

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

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## I. INTRODUCTION<sup>1</sup>

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

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

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

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

An increasing number of studies report that judges are continuously reaching biased decisions.<sup>6</sup> The theories of legal reasoning

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

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

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

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

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

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

6. See *infra* Part II.A.

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

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

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

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

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

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

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

jurisdictions implement an occasional daylong workshop or brown bag lunch, these voluntary sessions focus mainly on sensitivity training, limited group brainstorming, or they merely provide the legal definitions of different types of judicial bias.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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

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

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

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

14. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. *Id.*

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

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

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

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26. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

## II. DEFINING "JUDICIAL BIAS" FROM A PRACTICAL STANDPOINT

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

- Canon 3 of the American Bar Association's Code of Judicial Conduct requires that "[a] judge shall perform judicial duties without bias or prejudice."<sup>37</sup>
- 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."<sup>38</sup>
- Documents, such as the Proposed Ohio Judicial Creed, attest: "I know that a judge must not only be fair but also give the appearance of being fair."<sup>39</sup>

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

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

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

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

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

38. 28 U.S.C. § 455(b)(1) (2005).

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

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

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

the same emotions and behavioral influences that lead other professionals to make decisional errors.<sup>42</sup> Even though *stare decisis* requires judges to follow precedent, and it would be an outrage for judges to justify their decisions solely on emotional reactions, these truisms of judging do not prevent bias.<sup>43</sup>

Until the 1960s, aside from reviewing methods of legal reasoning, few courts fostered a practical educational approach to assist judges in their decision-making.<sup>44</sup> Even though many jurists pointed out the dangers faced by judges who assumed that they were infallible,<sup>45</sup> the notion that judges needed education in any subject, let alone bias, was “laughable.”<sup>46</sup> Not until the 1970s did courts and institutes develop extensive programs of continuing education for judges.<sup>47</sup> These courses, according to some commentators, “arose out of a hunger close to starvation.”<sup>48</sup> As a result of this new interest, courses emphasized ethics and legal reasoning, but most programs did not look beyond the discipline of law for any practical approaches to the problem of subconscious influences on judges.<sup>49</sup>

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42. *E.g.*, Guthrie et al., *supra* note 3.

43. *See* Seamone, *supra* note 7, at 1033-1036 (describing how legal reasoning conventions do not help judges when the law is indeterminate); *see also* JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 4 (1995) (revealing that many judges do not know the point at which their past experiences would be threatening enough to a case to require their disqualification); BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW 199 (1997) (suggesting that indeterminacy of rules leads to reliance on person values in judicial decisions); Zimmerman, *supra* note 19 (explaining how physical influences can detract from the quality of judicial decisions, regardless of the reliability of legal reasoning techniques); Peter D. Blanck, *Calibrating the Scales of Justice: Studying Judges' Behavior in Bench Trials*, 68 IND. L.J. 1119 (1993) (recognizing that judges can send unintended messages to juries that influence their decisions simply through judges' unintended physical reactions while on the bench that legal reasoning does not prevent); Guthrie et al., *supra* note 3 (documenting judges' errors attributable to cognitive shortcuts that have no bearing on legal reasoning methods); Cass R. Sunstein, *Hazardous Heuristics*, 70 U. CHI. L. REV. 751 (2003) (documenting cognitive shortcuts in reaching judgments); Peter D. Blanck et al., Note, *The Appearance of Justice: Judge's Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985) [hereinafter Blanck Note] (acknowledging that when judges expect or predict a certain trial outcome, their intended, or even unintended, behavior toward jurors can influence the jury's verdict).

44. DONALD DALE JACKSON, JUDGES 29 (1974).

45. *E.g.*, JEROME FRANK, LAW AND THE MODERN MIND (1930).

46. JACKSON, *supra* note 44, at 29.

47. *Id.* at 30.

48. *Id.*

49. Seamone, *supra* note 7, at 1031-33.

The legal realist movement strongly advocated psychological methods to increase judicial self-awareness.<sup>50</sup> In one seminar at the National Judicial College, psychologist Andrew Watson explained the realist approach in context as he imparted to judges the importance of mastering a behavioral approach to the discharge of their duties:

What I want to leave you with is the idea that you should watch your own impulses when you sentence. Don't let your impulses get in the way of your reasoning. Know yourself. Learn something about psychology. Allow for your own hang-ups. You have to learn who you are because you can't make a rational sentence until you do.<sup>51</sup>

Two major considerations limited the movement's impact. First, the behavioral approach often demands the aid of a trained psychoanalyst and many hours of supervision, if not therapy.<sup>52</sup> Second, psychology, in general, is "relatively weak, with little theoretical agreement and a high rate of theory turnover."<sup>53</sup>

For decades, the demands for behavioral interventions fell on deaf ears. However, resistance waned as courts began to use the vernacular of "bias."<sup>54</sup> Throughout the courts, the term generally includes the negative results of a process, oftentimes attributable to subconscious influences that could easily be classified as psychological.<sup>55</sup> The related obligation to train judges to avoid reaching biased decisions requires practical solutions to aid judges in increasing self-

50. *E.g.*, STEPHEN OFFEI, BASIC JURISPRUDENCE AND LEGAL PHILOSOPHY 125-33 (1998) (surveying the various views of American legal realism, which all express a "common attitude" that "one who would know the ways of legal action must dig beneath the doctrines formally announced in judicial decisions down in the substrate of personal preference, empirical fact, and conflicting social interest").

51. JACKSON, *supra* note 44, at 34.

52. James R. Elkins, *The Legal Persona: An Essay on the Professional Mask*, 64 VA. L. REV. 735, 758-59 (1978) ("The essential unresolved question is whether insight for effective self-scrutiny is possible without the encouragement and guidance of an experienced psychoanalyst or psychotherapist.").

53. TAMANAHA, *supra* note 43, at 15.

54. One of the first major efforts to emphasize debiasing in judicial training was prompted by the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP), which sponsored several educational programs commencing in 1980 with a course at the National Judicial College. Norma J. Wilker, *Educating Judges About Gender Bias in the Courts, in WOMEN, THE COURTS, AND EQUALITY* 228 (Laura L. Crites & Winifred L. Hepperle eds., 1987).

55. See ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 203 (2002) ("[A] large part of the behavior that produces racial discrimination is influenced by unconscious racial discrimination.").

awareness.<sup>56</sup>

While bias may call for a behavioral approach to legal analysis, it has simultaneously limited the applicability of many practical interventions because “bias” can take on different and inconsistent meanings.

#### *A. State Task Forces and Inconsistent Definitions of “Bias”*

According to the National Center for State Courts, 42 states conducted extensive investigations of bias in their judicial systems, most of which concluded that judges in each jurisdiction reached unfair decisions on the basis of personal characteristics such as gender.<sup>57</sup> At least 34 of these states published reports making recommendations to eliminate negative influences on these judges.<sup>58</sup> Although many of these reports are tentative and represent a first attempt to address the issue of bias, they have been very relevant to the courts. The reports demonstrate that the safeguards of legal reasoning do not always protect judges, and all judges risk the inherent danger that bias can unknowingly influence their decision-making process.

