

The Myth of Objectivity

Understanding implicit bias and the role of heuristics, cognitive errors and intuition in judicial decision making

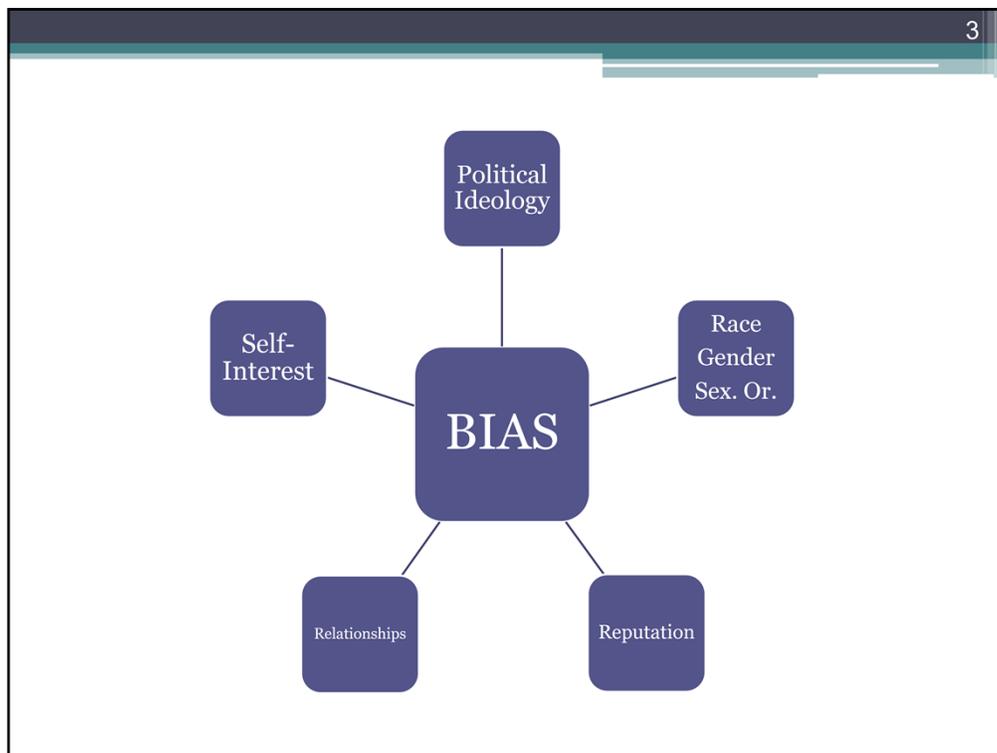
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Judges and court staff strive to be neutral, impartial and logical decision makers yet even they are not exempt from implicit bias. Judge Abernethy will discuss emerging research from cognitive science and the factors which can lead to systematic errors in judgment. She will also address the limited role for intuition in judicial decision making and how to combat implicit bias by improving our ability to objectively listen, perceive, find facts and make decisions.

Goals for today

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- Understand how mental shortcuts can lead to systematic errors in judgment.
- Understand key factors that influence a judge's ability to objectively listen, perceive, find facts and make decisions.
- Understand when intuition works
- Know tools to improve perception and combat implicit bias.



Bias is a fighting word. This is because it brings up images of someone who is ignorant and prejudiced, who stubbornly rejects conflicting evidence and rational argument. Judges and court staff strive to avoid biases that are known to them. We are often conscious of this kind of bias and take steps to guard against it. We think that is what we need to do to be “objective.” But you don’t know what you don’t know. **We have learned more about the brain in the last 10-15 years than in all of human history.**

What we will explore today is how the way human beings think is a source of systematic judicial error.

About 20 heuristic biases have been identified which increase the likelihood that we will jump to erroneous conclusions even when we think we are guarding against the “bias” depicted above.

Explicit Bias

- Public trust and confidence in the legal system is premised on the principle that judges are fair and impartial.
- A fair trial in a fair tribunal is a basic requirement of due process.
 - *Tumey v. Ohio* 273 U.S. 510, 523, 532 (1927) (judge must have no direct, personal, substantial pecuniary interest)
 - *Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868 (2009) (expanding when Due Process requires recusal)

This conversation is important because our very professional identity and the public's perception of justice rests on a belief of impartiality. Our codes of conduct and reported law reflect

***Caperton v. A.T. Massey Coal Co., Inc.* 556 U.S. 868 (2009)** (Despite justice's argument that he had no direct, personal, substantial pecuniary interest, Due Process Clause required recusal when appellant had a significant and disproportionate influence in placing justice on case by raising 3 million in funds, more than all other contributions combined, and it was reasonably foreseeable that case would be heard by that newly elected justice.)

