, *Perspective Taking: Misstepping into Others’ Shoes*, in HANDBOOK OF IMAGINATION AND MENTAL SIMULATION 297 (Keith Markman et al. eds., 2009).

260. *Id.*

261. Bandes, *Moral Imagination*, *supra* note 67, at 12.

262. Epley & Caruso, *supra* note 259, at 299 (“[T]here is no more immediate barrier to accurate perspective taking than failing to use it in the first place.”).

263. *Id.*

264. Bandes, *Moral Imagination*, *supra* note 67, at 12.

265. Bandes, *Empathetic Judging*, *supra* note 243, at 139.

public officials on the other, obtains, mine would be that those who decide the common law know through personal experience the sort of pressures that might exist for such decisionmakers in the absence of absolute immunity, but may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed.²⁶⁶

Justice Cardozo's comment, quoted by Justice Brennan, reveals why taking the perspective of another is so difficult: "Deep below consciousness are the other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."²⁶⁷ Judges "possess 'subconscious loyalties' to the groups 'in which the accidents of birth or education or occupation or fellowship have given us a place.'²⁶⁸ Thus, empathy is difficult for the same reasons it is necessary—both the judge and litigant are entangled by biases and are thus "unavoidably situated in his or her own experience."²⁶⁹

"Empathy" is a term that refers to the difficult feat of understanding the perspectives of people from very different backgrounds.²⁷⁰ For

266. *Id.* at 141 (quoting *Butz v. Economou*, 438 U.S. 478, 529 (1978) (Rehnquist, J., dissenting)). A significant number of judges were former prosecutors before taking the bench. Uphoff, *supra* note 182, at 529 (citing Bureau of Justice Statistics, U. S. Dep't of Justice, Source Book (2003), <http://www.albany.edu/sourcebook/pdf/t1822005.pdf>) (showing that between 1963 and 2005, between 38 percent and 50 percent of the Presidential appointees to U.S. District Court judgeships had prosecutorial experience). Professor Uphoff asserts that a significant number of judges with prior prosecutorial experience "bring a decidedly pro-prosecution attitude to the bench," which leads judges to presume that most defendants are guilty, and affects the manner in which many judges rule on motions, evaluate witnesses, and exercise their discretion. Uphoff, *supra* note 182, at 529, 533. See Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1110 (1976) (quoting Interview with C. J. Occhippinti, Alaska Superior Court Judge, Columbia Law Review (Jun. 10, 1967), "[e]ven in the absence of plea bargaining, I know that ninety-nine percent of all defendants are guilty, but I still give them their fair trials").

267. William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 5 (1988) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (Yale University Press 1921)).

268. *Id.* at 4-5 (quoting CARDOZO, *supra* note 267, at 175).

269. Minow & Spelman, *supra* note 236, at 52.

270. *Id.* See Abrams, *Empathy and Experience*, *supra* note 188, at 274. "[Empathy] is characterized not by the pity we feel for others but by our attempt to understand their reality. . . . We doff our own experience and try on another. For a moment, we live someone else's life." John Paul Rollert, *Reversed on Appeal: The Uncertain Future of President Obama's "Empathy Standard,"* 120 YALE L.J. ONLINE 89, 100 (2010). Thus, perspective-taking "entails the active consideration of another's point of view, imagining what the person's life and situation are like, walking a mile in the person's shoes." Adam D. Galinsky & Gillian Ku, *The Effects of Perspective-Taking on Prejudice: The Moderating Role of Self-Evaluation*, in 30 PERSONALITY & SOC. PSYCHOL. BULL. 594, 604 (2004).

example, former Justice William Brennan explained that the experiential narratives of another, such as he read in the briefs in *Goldberg v. Kelly*,²⁷¹ can create a moment of empathy for and understanding of a life very different from one's own.²⁷² It can mean understanding the consequences of judicial decisionmaking for other groups that are not identical to your group, but have something loosely in common.²⁷³ It is possible to empathize with people far distant from your experiential base because you see similar dynamics (e.g., a person who is a member of an outgroup in one setting or situation might identify with someone who is a member of an outgroup in another), or to empathize or envision consequences for both sides.²⁷⁴ It can also be an approach that one takes toward all people.²⁷⁵ In this way, empathy "will help to broaden the group to which [the judge's] subconscious loyalties are due."²⁷⁶

Thus, empathy properly exercised is not an identification with the party with whom we can most identify with based on our personal experiences; rather, it is a challenge to move away from our own experiences to understand the different world inhabited by one who is very different from us. Professor Mary Anne Franks proposes a definition that takes into account this important point: "empathy is the exercise of our moral imagination against, or at least indifferent to, our own self-interest."²⁷⁷ "Empathy forces us to imagine and to have concern for those who are radically different from, even threatening to, ourselves and our values."²⁷⁸ The most important aspect of empathy is that it challenges the presumption that we are objective or impartial.²⁷⁹ Empathy allows the judge to appreciate more fully the problem before her. It can help guide a decision-maker to the correct outcome, but it does not dictate a result or solve the problem for her.²⁸⁰ It simply insists that we question our assumptions and biases and it forces us to consider

271. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (deciding whether the Due Process Clause requires that a welfare recipient be afforded an evidentiary hearing before the termination of benefits).

272. Brennan, *supra* note 267, at 31.

273. Abrams, *Empathy and Experience*, *supra* note 188, at 274-75.

274. *Id.* at 275.

275. *Id.*

276. CARDOZO, *supra* note 267, at 176.

277. Mary Anne Franks, *Lies, Damned Lies, and Judicial Empathy*, 51 WASHBURN L.J. 61, 68 (2011).

278. *Id.* at 69.

279. *Id.*

280. Kim McLane Wardlaw, *Umpires, Empathy, and Activism: Lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1646-47 (2010).

interests other than our own.²⁸¹ It is through an exercise of empathy defined in this way, “by which judges attempt to understand the motivations, intentions, and goals of the litigants before them,”²⁸² but unlike sympathy, a truly empathic approach will not sway the judge to prefer one side over the other.²⁸³

A growing body of research provides evidence that empathy, defined as perspective-taking or imagining oneself in the shoes of someone from a different social or ethnic group, is a cognitive strategy that can reduce stereotyping.²⁸⁴ Recent experiments using various interventions to make participants engage in more perspective-taking have demonstrated that actively contemplating others’ psychological experiences weakens the automatic expression of racial biases.²⁸⁵ For example, in one experiment, before seeing a five-minute video of a black man being treated worse than an identically situated white man, participants were asked to imagine “what they might be thinking, feeling, and experiencing if they were Glen [the black man], looking at the world through his eyes and walking in his shoes as he goes through the various activities depicted in the documentary.”²⁸⁶ The control group was told to remain objective and emotionally detached. In other variations, perspective-taking was triggered by requiring participants to write an essay imagining a day in the life of a young black male. These perspective-taking activities substantially decreased implicit bias as measured by the IAT and behavioral changes.²⁸⁷ For example, the researchers found that those in the perspective-taking condition chose to sit closer to a black interviewer,²⁸⁸ and black experimenters rated their interaction with white participants put in the perspective-taking condition more positively.²⁸⁹

281. Frank, *supra* note 18. See Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205, 210 (2002) (citing Richard Posner, *Emotions versus Emotionalism in Law*, in *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999)). Posner praises empathy for its cognitive character, suggesting that it more likely reflects an evaluation of beliefs, rather than an ungrounded emotional reaction that short-circuits reasoning.