The numerous reports have significant drawbacks because they do not reflect the same definition of “bias.” When they recommend educating judges, often, the approach of one study is incomparable to the next.<sup>59</sup> In the reports, the term normally takes on four definitions. First, “bias” can be general, referring to a judge who lacks an open mind and reaches a predetermined outcome in a case, unwilling to consider alternative facts or laws for whatever reason.<sup>60</sup>

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56. See *infra* Part II.B (describing existing suggestions).

57. NATIONAL CENTER FOR STATE COURTS, GENDER BIAS TASK FORCE STATUS REPORT, available at [http://www.ncsconline.org/WC/Publications/KIS\\_RacFaiStLnks.pdf](http://www.ncsconline.org/WC/Publications/KIS_RacFaiStLnks.pdf) (last visited Oct. 7, 2005) [hereinafter STATUS REPORT]. Although most of these groups address gender bias, racial and ethnic bias has also motivated interest. As of 1993, 15 state commissions investigated the issue of ethnic bias. NATIONAL CENTER FOR STATE COURTS, A NEW PARADIGM FOR FAIRNESS: THE FIRST NATIONAL CONFERENCE ON ELIMINATING RACIAL AND ETHNIC BIAS IN THE COURTS I (1995) [hereinafter NEW PARADIGM]. At least ten of these commissions had published reports on race and ethnicity by 1996. Judith Resnik, *Asking About Gender in the Courts*, 21 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 952, 954 (1996) [hereinafter SIGNS]. See also NEW PARADIGM, *supra*, at 56 (describing involvement of state action teams from all U.S. states and territories to address racial and ethnic bias at the conference). See also SCHAFFRAN & WIKLER, *supra* note 5, at ix (discussing the establishment of 45 state task forces to address gender bias).

58. See generally STATUS REPORT, SIGNS, and NEW PARADIGM, *supra* note 57.

59. See, e.g., NATIONAL CENTER FOR STATE COURTS, ESTABLISHING AND OPERATING A TASK FORCE OR COMMISSION ON RACIAL AND ETHNIC BIAS IN THE COURTS 11-12 (1993).

60. BLACK'S LAW DICTIONARY 162 (6th ed. 1990) (defining bias as “the predisposition

A second, more specific view of bias denotes a judge who looks beyond the judicial forum to resolve matters in conflict. Widely recognized as the "extrajudicial source doctrine," this basis for judicial disqualification prohibits "an opinion on the merits [decided] on some basis other than what the judge learn[s] from his participation in the case."<sup>61</sup> When interpreting the term, some courts have simplified the matter to include knowledge gained "outside a courthouse."<sup>62</sup> Although there exists no all-encompassing definition of the term, and it remains quite elusive,<sup>63</sup> precedent is quite clear that offensive sources must be farther removed from the judge's consideration than his in-court statements or conduct.<sup>64</sup> For example, prohibited extrajudicial sources can include *ex parte* meetings in chambers with an appointed panel of experts,<sup>65</sup> as well as attendance at seminars where the information gleaned "can be neither accurately stated nor fully tested," even if they are open to the public.<sup>66</sup>

Factors such as specific past experiences that unknowingly influence the judge can raise similar concerns. While a judge's general knowledge of an area that is the subject of pending litigation, such as the effects of carcinogens on the body, may not result in bias, such knowledge will go virtually unchecked without self-analysis. This raises the issue of whether prior knowledge has limited the judge's ability to evaluate matters presented by the parties. Oftentimes judges face such concerns. Consider, for example, the role of Justice Harry Blackmun when deciding the landmark opinion of *Roe v. Wade*.<sup>67</sup>

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to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction").

61. *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

62. *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996).

63. *E.g.*, Adam J. Safer, Note, *The Illegitimacy of the Extrajudicial Source Requirement for Judicial Disqualification Under 28 U.S.C. § 455(a)*, 15 CARDOZO L. REV. 787, 789 (1993) ("[T]here is no single, concrete definition that easily encompasses everything that is considered a judicial source or everything that is considered an extrajudicial source . . .").

64. *E.g.*, *United States v. Cooley*, 1 F.3d 985, 993-94 (10th Cir. 1993) (surveying decisions involving permissible sources).

65. *Edgar*, 93 F.3d at 259. Here, the circuit court analogized the *ex parte* meeting with researchers of mental health facilities to an "undercover tour of a mental institution to see how the parties were treated." *Id.*

66. *Id.* ("[I]nformation a judge learns at a workshop devoted to a subject is extrajudicial, even though the workshop is open to other persons, and evidence could be taken about the proceedings."). Note, however, that the court cited *In re School Asbestos Litigation*, 977 F.2d 764 (3d Cir. 1992), for this proposition, a case that dealt with the attendance of the judge at a seminar on asbestos-related injury, a matter of ongoing litigation, which had a plaintiff-friendly view and involved some of the same witnesses that were called by the plaintiffs.

67. 410 U.S. 113 (1973).

Hailed by many to be particularly adept in medical issues based on his prior experience as counsel for the Mayo Clinic,<sup>68</sup> Justice Blackmun returned to the Clinic's libraries in the summer of 1972 to research the trimester system.<sup>69</sup> In such circumstances, the possibility for extrajudicial influence can surely arise.

The third, and most common, definition of bias adopted by the task force reports relates to the way judges show preferences toward some litigants but not others based on characteristics such as race, gender, ethnicity, sexual orientation, or socio-economic status. According to this view, but for that characteristic, the judge would have ruled more favorably for the party exhibiting the characteristic. Using this approach, the Commission addressing gender bias in Colorado, for example, identified a number of biased results:

- “[P]eople are denied rights or burdened with responsibilities solely on the basis of gender;
- [W]hen stereotypes about the proper behavior of men and women are applied to people regardless of their individual situations;
- [W]hen men and women are treated differently in situations where gender should make no difference; and
- [W]hen men or women are adversely affected by a legal rule, policy, or practice that affects members of the opposite sex to a lesser degree or not at all.”<sup>70</sup>

Before alleging bias, some would require that disproportionate results in a case first be supported by proof that the judge has adopted a myth or stereotype disfavoring a party.<sup>71</sup> But a more common approach to bias requires only evidence of the disproportionate treatment since judges, especially those influenced by subconscious forces, will find it difficult to identify bias at the outset.<sup>72</sup>

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68. E.g., Radhika Rao, *The Author of Roe*, 26 HASTINGS CONST. L.Q. 21, 24-25 (1998).

69. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 229 (1979); Jeffrey B. King, Comment, *Now Turn to the Left: The Changing Ideology of Justice Harry A. Blackmun*, 33 HOUS. L. REV. 277, 290-91 (1996).

70. COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER & JUSTICE IN THE COLORADO COURTS FINAL REPORT 3 (1990).

71. FOUNDATION FOR WOMEN JUDGES, OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION 1 (1986); Jennifer Gerarda Brown, *Sweeping Reform From Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MIN. L. REV. 363, 372-373 (2000).