Caperton interesting discussion by the dissent. Justice had no personal stake in the outcome. Majority emphasizes that facts in this case are extreme by any measure given the pivotal role Massey had in getting this justice elected and the fact that the campaign and case were close in time. Dissent argues "hard cases make bad law" (my take) stating that there are a numerous factors that could give rise to the appearance of bias in any given case but Due Process should not require recusal for those reasons; line should be clear as to when recusal is required and when it is not.

Oregon Code of Judicial Conduct

Rule 2.1 *Promoting Confidence in the Judiciary*

(A) A judge shall observe high standards of conduct so that **the integrity, impartiality and independence** of the judiciary and access to justice are preserved and shall act at all times in a manner that promotes public confidence in the judiciary and the judicial system.

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Rule 3.3 *Impartiality and Fairness*

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Rule 3.4 *External Influences on Judicial Conduct*

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to improperly influence the judge's judicial conduct or judgment.

JCIP/OJD Efforts to Combat Bias

- **Courts Catalyzing Change:**
 - Collaboration with NCJFCJ & Casey Family Programs
 - CCC Shelter Hearing Benchcard (JCIP website)
- **Current U of O Law School study** of shelter hearings and judgments
- **ICWA training and State-Tribal Convening**
- **Judicial promotion of OJJDP *DMC Reduction Cycle*** in delinquency and participation in Governor's DMC Summit.



News flash judges are human and Cardozo had it right:

“We may try to see things as objectively as we please. Nevertheless we can never see them with any eyes except our own.”

Benjamin Cardozo
THE NATURE OF THE JUDICIAL PROCESS 13
(1921)

Deep below consciousness are other forces, the likes an 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.

“The life of the law has not been logic, it has been experience.”