282. Bandes, *Moral Imagination*, *supra* note 67, at 8.

283. *Id.* at 10 (footnotes omitted).

284. See, e.g., Adam D. Galinsky & Gordon B. Moskowitz, Perspective-Taking: Decreasing Stereotype Expression, Stereotype Accessibility, and In-Group Favoritism, in 78 J. PERSONALITY & SOC. PSYCHOL., 708, 724 (2000).

285. Andrew R. Todd et al., *Perspective Taking Combats Automatic Expressions of Racial Bias*, in 100 J. PERSONALITY & SOC. PSYCHOL. 1027, 1027 (2011).

286. See *id.* at 1030.

287. See *id.* at 1035.

288. See *id.*

289. See *id.* at 1037.

V. APPLYING AN EMPATHETIC APPROACH

A. Fourth Amendment “Reasonableness”

Areas of the law that require a judge to apply a “reasonableness” standard exemplify the need for empathy in decisionmaking. A judge’s personal experience and prior assumptions constitute an unconscious starting point for issues, such as reasonableness, that lie within the “open space.”²⁹⁰ For example, in *United States v. Jones*,²⁹¹ the Justices used their own experiences as a frame of reference to understand whether attaching a GPS device to a suspect’s car without a proper warrant violates the Fourth Amendment.

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device *on all of our cars*, monitored our movements for a month? You think you’re entitled to do that under your theory?

MR. DREEBEN: The Justices of this Court?

CHIEF JUSTICE ROBERTS: Yes. (Laughter.)

MR. DREEBEN: Under our theory and under this Court’s cases, the Justices of this Court when driving on public roadways have no greater expectation of –

CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?

. . . .

JUSTICE BREYER: What . . . is the question that I think people are driving at, at least as I understand it and certainly share the concern, is that if you win this case, then there is nothing to prevent the police or the government from monitoring 24 hours a day the public movement of every citizen of the United States.²⁹²

Without understanding the subtle yet powerful influences of bias, the “reasonableness” inquiry can begin and end at what fits within a judge’s own experience. Therefore, there is a heightened risk of implicit bias

290. POSNER, HOW JUDGES THINK, *supra* note 29, at 116 (observing that when judges are confronted with ambiguous facts that touch on charged issues they, like everyone else, “fall back on their intuitions” and display “[t]he kind of telescoped reasoning . . . called . . . ‘cultural cognition’”).

291. *United States v. Jones*, 132 S. Ct. 945 (2012).

292. Oral Argument of *United States v. Jones*, *Id.* (No. 10 1259), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1259.pdf [emphasis added].

influencing the decision.

The ideal of justice includes an aspiration to try to step beyond personal predilections and prejudices. . . . But these aspirations are for naught if the judge fails to challenge his or her own point of view, and takes in all evidence and arguments without examining the tilt created by his or her own angle of vision. The very aspirational language of impersonality and objectivity, while aiming to stretch the judge beyond personal prejudices, denies the need to acknowledge the impact of one's own perspective in the process of trying to see another's point of view. There is a real risk of imposing one's own perspective by claiming already to be impartial and objective—by claiming, indeed, to be the kind of reasonable person whose standards provide the standards for judging the conduct of others.²⁹³

Empathy gives pause to our intuition of what may be reasonable, challenges a judge to question whether a response to a legal problem is based on a myopic view, or motivates a judge to adopt an opposite viewpoint to consider whether that view may also be reasonable.

Fourth Amendment jurisprudence is an “open space” in the law because the ban on “unreasonable searches and seizures”²⁹⁴ offers little guidance to judges on how to protect individuals from overzealous criminal investigations. The text does not provide any coherent principles for determining when a search or seizure is unreasonable, or even whether a search or seizure has occurred at all. As a result, deciding Fourth Amendment issues “require[s] judgment calls that inescapably are influenced by—if not based on—a judge's own views and experiences” and thus, calls for an empathetic approach to decisionmaking.²⁹⁵

The Supreme Court views the prohibition on unreasonable searches in light of the public's reasonable expectations of privacy.²⁹⁶ Assessing the constitutionality of a purported search requires the court to determine whether the government's action constitutes a “search,” and then whether the search is reasonable. The threshold question of whether a governmental intrusion is deemed a search depends on the highly subjective question, first articulated in *Katz v. United States*, of whether the government had intruded upon an “expectation of privacy . . . that society is prepared to recognize as ‘reasonable.’”²⁹⁷ “*Katz*'s reasonable

293. Minow & Spelman, *supra* note 236, at 52.

294. U.S. CONST. amend. IV.

295. Chemerinsky, *supra* note 28, at 1070.

296. See *Katz v. United States*, 389 U.S. 347 (1967).

297. See *id.* at 361 (Harlan, J., concurring).

expectation of privacy test became a way for the Justices to appoint themselves arbiters of which privacy expectations to afford society.”²⁹⁸ Instead of determining whether privacy expectations were reasonable, based on an empathetic approach that considers a variety of perspectives or empirical data of when most citizens regard their possessions or conversations as being private, “the Justices [have] applied *Katz* normatively, based on how privacy should operate.”²⁹⁹ By deciding when the government had intruded upon a reasonable expectation of privacy, the “Justices have dictated to society when society’s assumptions about privacy were acceptable.”³⁰⁰ As Justice Alito acknowledged in his concurrence in *Jones*, the *Katz* expectation of privacy test “involves a degree of circularity . . . and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.”³⁰¹

Illinois v. Wardlow, another Supreme Court search and seizure case, exemplifies a failure of empathy. In *Wardlow*, the Court decided the issue of whether it would be unreasonable for police to stop someone purely on the basis that the person ran when he saw the officer.³⁰² Chief Justice Rehnquist, writing for the majority, held that “[h]eadlong flight—wherever it occurs—is the consummate act of evasion.”³⁰³ Although the majority explained that the “determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior,”³⁰⁴ the Court likely answered the question of whether there are “good reasons for someone to run from the police even if he’s done nothing wrong?” with ‘no, because I wouldn’t.’³⁰⁵ It was beyond the majority’s perception to understand that in the context of high-crime areas, including communities typically populated by blacks

298. Erica Goldberg, *How United States v. Jones Can Restore Our Faith in the Fourth Amendment*, 110 MICH. L. REV. FIRST IMPRESSIONS 62, 65 (2012).