72. Seamone, *supra* note 7, at 1051 (describing the difficulty of recognizing bias, even when using strategies that are designed to do so).

The final view of bias relies on the perception of observers regarding the judge's ability to be impartial. Here, bias can be defined objectively, such as the case where the judge is a shareholder in the corporation appearing before him,<sup>73</sup> or where the judge had made public projections about the way he would decide cases similar to an instant case.<sup>74</sup> Collectively, these types of bias exist where "the judge's impartiality might reasonably be questioned," which would require disqualification from the bench.<sup>75</sup>

There is no doubt that a biased judge might fit any of the four definitions above. However, the inconsistency resulting from the differences in the way people define bias makes it difficult to develop a uniform approach to debiasing. In fact, approaches to debiasing inevitably conflict, even within only one of the four paradigms, as evident in the findings that "investigative tools or methodology used to identify subtle biases directed at racial and ethnic minorities are not automatically transferable to identification of gender bias" and "balancing divergent goals is often more complicated."<sup>76</sup>

The task force reports are bittersweet. They benefit judges by calling into question safeguards expected to shield judges from bias and they emphasize the need for judicial self-awareness; yet, they hurt judges by introducing inconsistent definitions of bias and accompanying approaches to debiasing. The courts, in their quest to eliminate bias, adopt a number of approaches, some dealing strictly with administrative processes and others placing more responsibility on the individual judges. Common solutions proposed by the task forces include: requesting further studies,<sup>77</sup> altering the structure of court proceedings,<sup>78</sup> calling for the support of external organizations, *e.g.*, high schools or law schools to promote resources for individuals who

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73. See Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 698 (1985) (explaining that under current statutory schemes, since it represents a financial interest in a case, "[t]he ownership of even one share of stock in a corporation that is a party to a case requires disqualification").

74. *E.g.*, JUDICIAL CODE, *supra* note 37, at Canon 5(A)(3)(d)(i) (prohibiting "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office").

75. *Id.* at Canon 3(C)(1).

76. NATIONAL CENTER FOR STATE COURTS, *supra* note 59, at 12.

77. *E.g.*, MASSACHUSETTS REPORT, *supra* note 11, at 98 (requesting further analysis of case outcomes that involve ethnicity or gender).

78. The Massachusetts commission recommended that a single judge should see cases through to their termination, even when they involve interpreters. *Id.* at 23.

are victims of judicial discrimination,<sup>79</sup> or adding additional prohibitions against bias.<sup>80</sup> Of the educational programs, most are voluntary<sup>81</sup> and range from focused training by outside organizations<sup>82</sup> to the development of resource guides<sup>83</sup> and diversity training via group discussions or videotapes.<sup>84</sup>

In many cases, the ineffectiveness of these programs has motivated critics to call for sweeping reforms that would remove significant responsibility from judges. Critics have suggested appointing panels of judges to all cases, permitting judges to check one another for biases,<sup>85</sup> forcing judges to articulate all of the bases for their decisions in an effort to make decisions more objective,<sup>86</sup> or granting parties peremptory challenges to remove judges on the grounds of bias.<sup>87</sup>

Many of these solutions are extreme, the clearest of all involving the mandate to make judicial language gender-neutral and less offensive. A number of commentators sincerely believe that a sentence such as the following is the only way a judge can truly exhibit gender neutrality:

As *co* was eating a sandwich and mumbling to *coself* at the restaurant, the *waitron* alerted the *hair-disadvantaged person* that *co's companion animal* was biting a small *prewomyn* outside the store

79. *Id.* at 49 (requesting high schools to develop programs that will train and prepare more interpreters for the courts).

80. *E.g.*, CALIFORNIA REPORT, *supra* note 11, at EXEC. SUMMARY 7 (suggesting rules that prohibit judges from belonging to social groups that practice discrimination).

81. The California committee took issue with this fact, remarking, “[i]n certain specific areas, most notably in family law, the model of voluntary education must yield ultimately to required courses for all judges who hear matters in these certain areas.” *Id.* at 40.

82. While Massachusetts lacked a “comprehensive” educational plan, the Flaschner Judicial Institute and the National Coalition Building Institute, on occasion, developed programs for judges. MASSACHUSETTS REPORT, *supra* note 11, at 162-63.

83. CALIFORNIA REPORT, *supra* note 11, at EXEC. SUMMARY 7 (suggesting the implementation of a “fairness manual” presenting examples of fair treatment to various parties and model opening remarks). Massachusetts similarly suggested the development of “a cultural resource reference guide . . . for use by judges . . . that describes the needs of non-English speaking persons, the effective use of interpreters, and facts about countries and/or cultures.” MASSACHUSETTS REPORT, *supra* note 11, at 4.

84. MASSACHUSETTS REPORT, *supra* note 11, at 164-65.

85. Patricia Cohen, *Judicial Reasoning is All Too Human*, N.Y. TIMES, June 30, 2001, at B9 (reviewing this and similar alternatives to increase fairness in the courts).

86. *E.g.*, Seamone, *supra* note 7, at 1071 (discussing the benefit of stating reasons for decisions); CALIFORNIA REPORT, *supra* note 11, at EXEC. SUMMARY 12 (suggesting “the introduction of . . . legislation which would require judges to state the factors on which they rely in setting child support awards at the minimum level”).

87. Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213 (2002).

entrance.

In this alternative universe of speech, the waiter or waitress is now a “waitron,” “himself” or “herself” becomes “coself,” “dog” becomes “animal companion,” “bald” becomes “hair disadvantaged,” and “girl” becomes “prewomyn,” all in an effort to preserve the sanctity of the judicial process.<sup>88</sup> The result of these substitutions is an incomprehensible paragraph that aids few besides the champions of political correctness, representing the major problem with divergent approaches to judicial debiasing: the difficulty of distinguishing between an appropriate corrective measure and a ridiculous one.

### *B. The Checklist Method to Judicial Debiasing*

Despite numerous and inconsistent definitions of bias, court systems have agreed that education is the best approach to eliminate bias.<sup>89</sup> Accordingly, they have developed judicial education programs in a similar manner. Their approach to debiasing usually begins with the assumption that all judges are biased, or at least, they are equally susceptible to the same harmful and unintended influences. The consequence of this assumption is the need to introduce a systematic approach that will apply to each and every case decided by the judge. Implicitly, this uniformity requires that the approach be an objective one, overcoming differences in judges’ personalities, experiences, or frames of reference. Court systems meet these narrow requirements by developing checklists for judges, which highlight aspects of decisions that potentially exhibit some level of bias.

The method of debiasing by checklist occurs whenever educators present judges with lists of specific outcomes in cases as indicators of

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88. HENRY BEARD & CHRISTOPHER CERF, *THE OFFICIAL POLITICALLY CORRECT DICTIONARY AND HANDBOOK* (Villard Books 1993) (substituting traditionally “biased” definitions with official suggestions of numerous scholars and officials). Even when language becomes gender neutral, this hardly guarantees the absence of gender bias by judges. “While it is true that the blatant forms of gender bias in the courts (such as sexist jokes and gender-biased language) have diminished, the subtle and intractable forms persist, particularly in substantive law decisionmaking.” SCHAFFRAN & WIKLER, *supra* note 5, at 33.