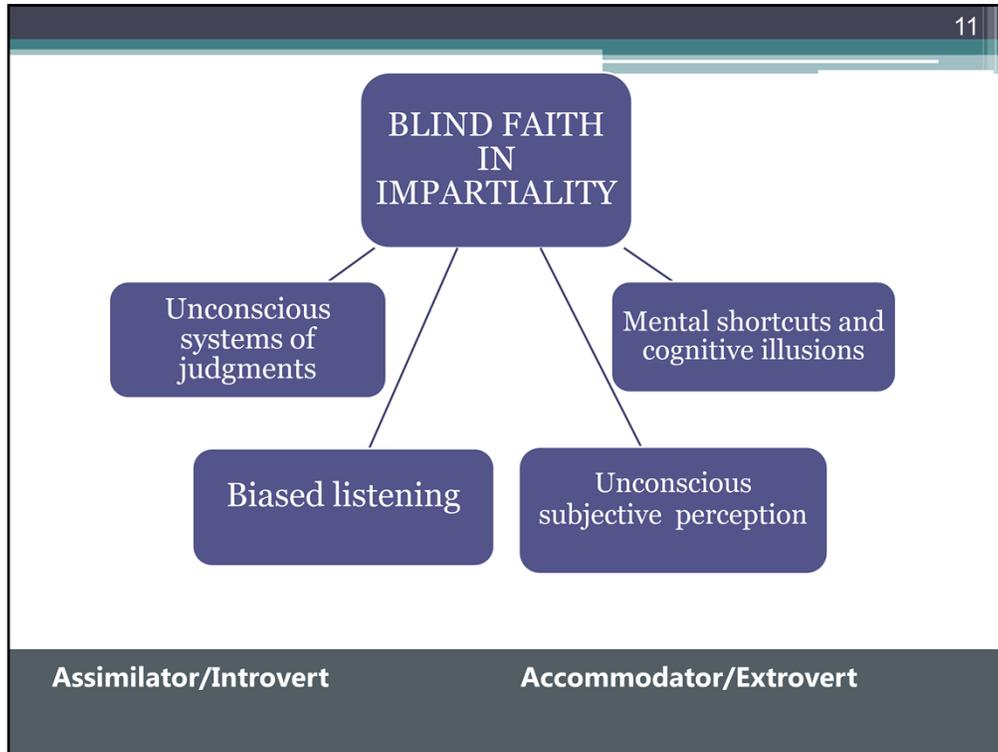
Oliver Wendell Holmes

Does the outcome of legal cases depend solely on laws and facts? Legal formalism holds that judges apply legal reasons to the facts of a case in a rational, mechanical, and deliberative Manner . An alternative view of the law—encapsulated in the highly influential 20th century legal realist movement—is rooted in the observation of US Supreme Court Justice Oliver Wendell Holmes that “the life of the law has not been logic; it has been experience” Realists argue that the rational application of legal reasons does not sufficiently explain judicial decisions and that psychological, political, and social factors influence rulings as well

Cognitive Science Confirms

- Assuming impartiality is dangerous
- Objectivity is a myth
- Perceptions are highly susceptible to error.

The Very Nature of Human Thought Leads to Systematic Error



Blind faith is unwarranted.

We all have unconscious system of judgments which leads to -- etc. Hueristics are mental shortcuts we rely on to make decisions.

Since Reality is a million grains of sand. And we only perceive a small portion of those grains, our personal and professional experience influences what we choose to pay attention to.

We listen, unwittingly we that unconscious bias. Also when we have a ‘hunch” about the right result we pay attention to facts that support it.

Learning style and personality can either help or hurt us.

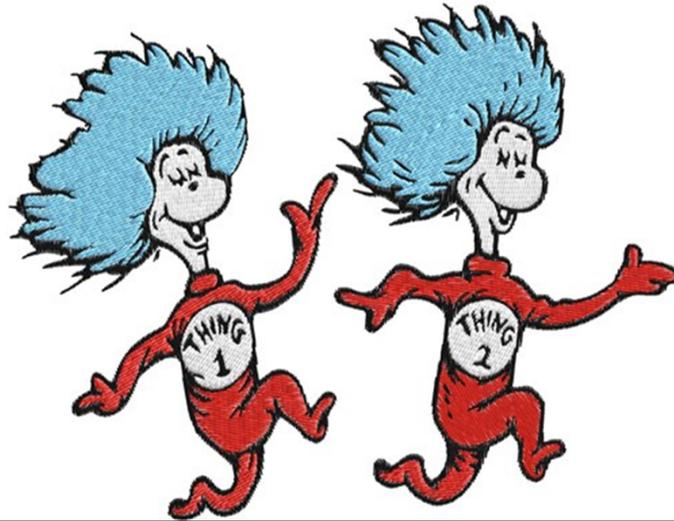
Other factors that influence ¹²our ability to be impartial

- **The law of least effort**
- **Over reliance on intuition**
- **Emotion**
- **Time**
- **Isolation**
- **Volume**



– even applying to bias we think is “explicit.”

Our complex system of unconscious judgments



ROTATE SLIDE



- System 1: Intuition and impulse – operates automatically and quickly with little, or no effort, and no sense of voluntary control
- System 2: Effort, self-control, and computation – allocates attention to the effortful mental activities that demand it
- Kahneman, Daniel, *Thinking Fast and Slow*, Farrar, Straus and Giroux, 2011

Even well meaning judges (that would be I presume all of us here) who pride themselves on being objective are influenced by unconscious thoughts and feelings.



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- System One works quickly and automatically
- System One likes coherent stories
- System one is intuitive and impulsive
- System One has confidence in its intuitions
- System One is biased and quick to confirm that bias
- System One does not like ambiguity and doubt
- System One ignores evidence
- System One uses facts recently brought to mind

The tale of Israeli judges

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Jerome Frank, one of the early champions of Legal Realism, famously argued that the outcome of a case could depend upon what a judge ate for breakfast. Jonathan Levav of Columbia Business School in New York and his colleagues analyzed 1,112 parole hearings for inmates of four Israeli prisons, made by eight judges over a ten-month period.

experienced judges (mean experience=22.5 y, SD=2.5

Demonstrate how extraneous factors can sway highly consequential decisions of expert decision makers. Prior research suggests that making repeated judgments or decisions depletes individuals' executive function and mental resources, which can, in turn, influence their subsequent decisions.