299. *Id.*

300. *Id.* at 65.

301. *United States v. Jones*, 132 S. Ct. 945, 962 (Alito, J. concurring). “The *Katz* test—whether the individual has an expectation of privacy that society is prepared to recognize as reasonable—has often been criticized as circular, and hence subjective and unpredictable.” *Kyllo v. United States*, 533 U.S. 27, 34 (2001). *See also* *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (“In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable,” . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”).

302. *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000).

303. *Id.* at 124.

304. *Id.* at 125.

305. Franks, *supra* note 277, at 70.

and Hispanics, “flight constitutes a reasonable reaction to a continuing pattern of police abuse and harassment of minority citizens” and “flight from law enforcement officials is a mode of survival; it is the mechanism for avoiding confrontations.”³⁰⁶

The Court’s reasoning evinces a refusal to acknowledge that there are other reasonable and compelling experiences of the world besides its own, or to recognize that “reasonable” can have different meanings depending on one’s life experiences. As Mary Anne Franks suggests,

[t]he failure of logic here is . . . intimately connected to the failure of empathy. If a person over-identifies so much with his own experiences that he assumes them to be universal, then he not only cannot hear the experiences of others in any meaningful way, but he also may be unable to hear the question actually being asked.³⁰⁷

Let us return to the facts summarized at the beginning of this Article to further illustrate this point. The first scenario is the story of *Scott v. Harris*, another Fourth Amendment case in which the Supreme Court had to “slosh [its] way through the factbound morass of ‘reasonableness.’”³⁰⁸ In that case, the Court was asked to decide whether a police officer’s use of deadly force to terminate a high-speed chase constituted an unreasonable seizure under the Fourth Amendment.³⁰⁹ Harris sued Scott in Federal District Court, alleging that Scott had violated his Fourth Amendment rights by using excessive force.³¹⁰ Scott filed for summary judgment, claiming qualified immunity.³¹¹ The District Court denied the motion and the U.S. Court of Appeals for the Eleventh Circuit affirmed,³¹² adopting Harris’s assertions that, during the chase, there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle:

[T]aking the facts from the non-movant’s viewpoint, [Harris] remained in control of his vehicle, slowed for turns and intersections, and typi-

306. Amy D. Ronner, *Fleeing While Black: The Fourth Amendment Apartheid*, 32 COLUM. HUM. RTS. L. REV. 383, 384 (2001). See also *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D. N.Y. 1996) *vacated*, 921 F. Supp. 211 (S.D. N.Y. 1996) (noting with respect to the behavior of residents of New York’s high-crime Washington Heights district: “After the attendant publicity surrounding [a high-profile investigation into police corruption], had the men not run when the cops began to stare at them, it would have been unusual”).

307. Franks, *supra* note 277, at 70-71.

308. *Scott v. Harris*, 550 U.S. 372, 383 (2007).

309. *Id.* at 374.

310. *Id.* at 376.

311. *Id.*

312. *Id.*

cally used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed [respondent], the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.³¹³

Stating that they were “happy to allow the videotape to speak for itself,”³¹⁴ the eight Justices in the majority found that the evidence told “quite a different story.”³¹⁵

There we see respondent’s vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.³¹⁶

Thus, the majority had “little difficulty in concluding it was reasonable for Scott to take the action that he did.”³¹⁷

Justice Stevens dissented, stating that “the tape actually confirms, rather than contradicts, the lower courts’ appraisal of the factual questions at issue.”³¹⁸ He suggests that the other Justices’ experiences account for their view of the facts.

Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways—when split second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately.³¹⁹

As Dan Kahan and his co-authors observed, “In reporting that *he*, at

313. *Harris v. Coweta Cnty., Ga.*, 433 F.3d 807, 815-16 (2007) (citations omitted).

314. *Harris*, 550 U.S. at 375 n.5.

315. *Id.* at 379.

316. *Id.* at 379-80.

317. *Id.* at 384.

318. *Id.* at 390 (Stevens, J., dissenting).

319. *Id.* at 390 n.1 (Stevens, J., dissenting).

least, saw something different, Justice Stevens was plainly advancing the claim that the tape doesn't speak for itself—that *different* people, with different experiences, can *see different things* in it.³²⁰ By implying that “no reasonable person could view the videotape and come to the conclusion that deadly force was unjustified in doing so,” the Court “implicitly labeled the four other judges to review the case unreasonable.”³²¹ The majority’s decision “effectively determined that, regardless of whatever other evidence might be presented in the case and whatever might transpire in the course of jury deliberations, there could be no room for ‘reasonable’ disagreement on *either* the magnitude of the risks involved in the case *or* the role of the police in reducing or exacerbating those risks.”³²²

Professors Dan Kahan, David Hoffman, and Donald Braman responded to the Court’s invitation to determine whether the *Scott v. Harris* tape speaks for itself and conducted an empirical study to test the Court’s conclusion and their hypothesis that reactions to the *Scott* tape would be shaped by group identities and values.³²³ They showed the video to a diverse sample of approximately 1,350 Americans, asked them what they saw, and to state their views on the dispositive issues, as identified by the Court.³²⁴ Although a substantial majority did interpret the facts the way the Court did, there were differences in perceptions across identifiable subgroups.³²⁵ A very sizable majority of a “diverse, nationally representative sample agreed with the *Scott* majority that Harris’s driving exposed the public and the police to lethal risks, that Harris was more at fault than the police for putting the public in danger, and that deadly force ultimately was reasonable to terminate the chase.”³²⁶ However, the results clearly showed that those who disagreed about the appropriateness of deadly force shared certain “identity-defining characteristics.”³²⁷ Specifically, members of various subcommunities such as African-Americans, low-income workers, and Northeast residents, for example, tended to form more pro-plaintiff

320. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARVARD L. REV. 837, 848 (2009).

321. *Harris*, 550 U.S. at 395. Thus, Justice Stevens concluded that “If two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court’s characterization of events.” *Id.* at 396.

322. Kahan, *supra* note 320, at 880.

323. *Id.* at 877-878.

324. *Id.* at 841.

325. *Id.* at 864.

326. *Id.* at 879.