89. Based on judges’ responses and independent research, California, like many states found, “judicial education offering state-specific examples and following new pedagogical approaches was widely perceived as *the most effective and important remedy* for problems of gender bias in the courts.” JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE CALIFORNIA COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS* 403 (July 1996) (final report). See also SCHAFFRAN & WIKLER, *supra* note 5, at 28 (stating that gender fairness task forces recommend gender fairness education for every sector of the judicial system).

the presence of bias. These indicators often include jokes about parties or their attorneys (who possess certain traits), differences in sentencing patterns, differences in the enforcement of monetary awards, or failure to provide guidance to individuals with one trait but not others with different traits.

The Massachusetts task force addressing racial and ethnic bias, for example, defined such bias as “decisions made or actions taken on the basis of stereotyped attitudes regarding individuals of various racial and ethnic groups[,] rather than a fair, impartial appraisal of the merits with respect to each individual or situation.”<sup>90</sup> The task force offered an index of eleven “key bias indicators,” prompting judges to question their analyses. Some of the indicators included:

- Judges berate/make jokes, or make demeaning remarks about minorities in the courthouse; . . .
- For similar offenses, minority defendants receive prison sentences while white defendants do not; . . .
- Courts are more willing to enforce alimony awards for white parties than for minority parties;
- When children are removed from the home pursuant to orders in Care and Protection cases, white parents are told where the children are residing, whereas minority partners [sic] are not told;
- The court enforces a child support award for a white child more vigorously than it does for a minority child.<sup>91</sup>

While oftentimes these behaviors may be undesirable, a fault with this checklist approach is that educators are focusing too heavily on the *results* of a biasing process but neglecting the very *process* itself. This over-reliance is problematic for four primary reasons.

### 1. Checklists Trigger False Alarms

The results-oriented process of identifying biases has the inherent risk of triggering a false alarm where the judge is mistaken about the nature of his decision. This mistake can happen in two ways. Suppose that a Caucasian judge sentenced an African-American female to a longer prison term than a Caucasian female who committed a similar crime who had been tried only days before. If he considers

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90. MASSACHUSETTS REPORT, *supra* note 11, app. A at 179.

91. *Id.* at 31 n.3 (citing J.M. SHUSTER WITH LIJIAN CHEN, EYES ON THE COURTS 1-33, 1-34 (1994)).

the sentence as evidence of racial bias, while ignoring valid considerations about the individual's criminal history or other permissible enhancements that warrant a harsher sentence, he runs the risk of violating the law. He may similarly risk overlooking the same considerations in future cases in an effort to overcompensate for his faulty estimations of bias.

Surely, the woman who receives a harsher sentence or lesser monetary award than a man in a similar case may very well be the victim of gender bias. In other cases, however, the quality of the legal or factual arguments presented by the party, and numerous other *neutral* factors, may have rightfully dictated the unfavorable outcome. For the judge, analysis of the result of any specific case does not easily distinguish between the multiple possible explanations, which contributed to his final determination. Without further case-specific guidance, the judge may use unreliable indicators to determine when he does or does not need to scrutinize his decision-making. Although some might argue that the judge should always be scrutinizing his decisions in great depth, the reality is that effective self-reflection "require[s] sophisticated theories and techniques dealing with basic cognitive processes."<sup>92</sup> Without knowing which considerations to investigate further, the judge could continue reflecting indefinitely without attaining any meaningful result.

The false alarm is an inherent risk of simply turning to the results of a biasing process without an explanation of *how* that biasing process operates.

## 2. Checklists Limit Self-Reflection to Single Cases

The checklist approach to debiasing is also problematic because it confuses the judge about the nature of behavioral influences that affect his decision-making. The truly biased judge may realize that he has acted in a prohibited manner based on factors related to his ruling on a case. However, nothing guarantees that the same influence that is responsible for this bias would be detected in different circumstances involving other cases. Without being able to identify the component processes that led to the biased decision, the judge is unable to transfer self-awareness gleaned from one case to future cases. He is similarly forced to wait until he has achieved the final result—

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92. Phillip M. Massad et al., *Utilizing Social Science Information in the Policy Process: Can Psychologists Help?*, in 2 *ADVANCES IN APPLIED SOCIAL PSYCHOLOGY* 213, 225 (Robert F. Kidd & Michael J. Saks eds., Lawrence Erlbaum Associates 1983).

or at least a tentative one—before being alerted to the potential biases.

### 3. *Checklists Defy the Judge's Intuition*

The factors identified in most debiasing checklists represent an attempt to substitute objective criteria for the judge's subjective intuitions. The importance of the judge's intuition is undeniable in the judicial debiasing process for the simple reason that no one knows the judge better; no one stands in his shoes, has the same experiences or personal history, or approaches decision-making in the same way he does. As one judge remarked: "The thing about this job . . . is that the only measuring stick is yourself. You can't go by what anyone else does. You can't tell if you're doing well or not. You're alone."<sup>93</sup> Each judge's intuition, therefore, will have special significance in influencing the choices he makes during legal and factual analysis. For those aiming to eliminate bias, they must recognize that "[i]ntuition is like a muscle—the more we exercise it, the stronger and more reliable it becomes."<sup>94</sup> Dependence of the judge on a debiasing checklist leads to the atrophy of his intuitive muscle.

Checklists silence the judge's inner voice and replace it with thinly supported generic and often-inconsistent explanations.

### 4. *Checklists Can Increase the Very Biases they Aim to Combat*

By failing to provide judges with a process to explore their reactions to a case, most checklists do no more than demand that the judge think harder about the law and suppress undesirable thoughts. Field studies have proven these empty mandates very dangerous approaches to eliminating bias.<sup>95</sup> In their efforts to avoid certain thoughts, most people actually think to a greater degree in the prohibited manner. Daniel M. Wegner's WHITE BEAR studies reveal this danger.<sup>96</sup> In various experiments, Wegner asked subjects to perform certain tasks

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93. JACKSON, *supra* note 44, at 34.

94. MILLER, *supra* note 35, at 98.

95. Massad et al., *supra* note 92, at 225 (observing that "biases will not go away by manipulating simple variables, such as asking people to work harder, or informing them about the bias"). In fact, "excess mental control can result in a kind of mental paralysis." Daniel M. Wegner & Ralph Erber, *Social Foundations of Mental Control*, in HANDBOOK OF MENTAL CONTROL 36, 51 (Daniel M. Wegner & James W. Pennebarker eds. Prentice Hall 1993) [hereinafter MENTAL CONTROL HANDBOOK].

96. DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 1-4 (Penguin Group 1989).

while making every effort to avoid thinking about white bears.<sup>97</sup> He found that the research subjects were unable to do anything but think about white bears no matter how hard they attempted to suppress the thoughts.<sup>98</sup> He concluded, “The more we try to control our thoughts, the more inclined we are to suffer a relapse.”<sup>99</sup>

Although many courts would promote sensitization training as a means to reduce racial or gender bias, mere exposure to alternative viewpoints is often ineffective. As Wegner explains,

Racist, sexist, and other prejudiced ideas often arrive in the form of denials and calls to disbelieve. We learn that women are no longer mere housewives, that Jews are not unusually rich, that Blacks and Hispanics are not any more prone to crime than people of other groups when their relative poverty is taken into account, that monogamous gay males are no more likely than heterosexual males to be carriers of AIDS . . . and so on, in a series of refutations of our potential prejudices. Can we reject our stereotypical beliefs when we learn these things? It would seem that the same processes underlying the acceptance of innuendo and the failure to reject false feedback would be in operation here—with the unfortunate result that prejudices are perpetuated even when we try to reject them.<sup>100</sup>

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.

### *C. Judicial Mindfulness: A Process-Oriented Interdisciplinary Approach to Debiasing*

The checklist method to judicial debiasing grows from the traditional approach to bias, which focuses more on the *results* of a biasing *process* instead of the process itself. While the task forces uniformly agree that education is the best means to debias judges, the traditional model leads judicial educators to adopt very limited educational interventions, most of which follow the format depicted in Figure 1, below.

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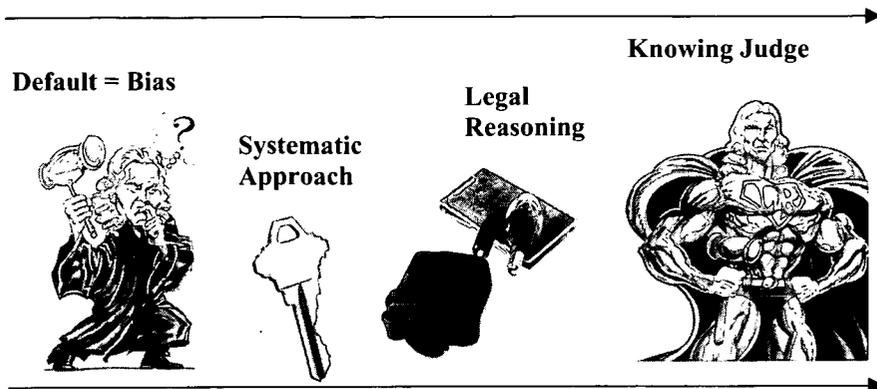
97. *Id.* at 2.

98. Not only did the subjects become “unusually preoccupied with white bear thoughts” during the experiment, “[t]he people thinking about a white bear after suppressing it tended even to show an *acceleration* of white bear thoughts over time.” *Id.* at 4. For an example of such incessant behavior, read the account of one subject, which is reproduced at p. 3.

99. *Id.* at 31.

100. *Id.* at 117-18.

**Figure 1**  
**The Format of Most Educational Interventions**



Under this traditional approach, educators assume that judges are biased from the outset. They idealize a systematic approach for all judges to apply to their decision-making, such as the checklist method. This systematic approach becomes the key to debiasing. Then, educators assume that the judges' knowledge of legal reasoning will enable them to retrace their steps and correct errors based solely on the identification of a prohibited outcome.<sup>101</sup> As depicted, the judge is expected to avoid the prohibited outcome, and emerge all-knowing. The problem with this educational approach is that educators expect judges to debias themselves through a process of osmosis. The million-dollar question remains *how*, precisely, judges are supposed to correct their decisional errors, even after they have consulted a checklist.<sup>102</sup>

While a few jurisdictions have offered more innovative approaches, recommending role-plays, group discussions, and mandatory diversity training,<sup>103</sup> the approaches lack consistency and continuity.<sup>104</sup> Similarly, while legal scholars have sketched out certain

101. *Supra* Part II.B.

102. Seamone, *supra* note 7, at 1054 (discussing the importance of a process-orientation to debiasing). Cf. HUTCHINSON, *supra* note 5, at 199 (“[A] nonfoundationalist account puts as much weight on *how* something is decided as on *what* is decided.”).

103. E.g., MASSACHUSETTS REPORT, *supra* note 11, at 164-65 (recommending various innovative approaches).

104. “Judicial education courses which attempt to cover several ‘isms’ (racism, sexism, handicapism, etc.) are too abstract and general to be useful in helping judges identify, under-

promising methods of debiasing, such as considering the opposite,<sup>105</sup> identifying further with parties in a case,<sup>106</sup> or attending court out of role,<sup>107</sup> these alternatives remain largely unexplored. The scholars conclude that judges must resist the temptation to “believe everything we think”<sup>108</sup> and they should constantly monitor assumptions,<sup>109</sup> but they still cannot define a uniform process to achieve these goals.

The new process-oriented approach introduced in this article, “judicial mindfulness,” diverges from the path of tradition in three important ways. First, it rejects the default assumption that all judges are biased from the outset. In so doing, the process of debiasing is not required for every case decided by the judge. Second, judicial mindfulness refuses to offer a tidy set of objective factors indicating the presence of bias. Instead, it relies on the judge’s intuition, subjective experiences, and the factors that make the judge a unique individual. This reliance on personal characteristics permits the judge to look beyond the conventions of legal reasoning for assistance in self-analysis. Third, it permits judges to use techniques from the disciplines of creative thinking, biomedicine, and improvisational theatre as supplements to, rather than substitutes for, traditional legal reasoning strategies.

Judicial mindfulness will not eliminate bias because elimination is an unrealistic goal. Some biases are good and necessary for judges, such as bias in favor of fairness or justice or a state’s constitution.<sup>110</sup> Other biases are deeply entrenched from childhood experiences and cannot be changed.<sup>111</sup> Finally, some biases are simply inaccessible to

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stand and correct concrete, day-to-day manifestations and consequences of their biases.” LYNN HECHT SCHAFFRAN & NORMA JULIET WIKLER, *OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION 6* (Foundation for Women Judges 1986).

105. Robert Rubinson, *The Polyphonic Courtroom: Expanding on the Possibilities of Judicial Discourse*, 101 DICK. L. REV. 3, 33-44 (1996) (“[T]here are a number of ways for judges to ‘consider the opposite.’ One particularly effective but impractical technique would be to write an opinion that resolves controversy in a manner that differs from the likely ‘decision.’ A less time-consuming alternative would be to sketch out opposite results as opposed to writing them out in a full opinion.”).

106. *Id.* at 35-36.

107. *Id.* at 36-37. For example, a judge could visit a similar court in “casual clothes” without identifying himself to gain awareness of less insulated perspectives on the court experience. *Id.*

108. Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 783, 834 (2002).