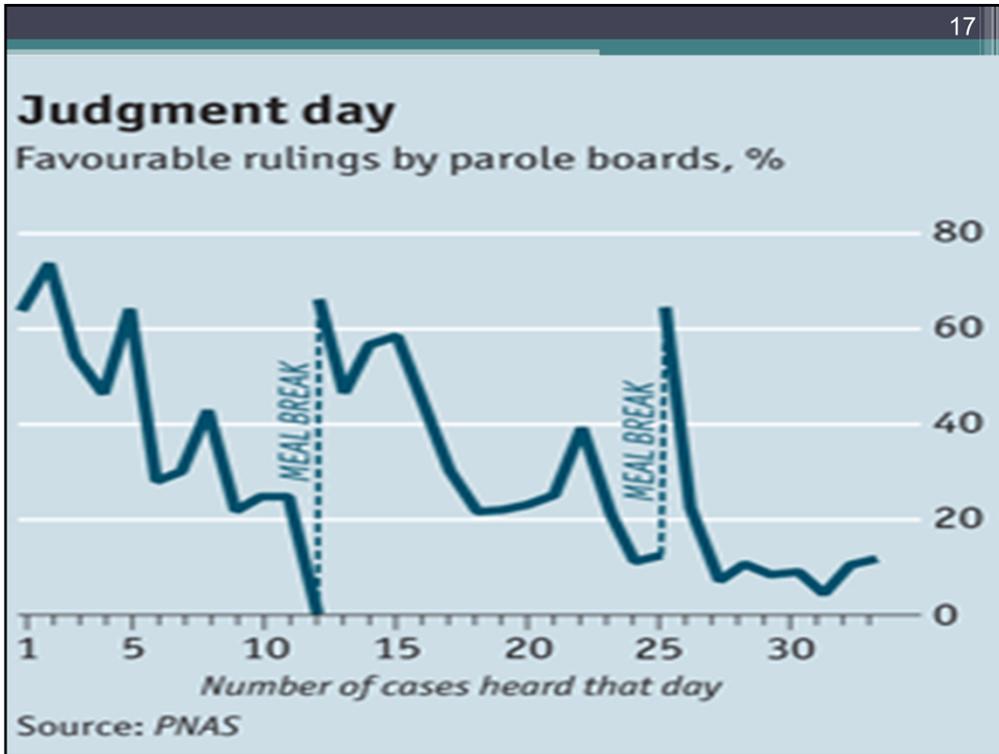
This is because System 2 demands Effort, self-control, and computation – allocates attention to the effortful mental activities that demand it

. "It is really troubling and quite jarring -- it looks like the law isn't exactly the law."

Easy way out

In a judge's case, this would be to deny parole.

Whether the effect is caused by a lack of food, rest or both remains unclear. And the study draws no conclusions about the quality of the decisions made. "We can't say without a shadow of a doubt that there is a causal link here, but the data are extremely suggestive of one," says Levav. The bias could "happen anywhere where there is sequential decision-making and some kind of status quo or default that allows people to simplify those decisions", Levav says.



In fact, Jerome Frank, one of the early champions of Legal Realism, famously argued that the outcome of a case could depend upon what a judge ate for breakfast.

System Two: The law of least effort

- **Cognitive ease vs cognitive strain**
- **Effort takes energy**
- **When we can get away without using it up, we will.**
- **Ten Cents**



10 common cognitive errors

1. Egocentrism
2. Overconfidence
3. Sunk cost effect.
4. Recency effect
5. Confirmation bias
6. Anchoring
7. Framing
8. Illusory correlation
9. Hindsight bias
10. Halo effect

TOP
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LIST

Egocentrism and Overconfidence

- “When he has nothing else to do, he can always contemplate his own greatness. It is a considerable advantage to a man, to have so inexhaustible a subject.”
– [Charles Dickens](#), *Bleak House*

- “**Snow Fall: The Avalanche at Tunnel Creek,**” by **New York Times** reporter John Branch,