327. *Id.*

views of the facts than did the Court.³²⁸ Statistically the difference between males and females was only marginally significant; however, women were generally more pro-plaintiff.³²⁹ As the Justices in *Wardlow* also failed to appreciate, beliefs about the abuse of police power and reasons for attempting to avoid police encounters “vary across socio-demographic and political groups.”³³⁰

The study demonstrates that people are likely to interpret the scene depicted in the tape in a way that reinforces the schemas of their socioeconomic and political peers.³³¹ In announcing that the minority view is unreasonable, the Justices in the majority likely did not recognize how their own perceptions “would be just as bound up with cultural, ideological, and other commitments that disposed them to see the facts in a particular way.”³³² Because of their personal and professional experiences, judges “social realities” differ from ordinary citizens.³³³ As Kahan, Hoffman, and Braman aptly assert, “The Court’s failure to recognize the culturally partial view of social reality that its conclusion embodies is symptomatic of a kind of cognitive bias that is endemic to legal and political decisionmaking.”³³⁴

Without referring to the approach as empathetic, Kahan and his co-authors suggest “that one way to compensate for the partiality, and the incipient partisanship, of their own factual perceptions is to attend to cues that a cultural subcommunity will react with outrage should judges privilege their own factual perceptions.”³³⁵ Empathy gives a judge “reason to rethink, and might, in some cases, furnish her a reason to decide a case in a manner contrary to her own inclinations.”³³⁶ An empathetic approach could serve as an “effective debiasing strategy”³³⁷ by giving judges pause to consider whether what strikes them as an “obvious” fact might actually be interpreted differently by an

328. Kahan, *supra* note 320, at 841.

329. *Id.* at 867.

330. *Id.* at 853.

331. *Id.*

332. *Id.* at 897.

333. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 248 (1986) (“[T]he overwhelming majority of judges are still white males who come from a privileged sector of our society. Often their views of the world reflect their backgrounds. Some rather rigidly adhere to a narrow perspective of justice and fairness that is not consistent with that of the general community.”).

334. Kahan, *supra* note 320, at 881.

335. *Id.* at 898.

336. *Id.*

337. Kahan, *supra* note 320, at 899.

identifiable socioeconomic or political subcommunity.³³⁸ In exercising empathy when ruling on a motion that would summarily resolve a dispute, a judge should engage in a “mental double-check.”³³⁹ When a judge decides that there is no genuine dispute about some set of material facts, before concluding that no reasonable juror could find such facts, the judge should try to imagine who those potential jurors might be.³⁴⁰ If such jurors cannot be imagined or would be only “statistical outliers,” she should decide the case summarily. However, if, instead, the judge can imagine dissenting jurors, with specific demographic, cultural, or political characteristics, he should question if his decision regarding “reasonableness” is based on his own experience, or whether another perspective would be equally reasonable.³⁴¹

The Court applies an empathetic approach in *Safford v. Redding*, in which the Court was asked to decide whether a thirteen-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.³⁴² This case required the Court to analyze the intrusiveness of the search, the importance of the government’s interest, and whether the government’s means were reasonable.³⁴³ Resolution of the Fourth Amendment issue thus necessitated an understanding of all the litigants’ perspectives.³⁴⁴ “To assess how intrusive such a search was, it needed to focus on how it was experienced by the litigant and on how it would be experienced by others in her place. To understand the nature of the governmental interest, it needed to put itself in the place of school administrators.”³⁴⁵

Empathy, as perspective-taking, challenges a judge to examine his assumptions about how the world works. As Judge Richard Posner asserts, empathy enables a judge to consider litigants’ concerns and interests may be affected by the judge’s decisions, even though they may

338. Cf. Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES, Jan. 10, 2008, at A1, <http://www.nytimes.com/2008/01/10/washington/10scotus.html> (reporting Justice Roberts’ skepticism toward the claim that obtaining official identification at the county seat as a prerequisite to voting is burdensome and reply of counsel that “[i]f you’re indigent, [the seventeen-mile bus trip from urban Gary to the county seat is] a significant burden” (internal quotation marks omitted)).

339. Kahan, *supra* note 320, at 898.

340. *Id.*

341. *See id.* at 898-99.

342. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009).

343. *Id.* at 370; Bandes, *Empathetic Judging*, *supra* note 255, at 145.

344. Bandes, *Empathetic Judging*, *supra* note 243, at 143-45.

345. *Id.* at 143.

not be central to the case.³⁴⁶ Experiencing a connection with a particular subcommunity may help a judge take, rather than evade, responsibility for the consequences of her decisions.³⁴⁷ As Judge Sotomayor says, “I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives[.]”³⁴⁸ Justice Souter, for example, imagined the thought process of the principal responsible for the students’ safety:

JUSTICE SOUTER: I’ve got suspicion that some drug is on this kid’s person. My thought process is I would rather have the kid embarrassed by a strip search, if we can’t find anything short of that, than to have some other kids dead because the stuff is distributed at lunchtime and things go awry. Is that the basis? Is that thought process, that reasoning, the basis for a—a reasonable strip search?

Empathy challenges judges to be “aware of their reactions to the parties and their arguments so they—and those who evaluate their decisions—can examine their assumptions, identify their blind spots and prejudices, and seek out additional information and insight when necessary.”³⁴⁹ Justice Breyer understood that his own experience and perspective was limited, and thus, that he needed more information about how a thirteen-year-old girl would experience the search.

JUSTICE BREYER: I’m trying to work out why is this a major thing to say strip down to your underclothes, which children do when they change for gym, they do fairly frequently, not to—you know, and there are only two women there. Is—how bad is this, underclothes? That’s what I’m trying to get at. I’m asking because I don’t know.³⁵⁰

. . . .

In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear (Laughter.) Or not my underwear. Whatever. Whatever. I was the one who did it? I don’t know. I mean, I don’t think it’s beyond

346. Little, *supra* note 281, at 210 (citing Richard Posner, *Emotions versus Emotionalism in Law*, in *THE PASSIONS OF LAW* (Susan A. Bandes ed., 1999)).

347. See Richard Posner, *EMOTION AND EMOTIONALISM IN LAW*, in *THE PASSIONS OF LAW* 309, 323-24 (Susan Bandes ed., 1999).

348. Sotomayor, *supra* note 187, at 93.

349. Bandes, *Moral Imagination*, *supra* note 67, at 12.

350. Transcript of Oral Argument, *Safford Unified Sch. Dist. #1 v. Redding*, No. 08-479 (Apr. 21, 2009), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-479.pdf.

human experience, not beyond human experience.³⁵¹

Justice Ginsburg explained that this was not merely a locker room routine, but the search of a thirteen-year-old girl forced to strip to her underwear and shake out her bra and pants in front of school officials.