109. *Id.*

110. Seamone, *supra* note 7, at 1047-49 (describing various “good” biases).

111. *E.g.*, DENNIS GREENBERGER & CHRISTINE A. PADESKY, *MIND OVER MOOD*:

a person. The famous JoHari Window provides the best example of such inaccessibility by revealing that, in any case of interpersonal communication, there will be aspects of a person that only he sees, aspects that only his peers can see, aspects exposed to both he and his peers, and, inevitably, aspects of his own personality that are accessible to neither him nor his peers.<sup>112</sup>

Bias, when viewed as a process, provides very important insight. Professor Robert MacCoun has reduced the concept to two primary processes, which are voluntary and unintentional actions.<sup>113</sup> This article, like the task force reports, concerns itself with unintentional bias. MacCoun labels certain unintentional actions as "advocacy," a process that involves unknowingly using certain types of information to support one's hypotheses when alternative sources are available.<sup>114</sup> Professor Jennifer Brown provides an example of advocacy in the judge who accepts "social scientific evidence" regarding the parties in a case "rather than demanding evidence specific to the litigants before them."<sup>115</sup> This can also occur when the judge who accepts certain facts on judicial notice without devoting serious attention to their reliability.<sup>116</sup>

MacCoun also specifies three other types of unintentional bias.<sup>117</sup> The first category is "cold bias," which occurs entirely at the unconscious level when judges' decisions are influenced by factors beyond their control.<sup>118</sup> This can occur, for example, when the judge reviews a sexual assault case involving crimes similar to ones that the judge experienced earlier in life and the judge experiences an emotional reaction without knowing why.<sup>119</sup> The second form, "hot bias," occurs

CHANGE THE WAY YOU FEEL BY CHANGING THE WAY YOU THINK 130 (The Guilford Press 1995) ("[S]ome of our beliefs from childhood stay absolute even into adulthood.").

112. JOSEPH LUFT, *GROUP PROCESSES: AN INTRODUCTION TO GROUP DYNAMICS* 11-12 (Mayfield Publishing Co. 2d ed. 1970) (1963).

113. See generally Robert J. MacCoun, *Biases in the Use and Interpretation of Research Results*, 49 ANN. REV. PSYCHOL. 259 (1998).

114. *Id.* at 268.

115. Brown, *supra* note 71, at 396.

116. *Id.*

117. MacCoun, *supra* note 113, at 268.

118. *Id.*

119. Seamone, *supra* note 7, at 1056 (describing this risk). While some courts have found that child abuse of a judge occurred so remotely in time, that a reasonable person would not find problematic the similarity of such abuse to an instant case, the legal aspects of the decision do not address the psychological implications of such abuse. Compare *State v. Mann*, 512 N.W.2d 528 (Iowa 1994) (addressing failure of judge to raise issue of his abuse as a child when trying a child kidnapping case), with James W. Pennebaker, *Social Mechanisms of Con-*

when judges steer their evaluations toward an intended outcome.<sup>120</sup> Professor Duncan Kennedy explains that this natural tendency becomes problematic in judicial decision-making when the judge recognizes that he wants a case to end a certain way but fails to consider the opposite perspective in his analysis.<sup>121</sup> In the final instance, “statistical” bias, a judge relies on the wrong probabilities or numeric figures when reaching a decision involving calculations.<sup>122</sup> Here, the literature on cognitive shortcuts (heuristics) plays a significant role by emphasizing the importance of using statistics wisely.<sup>123</sup>

These four variations of bias, advocacy, cold, hot, and statistical, explain how it is possible that judges can experience entirely different processes that lead to unreliable decisions. Considering the numerous alternatives, it is no wonder why “[j]udicial education courses which attempt to cover several ‘isms’ (racism, sexism, handicapism, etc.) are too abstract and general to be useful in helping judges identify, understand and correct the concrete, day-to-day manifestations and consequences of their biases.”<sup>124</sup> However, the processes all share something in common. The processes become dangerous and impair decisions when they cause the judge to use a bad cue, or miss a good one, during the course of legal and/or factual analysis.<sup>125</sup>

Such limitations usually exist when a judge relies on only one possible theory, definition, or factual explanation despite multiple perspectives.<sup>126</sup> It is appropriate to think of this situation in terms of Herbert Simon’s theory of “satisficing,” which recognizes that all de-

*straint*, in MENTAL CONTROL HANDBOOK, *supra* note 95, at 200-01 (“Death of a loved one, major failure, break up of a relationship, rape, physical assault, or other upheavals can affect us cognitively by undermining our world views about safety, predictability, and who we are.”).

120. MacCoun, *supra* note 113, at 268.

121. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 522-23 (1986) (explaining that the judge is free to “play around” with different theories in support of a resolution that supports his initial tendency but he betrays legality if he closes himself off to viable contrary theories).

122. See MacCoun, *supra* note 113, at 269 (discussing “skeptical processing”).

123. Professor Massimo Piattelli-Palmarini describes a heuristic as a form of “tunnel vision” that leads one to the wrong answer. MASSIMO PIATTELLI-PALMARINI, INEVITABLE ILLUSIONS: HOW MISTAKES OF REASON RULE OUR MINDS ix (Massimo Piattelli-Palmarini & Keith Botsford trans., 1994). He has succinctly described “seven deadly sins” that affect decision-makers in general. *Id.* at 115-37. For applications of these sins to the decisions of judges, see generally Guthrie et al., *supra* note 3 and see generally Sunstein, *supra* note 43.

124. SCHAFFRAN & WIKLER, *supra* note 104, at 6-7.

125. See Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687, 689 (1996).

126. Seamone, *supra* note 7, at 1059.

cision makers, at some point, are forced to stop analyzing facts because they could literally continue evaluating information forever.<sup>127</sup> The danger comes when a behavioral influence or sudden impulse causes judges stop their analyses “too soon.”<sup>128</sup> Such “unhealthy satisficing” limits the decisional alternatives accessible to the judge. Most judges experience unhealthy satisficing as a result of (1) emotional reactions to aspects of cases that resemble their significant experiences or the experiences of loved ones, and (2) ambiguity relating to facts, the definition of words, or legal theories.<sup>129</sup> Essentially, when more than one theory applies to the circumstances of a case, unhealthy satisficing can cause judges to ignore other viable theories.<sup>130</sup>

Judicial mindfulness presents a framework to reverse the effects of unhealthy satisficing by giving judges the tools to generate additional alternatives through intensive self-reflection. These strategies permit judges to identify sources of unhealthy satisficing. After evaluating the nature of missed alternatives, judges can determine whether their initial oversights were serious enough to warrant a modified legal analysis. While some link the concept of “mindfulness” solely to the practice of meditation,<sup>131</sup> the theory of judicial mindfulness, derived from Ellen Langer’s work in the field of clinical psychology, recognizes the limitations of automatic thinking and old mental associations in creating decisional impairments.<sup>132</sup> Her solution to these problems is viewing a situation from as many different perspectives as possible, which she calls a state of “cognitive flexibility.”<sup>133</sup>

*Judicial* mindfulness encompasses more than Langer’s theory alone. It envisions judges who think at the transitional/dialectical level, which is thinking that permits a person to recognize contradictions and limitations in his own thought processes, usually in a flexi-

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127. See JAMES G. MARCH & HERBERT A. SIMON WITH THE COLLABORATION OF HAROLD GUETZKOW, *ORGANIZATIONS* 140-41 (1958).

128. Seamone, *supra* note 7, at 1059.

129. See *id.* at 1054.

130. See *id.*

131. See generally Riskin, *supra* note 16 (describing the practice of mindfulness meditation limited to meditative techniques).