The avalanche was triggered when sixteen of the nation's top [free skiers](#) and free snowboarders were making a run together.^[2] They had been gathered by Chris Rudolph, a charismatic marketing director at the attached ski resort.^[2] It is unusual for so many experts to be together outside of a competition.^[2] One or more of the skiers triggered the avalanche 300 feet below the top of the mountain, and it rushed down 2,650 vertical feet,^[3] carrying away five skiers.^[4] One of the skiers wedged himself between two trees and avoided being swept away as the avalanche rushed over him.^[4] Another skier, [Elyse Suggested](#), deployed an avalanche survival airbag and suffered minor injuries, despite being trapped until her fellow skiers rescued her.^{[2][4]} The remaining three skiers, Jim Jack, Chris Rudolph and John Brenan, were killed through a combination of [blunt force trauma](#) and [asphyxia](#).^{[2][3][4][5]}

Sunk cost effect

Escalating commitment to a course of action in which we have made a substantial investment of time, money or other resources.

- 1996 Mt. Everest tragedy
- J. Krakauer, *Into Thin Air*



Recency effect, Anchoring and Confirmation Bias

- **Recency effect:** Priming the brain with associated ideas.
- **Anchoring:** Estimate based on irrelevant starting point.
- **Confirmation bias:** *Coherence is like candy.*



Framing and Illusory correlation

- **Framing:** Mental models we use to simplify our understanding of a complex world.
- **Illusory correlation:** Jumping to a conclusion about the relationship between 2 variables.



Hindsight and Halo Effects

- **Hindsight bias: Judging past events as easily predictable.**
- **Halo effect: Evaluation based on a handful of traits.**



When intuition works: Experts and
pattern recognition

Malcolm Gladwell

*Blink: The Power of
Thinking without
Thinking*

Little Brown and
Company, 2005.



Handout 4 Hayashi. Alden M. Hayashi, "When to Trust Your Gut," *Harvard Business Review*, (February 2001). (cross-indexing is the ability to see similar patterns in disparate fields.)

Implicit Bias and Application of law

- When is the use of deadly force “reasonable”
- What makes a work environment “abusive”
- What does it mean for a town to “endorse” religion?

- C. Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception* , 47 AKRON L.REV. 693,700-701 (2014)

Since court is reviewing for legal error, where do you see implicit bias factoring in? Application of law: E.G. what is reasonable? What is usual? Defining “reasonable” and other terms in the application of the law is hard. What is a RPP in same or similar circumstances – understanding context is critical. What is the perspective of a RAPP in that situation. How do you know if you have not been in that situation. Can a group of judges can better actively imagine the world from another’s vantage point.

Factors Especially Affecting Trial Judges

- **Findings of fact:** Unconsciously biased perception
- **Time**
- **Isolation**
- **Volume**



Isaiah M. Zimmerman, *Stress: What it Does to Judges, and How it Can be Lessened*, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 117 (George H. Williams & Kathleen M. Sampson eds., 1984)

Especially Affecting *Trial* Judges?

Perception : Our ability to perceive and thus “find facts” -- how much does this impact the appellate court. De Novo review?

Time Caution most needed in high volume: The AWOP Denial of a Petition for Review?

Isolation: Does a 3 judge panel make a difference

Volume – talking about our brain’s limited capacity for attention.

Selected Resources

- A. Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 13, 177 (1921).
- Kang et. al, *Implicit Bias in the Courtroom*, 59 UCLA L.REV. 1124, 1128 (2012);
- Chris Guthrie et. al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777,820 (2001)
- C. Nicole Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception* , 47 AKRON L.REV. 693 (2014)

Combating implicit bias

Doubt Your Objectivity

**“The Fool Doth Think He Is Wise
But The Wise Man Knows Himself
To Be A Fool”**

As You Like It - Act 5, Scene 1

Doubt Your Objectivity

The worst thing we can do is have blind faith in our impartiality.

“If judges are unaware of the cognitive illusions that reliance on heuristics produces, then extra time and resources will be of no help. Judges will believe that their decisions are sound and choose not to spend the extra time and effort needed to make a judgment that is not influenced by cognitive illusions.”