JUSTICE GINSBURG: I don't think there's any dispute what was done in the case of both of these girls. It wasn't just that they were stripped to their underwear. They were asked to shake their bra out, to—to shake, stretch the top of their pants and shake that out.

Souter's majority opinion clearly makes an effort to understand the perspective of both parties. It acknowledged Savana's subjective expectation of privacy against such a search was "inherent in her account of it as embarrassing, frightening, and humiliating."³⁵² The Court looked beyond its limited perspectives by considering the Brief for the National Association of Social Workers and school psychology research to determine that "reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure." It further acknowledged that

The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be.³⁵³

The Court also expressed understanding of the administration's interest.

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students. . . . Parents are known to overreact to protect their children from danger, and a school

351. *Id.*

352. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 366 (2009).

353. *Id.* at 375 (citing Brief for National Association of Social Workers et al. as *Amici Curiae* 6–14); Irwin A. Hyman & Donna C. Perone, *The Other Side of School Violence: Educator Policies and Practices That May Contribute to Student Misbehavior*, 36 J. SCH. PSYCHOL. 7, 13 (1998) (strip search can "result in serious emotional damage").

official with responsibility for safety may tend to do the same.³⁵⁴

The Court's understanding of both parties' perspectives allowed a more accurate balancing of interests, but did not resolve the issue of how the balance should be struck.³⁵⁵

[E]mpathy enables the decisionmaker to have an appreciation of the human meanings of a given legal situation. Empathy aids both processes of discovery—the procedure by which a judge or other legal decisionmaker reaches a conclusion—and processes of justification—the procedure used by a judge or other decisionmaker to justify the conclusion—in a way that disembodied reason simply cannot.³⁵⁶

Empathy facilitates the process of understanding competing points of view.³⁵⁷ Because the law attempts to influence human behavior, in applying the law, judges must strive “to understand and predict motivations, intentions, perceptions, and other aspects of human conduct. Empathy makes that understanding possible.”³⁵⁸

B. The “Reasonable Person” of Sexual and Racial Harassment Law

Because of the prominence of the reasonable person in sexual harassment law,³⁵⁹ judges deciding these cases should be aware of how implicit bias privileges particular perspectives, and therefore calls for an empathetic approach to decisionmaking. In *Meritor Savings Bank, FSB v. Vinson*,³⁶⁰ the United States Supreme Court found that sexual harassment was actionable under federal anti-discrimination law in those situations where it was severe enough to create a hostile work environment.³⁶¹ Determining whether a hostile work environment existed is evaluated from the objective viewpoint of a reasonable person.³⁶²

354. *Safford*, 557 U.S. at 377.

355. Bandes, *Empathetic Judging*, *supra* note 243, at 145.

356. Henderson, *supra* note 248, at 1576. See Abrams, *Empathy and Experience*, *supra* note 188, at 279 (“When you have an experiential connection to the lives of a particular group, you may be able to imagine, with a kind of immediacy or specificity, the effects of a judicial decision on members of that group.”)

357. Little, *supra* note 281.

358. Bandes, *Empathetic Judging*, *supra* note 243, at 139.

359. A plaintiff's claim of sexual harassment derives from Title VII's proscription that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment, because of such individual's . . . sex. . . .” 42 U.S.C. § 2000e-2(a)(1) (2013) (§ 703(a)(1) of Title VII).

360. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

361. *Id.* at 67.

362. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (stating that Title VII bars conduct

Armed now with an understanding of decisionmaking and perspective-taking, let us revisit the second scenario, based on the facts of *Rabidue v. Osceola*, presented in Part I of this Article. In determining whether the workplace constituted an “offensive work environment,”³⁶³ the district court judge concluded that the vulgarity, which included comments, such as “all that bitch needs is a good lay”³⁶⁴ “merely constituted an annoying—but fairly insignificant—part of the total job environment.”³⁶⁵ Regarding the obscene posters, including at least one violent image, the court stated, “For better or worse, modern America features open displays of written and pictorial erotica. Shopping centers, candy stores and prime time television regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be *legally* offended by sexually explicit posters.”³⁶⁶ As Wendy Pollack aptly observes, in *Rabidue*, the district court judge and Sixth Circuit judges who affirmed the decision reasoned that “since the conduct complained of, pornographic displays and vulgar comments, is an everyday occurrence to which both men and women are subjected, it is natural, acceptable, and part of the fabric of society’s morality. How could it be unwelcome?”³⁶⁷

On appeal, Judge Keith of the Sixth Circuit disagreed vehemently with this conclusion.

that would seriously affect a reasonable person). *See also*, *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986) (stating that “[t]o accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, . . . must adopt the perspective of a reasonable person’s reaction to a similar environment under essentially like or similar circumstances.”).

363. “[T]o state a claim under Title VII, sexual harassment must be (1) sufficiently persuasive so as to alter the conditions of employment and create an abusive working environment and (2) be sufficiently severe and persistent to affect seriously the psychological well being of employees.” *Rabidue v. Osceola Ref. Co.*, 584 F. Supp. 419, 433 (E.D. Mich. 1984).

364. *Rabidue*, 805 F.2d at 615.

365. *Rabidue*, 584 F. Supp. at 432.

366. *Id.* at 433. The Sixth Circuit Court of Appeals upheld the trial court’s ruling.

In the case at bar, the record effectively disclosed that Henry’s obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee’s vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a *de minimis* effect on the plaintiff’s work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, Henry’s vulgar language, coupled with the sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive.

Rabidue, 805 F.2d at 622.

367. Wendy Pollack, *Sexual Harassment: Women’s Experiences vs. Legal Definitions*, 13 HARV. WOMEN’S L.J. 35, 64-65 (1990).

I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stifles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job.³⁶⁸

Judge Keith criticized the majority's application of a "reasonable person" standard for "fail[ing] to account for the wide divergence between most women's views of appropriate sexual conduct and those of men"³⁶⁹ and for "sustain[ing of] ingrained notions of reasonable behavior fashioned by the offenders, in this case, men."³⁷⁰ In other words, the reasonable person standard seemed to privilege male understandings of social interaction in the workplace and simultaneously to obscure those of women³⁷¹ because a judge's frame of reference for reasonableness is his own experience and prior assumptions. Instead, Judge Keith called for a better standard, which he named the "reasonable victim."³⁷² Without calling it such, he was advocating an empathetic approach to deciding sexual harassment claims that would move male judges away from their own ingrained notions of what constitutes a hostile work environment, and would focus instead on the perspective of the female plaintiff.³⁷³

The Ninth Circuit accepted this empathetic approach in *Ellison v. Brady*,³⁷⁴ the landmark case where, for the first time, a court adopted a "reasonable woman"³⁷⁵ standard for hostile work environment sexual

368. *Rabidue*, 805 F.2d at 627 (Keith, J. dissenting).