132. See generally ELLEN J. LANGER, *MINDFULNESS* (1989).

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

ble and free-flowing manner.<sup>134</sup> Thinking at this level enables people to identify their own assumptions and to generate alternative courses of action by challenging those very assumptions.<sup>135</sup>

This article discusses specific techniques that permit judges to think at this transitional level. When contemplating these methods, they employ forms of epic judging, similar to Bertolt Brecht's concept of epic theatre. As a drama theorist and playwright, Brecht's goal was to "shock the audience—by interrupting the narrative flow and the identification with the characters—so as to create a critical distance, a thinking attitude."<sup>136</sup> Using the *Verfremdungseffekt* (or "alienation effect"), Brecht attempted to "make strange" common experiences in the theatre by having actors change clothing on stage, speak their thoughts, changing lighting effects, and engaging in a number of other unconventional practices.<sup>137</sup> The objective of "making strange" is also common in the literature on creativity, spontaneity, and critical thinking.<sup>138</sup> Brecht chose these methods because "he

134. See MICHAEL BASSECHES, *DIALECTICAL THINKING AND ADULT DEVELOPMENT* 55 (1984).

135. E.g., STEPHEN D. BROOKFIELD, *DEVELOPING CRITICAL THINKERS: CHALLENGING ADULTS TO EXPLORE ALTERNATIVE WAYS OF THINKING AND ACTING* 89-90 (1987) (describing the value of challenging one's own assumptions as the precursor to "develop[ing] alternative visions and scenarios").

136. Jan Bruck, *Brecht's and Kluge's Aesthetics of Realism*, 17 *POETICS* 57, 58 (1988).

137. As one scholar noted:

In his famous alienation theory, Brecht hypothesized that if the actor presents social issues . . . taking pains to remind the viewer that he is in a theatre and not the real world, then the viewer will be able to think through the issues, see the injustices, and be provoked toward action in the world. The alienation effect is based upon a separation of thought and feeling.

LANDY, *supra* note 33, at 86. Such viewpoints often yield benefits in self-awareness and reflection. See *id.* at 87 ("As the viewer is unable to separate natural events from theatrical events, his ability to think critically becomes impaired. Brecht sought to foster that critical ability through restoring the illusion of theatricality."). See also Lindsay Harrison, Note, *The Problem with Posner as Art Critic: Linnemeir v. Board of Trustees of Purdue University Fort Wayne*, 37 *HARV. C.R.-C.L. L. REV.* 185, 199 (2002) (observing that the "'alienation effect,' forced the audience to struggle with assumptions and norms they had mistakenly taken as immutable truths, paving the way for a reconstruction of those norms").

138. E.g., SIDNEY J. PARNES ET AL., *GUIDE TO CREATIVE ACTION* 156 (1977). In the creative process:

To make the familiar strange is to distort, invert, or transpose the everyday ways of looking and responding which render the world a secure and familiar place. This pursuit of strangeness is not merely a search for the bizarre and out-of-the-way. It is a conscious attempt to achieve a new look at the same old world, people, ideas, feelings, and things.

*Id.*

hoped to change the audience's preconceptions about reality by turning them upside down."<sup>139</sup> As applied to judicial self-awareness, epic judging requires not only "making the familiar strange" but also "making the strange familiar."<sup>140</sup>

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.

Although judicial mindfulness relies on multiple disciplines outside of the law, the strategies are ideal because they are effective in different settings. One example would be role-reversal, which has been acclaimed in the clinical psychology literature, as well as the literature on creative thinking.<sup>141</sup> In one setting, therapists supervise patients during this process.<sup>142</sup> However, in the other setting, no such professional involvement is necessary and the individual is expected to use the same method on an unsupervised basis.<sup>143</sup> The key is that the same practice transcends professional labels because it assists decision-makers in becoming aware of factors they would have not otherwise considered.

Legal reasoning may require years of training and experience; however, as long as judges remain human beings, they will be influenced by factors beyond their control that impair the quality of their decisions. Because proven techniques assist interdisciplinary professionals in their decision-making, judges should take note of them and apply them in their own decision-making process. Radiologist Webster Riggs, Jr. explained why an interdisciplinary approach to decisional enhancement is ideal; common influences, experienced by all professionals, still have the power to undercut his medical training and experience, resulting in faulty conclusions:

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139. Bruck, *supra* note 136, at 58.

140. See PARNES ET AL., *supra* note 138, at 156 (describing the two-prong creative process of synectics as "making strange the familiar, and making the familiar strange").

141. See *infra* Part VI.B.

142. See, e.g., Marsha B. Stein & Monica Leonie Callahan, *The Use of Psychodrama in Individual Psychotherapy*, 35 J. GROUP PSYCHOTHERAPY PSYCHODRAMA & SOCIOMETRY 118, 127 (1982) (urging therapists to "exercise special caution" in using common psychodrama methods, even contemplating their training and experience with the techniques).

143. See, e.g., WONDER & DONOVAN, *supra* note 34, at 105.

I might be apt to shorten my dictated X-ray reports if I have a cold and laryngitis. Do I interpret radiographs differently when I stay late and am tired and hungry? Could I be swayed by having a latent or overactive thyroid or an incipient brain tumor? What about the heat and humidity in the room in which I am working? What effect on my mood does the wall color in the room have? Am I wearing a shirt with the tag scratching the back of my neck? All of these factors may be affecting me unconsciously.

What other psychological factors are influencing my diagnostic ability? Will I tend to overassess a case (make a false positive) if I recently missed something on another case and feel guilty? What are the effects on me of some long-forgotten traumatic childhood experience? What hereditary factors are influencing my decision? The same problems that I have as a radiologist when I try to be objective and honest beset all people in all walks of life.<sup>144</sup>

Judges are not alone in the quest for greater self-awareness. Just as doctors use the wrong figures when making estimates, so do judges.<sup>145</sup> Just as language limits doctors' diagnoses, it similarly limits judicial options.<sup>146</sup> Just as doctors may see facts as pointing to one distinct answer only to realize that an alternative view was equally, if not more, permissible, so do judges.<sup>147</sup> Based on these similarities, a reasonable course of action for judges would be to exchange ideas with, and borrow tactics from, other professionals who have a greater familiarity with resolving such problems. Even though these answers are not tailored specifically to legal problem-solving, they can en-

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144. WEBSTER RIGGS, JR., *THE YOU YOU DON'T KNOW: COVERT INFLUENCES ON YOUR BEHAVIOR* 22 (1997).

145. *Compare id.* at 20 ("If we happen to encounter films from a large number of vehicular wrecks in the emergency room one night, we might conclude that there must be something going on that is causing the accidents to happen throughout the city. But purely from statistical probability, on some nights there will be a cluster of wrecks."), with Guthrie et al., *supra* note 3, at 808-11 (describing judges who inaccurately estimated the chances that a barrel negligently fell from a window based on similar inaccurate estimates of probabilities).