***Chris Guthrie et. al., Inside the Judicial Mind, 86 CORNELL L. REV. 777,820 (2001)
(Empirical study to explore the influence of cognitive illusions on judicial decision-making using a sample of 167 federal magistrate judges)***

Combating Bias: Justify the decision

- Apply the law and justify the decision
- To yourself
- To the parties



Combating Bias: Justify the decision

- Possibility of appeal improves judges incentive for accuracy at all earlier levels of appeal.
- Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 *J. Legal Studies* 379, 410-11, 425-6 (1995).



How could an appeals court confirm a claim by the defendant that the testimony is false? There is no ready way for an appeals court to do so, no rule book that it can consult to see whether a witness lied. For an appeals court to assess the validity of the witness's testimony, the appeals court would often have to engage in costly reexamination of the trial court record and perhaps hear live testimony; moreover, such an undertaking might not be thought to yield a substantially more accurate evaluation of the witness's veracity (an appeals court may not have a comparative advantage in the fact-finding process). In consequence, the exclusion of claims of errors of fact from the scope of appeal may make rough sense from the point of view of our theory's' Nevertheless, one should admit that despite the drawbacks to appeals court consideration of errors in found facts, it is still possible that this often would be desirable on net. And, indeed, one observes that in the civil-law and the formerly socialist countries, there has apparently been much greater willingness than here of appeals courts to ascertain whether factual errors were made (including **by the appeals courts taking evidence afresh**).^{7 2}

There error prevention came about because judges devoted greater effort to their decisions, but, more generally, it may also occur because judges are less likely to follow their predilections or to exercise favoritism. At 426

Combating Bias: Take a break



Executive function can be restored and mental fatigue overcome, in part, by interventions such as viewing scenes of nature, short rest, experiencing positive mood and increasing glucose levels in the body.

Danziger, Levav, and Avnaim- Pesso, *Extraneous Factors in Judicial Decisions*, (2010).

Balanced emotion and self-care

Isaiah M. Zimmerman, *Stress: What it Does to Judges, and How it Can be Lessened*, in **HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL READINGS 117** (George H. Williams & Kathleen M. Sampson eds., 1984)

Combating Bias: Listening Skills

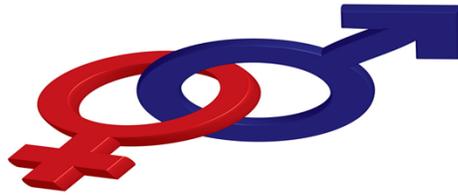
- Listening with an “unrebutting mind”
- Defer judgment as you take more facts and ideas into consideration, viewing all decisions as tentative.
- Develop a system for note taking.

Combating Implicit Bias: Empathy

- Empathy is a cognitive strategy that can reduce implicit bias and lead to better application of the law within context.
- [Nicole E. Negowetti, Judicial Decisionmaking, Empathy and the Limits of Perception. 47 Akron Law Review 693 \(2014\).](#)

Empathy in Action

- Glaspell, Susan, *Jury of Her Peers* (1917) The Best American Short Stories of the Century at 18 (Houghton Mifflin Company, 1999), edited by John Updike.



“Judicial Mindfulness”

- Evan R. Seamone, *Understanding the Person Behind the Robe: Practical Methods for Neutralizing Harmful Judicial Biases*, 42 Willamette L. Rev. 1 (2006).

A process-oriented approach which recognizes that checklists and sensitization training are not enough: “Directing judges not to be biased in certain specific ways can actually increase the amount of bias they exhibit unless they have practical and specific methods to use.” All too often, the facilitators of these educational workshops assume that judges are able to automatically correct errors in their decision-making simply by being alerted to common biases exhibited by other judges.¹³ The problems with these solutions are the lack of specific instructions to gain awareness of subconscious negative influences, the lack of methods to limit the harmful effects of such influences, and the lack of reliable indicators that a technique has successfully neutralized the bias.¹⁴

The mindfulness-based approach realizes that methods to enhance judicial decision-making are not required in every case decided by the judge. Rather than prioritizing a list of objective factors, mindful judging hinges on individual judges and embraces their intuition, past experiences, unique views, and personality traits. *Id* at 29. “[L]imiting the effect of a subconscious impulse requires more than knowing of its existence; it requires an active process.” *Id* at 39

The End

*The aspiration to impartiality is just that * * *
There is no objective stance but only a series of
perspectives * * *Personal experiences affect the
facts that judges choose to see.*

Justice Sonia Sotomayor