369. *Id.* at 626 (Keith, J. dissenting).

370. *Id.*

371. Moran, *supra* note 48, at 1260.

372. *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting).

373. As Kathryn Adams explains, "Judges might view [the reasonable person standard] as authorizing them to decide cases on the basis of their own intuition. Kathryn Abrams, *The Reasonable Woman: Sense and Sensibility in Sexual Harassment Law*, DISSENT 49-50 (Winter 1995) [hereinafter Abrams, *Reasonable Woman*]."

374. *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).

375. The "reasonable woman" standard is controversial. See Abrams, *Reasonable Woman*,

harassment claims. Kerry Ellison's male coworker, Sterling Gray, repeatedly expressed an interest in getting to know her, asking her to lunch, and writing several long, emotionally intense letters.³⁷⁶ The Ninth Circuit panel, which consisted of all male judges, stated that, "it is not difficult to see why the [male] district court [judge] characterized Gray's conduct as isolated and trivial."³⁷⁷ Some men may consider Gray to be a "modern-day Cyrano de Bergerac."³⁷⁸ Ellison, however, found the letters extremely disturbing because she perceived Gray to be obsessed with her.³⁷⁹ Gray "told her he had been 'watching' and 'experiencing' her; he made repeated references to sex; he said he would write again. Ellison had no way of knowing what Gray would do next."³⁸⁰ Therefore, viewing the case from the perspective of a reasonable woman, the Ninth Circuit concluded that it could not "say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive."³⁸¹ In applying a "reasonable woman" standard, the Ninth Circuit court explained that there is a gender-based "gap in perception"—men and women are likely to differ as to what constitutes harassment.³⁸² Because "women are disproportionately victims of . . . sexual assault," they may be more concerned about displays of sexual behavior at work and may reasonably anticipate that overtures from male coworkers might escalate into sexual violence, even if a reasonable man might not agree.³⁸³ The court commented on the dangers of recourse to the reasonable person test in sexual harassment: "If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory

supra note 373, at 50-51 (discussing challenges to the "reasonable woman" standard from the feminist movement.) For example, some feminists have expressed concern that the standard could "simply free women judges to resort to *their* intuitions, in ways that were not uniformly promising to female claimants. Moreover, the standard might prompt the desired response from male judges—permitting them to indulge their own, biologized visions of female difference." *Id.* at 51. *See also*, *Radtke v. Everett*, 501 N.W.2d 155, 166-67 (Mich. 1993).

The gender-conscious standard . . . places undue emphasis on gender and the particular plaintiff while it inappropriately deemphasizes society's need for uniform standards of conduct. Hence, a gender-conscious standard eliminates community standards and replaces them with standards formulated by a subset of the community.

376. *Ellison*, 924 F.2d. at 873-74.

377. *Id.*

378. *Id.* at 880.

379. *Id.* at 874.

380. *Id.* at 880.

381. *Id.*

382. *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991).

383. *See id.* at 879 & n.10.

practice was common, and victims of harassment would have no remedy.”³⁸⁴ The *Ellison* Court thus gave credence to the concern that because reasonable tends to get interpreted as “ordinary,” a sex-blind reasonable person standard, it suggested, is likely to be male-biased and hence to systematically ignore the experiences of women.³⁸⁵

Although in his *Ellison v. Brady* dissent Judge Stephens rejected the assumption that “men’s eyes do not see what a woman sees through her eyes,”³⁸⁶ research on gender differences in perceptions of harassment suggest that men and women do differ in their perceptions of sexual harassment.³⁸⁷ Although the associated effect is only slightly larger than a “small” effect, the difference is consistent across studies, with almost every study finding significant differences and concluding that women are more likely to perceive social-sexual behavior as harassment than are men.³⁸⁸ This gender difference is largest for the ambiguous behaviors, such as sexual jokes or gestures that are often associated with hostile environment harassment.³⁸⁹ Moreover, when third parties evaluate incidents of social-sexual behavior involving a man and a woman, female third parties are more likely to view the incident as sexual harassment and to hold the man accountable for the incident than are male third parties.³⁹⁰

Although there are mixed results regarding the impact of judges’ gender and race on sexual harassment cases, some personal characteristics, particularly those associated with political conservatism (age, political affiliation), have been found to consistently influence judge decisions.³⁹¹ “[A] judge’s personal characteristics may be most influential in discrimination or harassment cases in which the issues are directly associated with race or gender.”³⁹² The research suggests that “[i]n the context of complex social judgments, judges may be unable to systematically process all of the relevant information and instead rely on heuristics based on their political experiences.”³⁹³ Thus, exercising

384. *Id.* at 878.

385. *Id.* at 879.

386. *Id.* at 884 (Stephens, J., dissenting).

387. Carol T. Kulik et al., *Here Comes the Judge: The Influence of Judge Personal Characteristics on Federal Sexual Harassment Case Outcomes*, 27 *LAW & HUM. BEHAV.* 69, 73 (2003).

388. *Id.*

389. *Id.*

390. *Id.*

391. *Id.* at 74.

392. *Id.*

393. *Id.* at 82 (concluding that “These effects are not necessarily due to any intentional bias on the part of the judge—instead, they may reflect the inherent ambiguity of legal information and the

empathy, regardless of whether the applicable standard is called reasonable man, woman, or victim, means recognizing this tendency and being mindful that reasonableness is not usually a universal truth. Understanding that a determination of reasonableness can be shrouded in a judge's own perceptions and taking the time to consider the perception of the victim (who is usually an "other"—i.e., a female victim vs. a male judge) can help a judge evaluate the facts in a less biased way.

Analysis of retaliation claims³⁹⁴ for opposing an unlawful employment practice under Title VII is also subject to a judge's implicit bias. Although the test contains "both subjective and objective elements, requiring that the plaintiff have a reasonable, good faith belief that the alleged employer practices . . . violated Title VII," some courts have treated reasonableness and good faith as if they were identical.³⁹⁵ Thus, the doctrine pits the plaintiff's subjective perception against the judge's own subjective perception. As Professor Robinson explains, "a black employee might in good faith allege racial discrimination, or a female employee might in good faith assert sexual discrimination or harassment, but a white male judge might readily conclude that the outsider's good faith assertion was unreasonable."³⁹⁶ Because courts require a plaintiff to meet both requirements, and it is difficult for courts to assess the subjective good faith component, the "reasonableness" requirement is usually dispositive in these cases.³⁹⁷ "Although the reasonableness test is framed as 'objective,' in application, the judge's intuitions about reasonableness are likely to be shaped by the judge's race and gender, which will usually be white and male."³⁹⁸ An empathetic approach would make the judge "cognizant of perceptual differences, including his own."³⁹⁹

An example of this approach is evidenced in *Harris v. International Paper Co.*,⁴⁰⁰ in which a district court in Maine adopted a "reasonable black person" standard to assess the severity of racial harassment under Title VII and the Maine Human Rights Act ("MHRA"). In *Harris*, a

limited cognitive capacity of judicial decision.").

394. 42 U.S.C. § 2000e-3(a) (2000). "Unlawful employment practices" include failing or refusing to hire, discharging or otherwise discriminating against any individual with respect to compensation, terms, or conditions of employment because of a protected trait, such as race and sex. See *id.* § 2000e-2(a)(1).

395. Robinson, *supra* note 107, at 1157 (internal citations omitted).

396. *Id.*

397. *Id.*

398. *Id.*

399. *Id.* at 1156.

400. *Harris v. Int'l Paper Co.*, 765 F. Supp. 1509 (D. Me. 1991), *vacated in part for other reasons*, 765 F. Supp. 1529 (D. Me. 1991).

postcard depicting “Our Gang” with a handwritten caption that said: “The new generation of papermakers” was posted next to the time clock within a week of the African-American plaintiff’s arrival at the paper mill.⁴⁰¹ It depicted the “Little Rascals” attempting to wash a dog and the black character “Buckwheat” was set apart from the other children, who were white.⁴⁰² The term “Buckwheat” was also used routinely in the mill as a racial epithet.⁴⁰³ The court found that these circumstances could reasonably be perceived by an African-American to be abusive.⁴⁰⁴ “Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims, the fact finder must ‘walk a mile in the victim’s shoes’ to understand those effects and how they should be remedied.”⁴⁰⁵ The court then explicitly adopted the “reasonable black person” standard by which to measure the hostility of the environment.⁴⁰⁶

Similarly, in *McGinest v. GTE Service Corp.*,⁴⁰⁷ the Ninth Circuit extended its reasoning from *Ellison v. Brady* to racial harassment: “[A]llegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff.”⁴⁰⁸ The majority reasoned that “[r]acially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group.”⁴⁰⁹ The court’s adoption of this identity-specific standard was specifically designed to counteract “the perspective of an adjudicator belonging to a different group than the plaintiff.”⁴¹⁰

C. Self-defense and the “Reasonable Man”

The reasonable person (or more accurately, reasonable man) has also played a role in assessing whether the use of deadly force is culpable in the law of self-defense.⁴¹¹ In *State v. Wanrow*, the

401. *Id.* at 1518.

402. *Id.*

403. *Id.*

404. *Id.* at 1519.

405. *Id.* at 1516.

406. *Id.*

407. *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103 (9th Cir. 2004).

408. *Id.* at 1115.

409. *Id.* at 1116.

410. *Id.*

411. WAYNE R. LAFAVE, CRIMINAL LAW 539 (4th ed. 2003) (“One who is not the aggressor

Washington Supreme Court recognized the danger of bias in the application of a reasonable person standard.⁴¹² When courts applied the reasonable man standard, they implicitly evaluated the reasonableness based on two parties (males) who were relatively equal in size and strength.⁴¹³ Thus, for most of the history of the law of self-defense, the reliance on the reasonable person effectively precluded women who killed their abusive partners from successfully pleading self-defense.⁴¹⁴ However, in *Wanrow*, the court reversed Yvonne Wanrow's second-degree murder conviction and held that use of the reasonable man objective standard of self-defense violated Wanrow's right to equal protection of the law.⁴¹⁵ Wanrow shot an intoxicated, unarmed man whom she knew had a reputation for violence when he approached her in a threatening manner.⁴¹⁶ At the time, Wanrow, who was five-foot-four, had a broken leg and was using a crutch.⁴¹⁷ Recognizing that Wanrow's fear and perception of danger were affected by her status as a woman, the court held that use of the reasonable man standard in the jury instructions⁴¹⁸ was improper because it deprived Wanrow of the right to have the jury consider her conduct in light of her own perceptions.⁴¹⁹

The impression created—that a 5'4" woman with a cast on her leg and using a crutch must, under the law, somehow repel an assault by a 6'2" intoxicated man without employing weapons in her defense, unless the jury finds her determination of the degree of danger to be objectively reasonable—constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law. The respondent was entitled to have the jury consider her actions in the light of her own perceptions of the situation,

in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.”).

412. *State v. Wanrow*, 559 P.2d 548 (Wash. 1977).

413. *Moran*, *supra* note 48, at 1250.

414. *Id.*

415. *Wanrow*, 559 P.2d at 559.

416. *Id.* at 550-51.

417. *Id.*

418. *Id.* at 558. That portion of the instruction reads:

However, when there is no reasonable ground for the person attacked to believe that His person is in imminent danger of death or great bodily harm, and it appears to Him that only an ordinary battery is all that is intended, and all that He has reasonable grounds to fear from His assailant, He has a right to stand His ground and repel such threatened assault, yet He has no right to repel a threatened assault with naked hands, by the use of a deadly weapon in a deadly manner, unless He believes, And has reasonable grounds to believe, that He is in imminent danger of death or great bodily harm.

419. *Id.* at 559.

including those perceptions which were the product of our nation's 'long and unfortunate history of sex discrimination.'⁴²⁰

The court directed that the jury on retrial should be instructed to apply a subjective, sex-specific standard of reasonableness.⁴²¹

D. "Reasonable Observer" of the Establishment Clause

The reasonable person also plays a significant role in resolving Establishment Clause cases. The "objective observer" or "reasonable observer" test is a legal fiction developed and endorsed by Justice O'Connor to determine whether government action demonstrates a purpose to endorse or disapprove of a particular religion, or to promote religion over non-religion.⁴²² The Court must determine whether the effect of the government's action endorses or approves of religion in the eyes of a "reasonable" or "objective" observer,⁴²³ who is "acquainted with the text, legislative history, and implementation of the [relevant government action]."⁴²⁴

For example, applying the reasonable observer test in *Lynch v. Donnelly*, Justice O'Connor implicitly adopts the perspective of a Christian.⁴²⁵ Similar to the facts of the third scenario discussed at the beginning of this Article, the challenged display included a crèche among other Christmas symbols, such as a Santa Claus house, reindeer and sleigh, a Christmas tree, a candy-cane pole, and carolers. Justice O'Connor concluded that "Pawtucket's display of its crèche . . . does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche."⁴²⁶ Although she acknowledged that the crèche conveys both religious sectarian messages, Justice O'Connor determined that the addition of sectarian symbols such as Santa's sleigh "changes what viewers may fairly understand to be the purpose of the display."⁴²⁷ By insisting that both the symbols and the Christmas holiday have "very strong secular components," Justice O'Connor failed to acknowledge that the display only included Christian

420. *Id.* at 558-59.

421. *Id.*

422. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring); *Cnty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989).

423. *Id.*

424. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

425. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

426. *Id.*

427. *Id.*

symbols.⁴²⁸ Justice O'Connor's assessment embodies the perspective of the reasonable Christian: "The display celebrates a public holiday, . . . [which] generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood."⁴²⁹ Justice O'Connor concludes that the display of the Christian crèche "serves a secular purpose—celebration of a public holiday with traditional symbols."⁴³⁰ This assumption that government displays of Christian symbols are not religious endorsements strongly suggests that she has adopted the viewpoint of a religious believer.⁴³¹

Justice Stevens advocates what can be considered an empathetic approach and argues that the reasonable observer should "take account of the perspective of a reasonable observer who may not share the particular religious belief [the display at issue] expresses."⁴³² The "objective observer" standard "presumes that different racial and gender groups place the same meaning upon the expressive content of a government action that affects them differently."⁴³³ The standard presumes that it is possible to view the world without a lens created by any particular race, class, or gender perspective. However, as we now know from social science, people do in fact generally view the world from the perspective of their race, class, and gender.⁴³⁴ We also know that judges have not escaped this propensity. As a result, the perspective of the judge will determine the "objective" observer standard and impose that perspective upon the plaintiffs.⁴³⁵ Because different beliefs will create different perceptions, there will be several "reasonable" observers.⁴³⁶ Thus, the Court's application of a universal "reasonable" observer standard becomes normative.⁴³⁷

Philosopher D. Z. Phillips asserts that one's religious belief alters his perception of the world.⁴³⁸ Therefore, two people with different

428. *Id.* See Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement Of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1542 (2010) [hereinafter Abrams, *The Reasonable Believer*].

429. Abrams, *The Reasonable Believer*, *supra* note 428, at 1542.

430. *Id.*

431. Abrams, *The Reasonable Believer*, *supra* note 428.

432. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 (1995) (Stevens, J., dissenting).

433. Rachel D. Godsil, *Expressivism, Empathy and Equality*, 36 U. MICH. J.L. REFORM 247, 250 (2003).

434. *Id.*

435. *Id.* at 287.

436. Abrams, *The Reasonable Believer*, *supra* note 428, at 1550.

437. *Id.*

438. D.Z. PHILLIPS, FAITH AFTER FOUNDATIONALISM 117 (1988) (quoted in Abrams, *The*

religious belief systems, faced with the same facts, will arrive at “different moral conclusions.”⁴³⁹ Similarly, political beliefs will also influence one’s reactions and conclusions: “Whether an observer would ‘perceive’ an . . . [endorsement] depends entirely on the observer’s view of the proper relation between church and state.”⁴⁴⁰ Thus, religious and political beliefs can lead to different conclusions regarding the endorsement question. As Paula Abrams argues, “the reasonable observer standard thus relies on the quite unreasonable assumption that application of the standard will necessarily yield only one objective answer.”⁴⁴¹ The Court’s assumption that it can identify one reasonable perspective is therefore flawed because a variety of reasonable results are possible, depending on the religious and political beliefs of the observer.⁴⁴² An empathetic approach would have the judge consider, as Justice Stevens suggested, the perspective of an observer who does not share the beliefs expressed by the religious display.

VI. CONCLUSION

This discussion regarding reasonable people, men, women, and observers highlights the legitimate concern with the implicit cognitive processes discussed in this Article. Thus, the realities of how all humans make decisions must inform the application of any “reasonable” or “objective” test in the law. That is, a judge must understand that what is reasonable can be other than what he or she instinctively believes to be so. Empathy can serve as a “corrective” to a judicial point of view that may be uninformed or unaware of the mistakes judges are inclined to make because of their own position of privilege and stereotypes.⁴⁴³ Without an attempt to understand the opposing viewpoint, judges who still are predominantly privileged and male, may misread the significance of various facts such as treatment in a work environment or

Reasonable Believer, *supra* note 428, at 1549).

439. D.Z. PHILLIPS, INTRODUCING PHILOSOPHY: THE CHALLENGE OF SKEPTICISM 95 (1996) (quoted in Abrams, *The Reasonable Believer*, *supra* note 428, at 1549).

440. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 48 (1985) (quoted in Abrams, *The Reasonable Believer*, *supra* note 428, at 1550).

441. Abrams, *The Reasonable Believer*, *supra* note 428, at 1550.

442. *Id.*

443. See Godsil, *supra* note 433, at 284 (proposing a “reasonable community member” standard in Equal Protection cases, “in which the government action would be examined from the perspective of a reasonable member of the affected or allegedly harmed community”). Professor Godsil suggests that this standard will invite the judge to empathize with the affected community, which “will be a step toward ensuring that the judge’s own perspective—or his own unconscious bias—does not influence his own determination of the message.” *Id.* at 285.

the impression made by a religious display. In this way, empathy can motivate decision-makers to question their unreflective biases and preconceptions.

As Dan Simon explains,

the problem is that judges would be required to alter habits of thought of which they are generally unaware, and over which they have very little control. . . . [H]owever, current research suggests that the distinction between automatic and controlled mental processes is not absolutely impermeable. Given the right conditions, people can break into automatic processes and, at least to some degree, *overcome* them.⁴⁴⁴

As the above discussion of schemas and implicit bias proves, overcoming automatic processes is no easy feat. “To begin to overcome these biases it is necessary that the person has both the cognitive capability and the motivation to do so.”⁴⁴⁵ No matter how much training they receive, judges can only avoid biases that are known to them. Even when they desire to render a “fair” decision, subconscious influences can cloud their decisions and impede their legal reasoning. Therefore, for judges to be fair, they must identify and then neutralize the effects of their subconscious influences.⁴⁴⁶ Although we can never hope to free ourselves of all implicit biases, the effect of empathy is to achieve a level of objectivity that Owen Fiss describes as “transcend[ing] the particular vantage point of the person offering the interpretation.”⁴⁴⁷

444. Simon, *supra* note 32, at 138.

445. *Id.* at 139.

446. Evan R. Seamone, *Understanding the Person Beneath the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 WILLAMETTE L. REV. 1, 64-66 (2006).

447. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982). See Godsil, *supra* note 433, at 288.