146. *Compare* RIGGS, *supra* note 144, at 21 ("All radiologists are limited by the inherent vagaries of language in conveying their findings."), with Seamone, *supra* note 7, at 1069 n.218 (describing judges' misplaced reliance on dictionary definitions of words and the subjectivity inherent in the selection of such terms).

147. *Compare* RIGGS, *supra* note 144, at 24 ("Sometimes incomplete information is all too willingly accepted. Based on a single view X-ray of an extremity, I have at times thought that there was no fracture, but another view from a different angle revealed an obvious fracture."), with FRANK M. COFFIN, *On Working Up an Opinion*, in *JUDGE'S HANDBOOK*, *supra* note 4, at 89, 94 (describing how, even with a team of law clerks, he missed important alternatives in his legal decisions that only became obvious through authors of law reviews evaluating his decisions).

hance the process. The following sections offer techniques that may be used successfully in a variety of disciplines where similar universal dilemmas have been resolved.

### III. ASPECTS OF JUDICIAL SELF-AWARENESS

Judicial mindfulness involves three distinct activities. First, the judge should appreciate different aspects of his awareness when dealing with a case. He should search for the existence of behavioral anomalies in different categories of perception. Second, the judge should apply specific techniques to determine whether decisional anomalies have negatively influenced his legal analysis. Third, he should compensate for overlooked theories, facts or related factors attributable to unhealthy satisficing. While the three activities involved in judicial mindfulness do not promise total elimination of unknown and unwanted behavioral impulses, the process is superior to existing judicial debiasing interventions because it overcomes several obstacles that impede the path to other existing alternatives.

The following sections will be useless to readers who do not understand how easily their decisions can be impaired by unseen influences. Accordingly, this Part begins with a four-question practical exercise for the reader. Take approximately seven minutes to complete the following questions. Carefully read the questions and try to anticipate any tricks. List multiple answers for a given question if you believe more than one exists. Space has been provided in this article to record your responses.

#### *A. Decisional Impairment Practical Exercises*

*1. Read the capitalized font below one time. Next, reread it once more and write down how many times the letter "F" appears in the sentence in the space provided.*

FINAL FOLIOS SEEM TO RESULT FROM YEARS  
OF DUTIFUL STUDY OF TEXTS ALONG  
WITH YEARS OF SCIENTIFIC EXPERIENCE<sup>148</sup>

Number of Fs: \_\_\_\_\_

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148. LANGER, *supra* note 132, at 17.

2. Look to the equation below and add a single straight line anywhere to make it a true statement. Write your answer(s) in the space provided.<sup>149</sup>

$$2 + 7 - 118 = 129$$

Correct Equations:

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3. Does anything seem wrong with the images below? If so, how many times did you glance at the images to gain this awareness?<sup>150</sup>




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149. DAVID PERKINS, ARCHIMEDES' BATHTUB 60 (2000).

150. M.L. JOHNSON ABERCROMBIE, THE ANATOMY OF JUDGMENT 28 (2d ed. 1989).

4. *In the space provided below, explain how this account is possible.*<sup>151</sup>

One day in the office, Alice says to Betty, "I heard this great joke from Cathy." And she begins to tell Betty the joke.

But Betty says, "Oh, I already know that joke."

Alice says, "Oh, Cathy already told you."

"No," says Betty. "In fact, I never heard it or read it before."

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Before turning to the next page, consider the seeming simplicity of the foregoing exercises. For each one, there are clearly correct answers. However, in the presentations delivered by the author of this article and in the original contexts intended by the authors of these problems, judges and other professionals have consistently provided incorrect answers to the questions or no answers at all. Because many judges reading this article will fail to identify the correct answer to some of these questions, even while paying careful attention to them, this inevitably raises concerns that they are prone to overlook alternatives in complex legal analyses.

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151. PERKINS, *supra* note 149, at 59.

### B. Analysis of the Exercises

In response to the first question, the letter “F” appears eight times.<sup>152</sup> What may have appeared to be an accurate number to readers was very likely an illusion because it is so easy to miss the obvious appearances of the letter.<sup>153</sup>

For the second question involving the equation, readers often have difficulty with the exercise because of the “natural” temptation to “change numbers into other numbers, . . . change operations (+, -, . . .) into other operations, or . . . change relations (=) into other relations.”<sup>154</sup> By resisting this tendency, the originator of the equation presents three solutions. First, one could “simply put a slash through the equals sign to make it ‘does not equal.’”<sup>155</sup> Second, he could “put a diagonal line upward from the right end of the equal sign to make the expression read ‘less than or equal to.’”<sup>156</sup> Third, “[t]he + can be changed to a 4 by adding a vertical line on the upper left of the sign.”<sup>157</sup> Each of these changes would make the statement accurate.<sup>158</sup>

In the third question depicting the words in triangles, viewers regularly fail to spot anything wrong with the image. However, when they look more carefully, the repetition of the words “the,” “the,” and “a” in each triangle becomes evident. To author Abercrombie, such examples reveal to us how a way of organizing something in our thinking—a schemata—“may help us *not* to see certain things.”<sup>159</sup> The additional information is usually seen as “irrelevant background.”<sup>160</sup>

Finally, in the fourth question relating to the joke, one answer is that “Betty composed the joke and told it to Cathy, who in turn told it to Alice. So, when Alice began to tell it to Betty, she already knew it without having been told.”<sup>161</sup> In combination, these four exercises

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152. LANGER, *supra* note 132, at 206.

153. *See id.* at 17.

154. PERKINS, *supra* note 149, at 63.

155. *Id.* at 65.

156. *Id.*

157. *Id.*

158. *Id.*

159. ABERCROMBIE, *supra* note 150, at 28.

160. *Id.*

161. PERKINS, *supra* note 149, at 64.

should give judges a sense of how easy it is to be blinded to viable solutions to the problems that arise in their decision-making. While legal decisions do not normally involve such optical illusions or word puzzles, they clearly involve situations that can be interpreted in any number of competing ways, similar to these exercises. As just one example in jurisprudence, judges will often oversimplify their decisions by reducing legal analyses to a maximum of three concerns when many others exist.<sup>162</sup> Consequently, to economize on expenditure of time and energy, judges see further analysis of the issues as irrelevant.

Some experts suggest deliberately working through brain-teasing exercises like the triangle exercise to increase one's perceptual abilities.<sup>163</sup> In this article, however, the various tricks and illusions are not offered as solutions to enhanced self-awareness. They merely signify that judges can easily become locked into automatic thought by practicing the same routines regularly or by lacking exposure to other ways of perceiving. The literature on creativity meets the objective of this article by stressing the importance of deferred judgment, a practice where a decision-maker "takes more and more facts and ideas into consideration in a given unit of time prior to making a decision . . . view[ing] decisions as *tentative*."<sup>164</sup>

When people become aware of alternatives, the door opens to new frameworks for seeing structures and processes, not just alternative theories. In the context of interpreting paintings, consider Professor Charles Bouleau's concepts from *The Painter's Secret Geometry*.<sup>165</sup> After years of exposure to various works of art, he recognized that there were unseen geometric structures—hidden patterns—

162. See Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 115 (1987) ("So many procedural doctrines appear, after research and teaching, to trifurcate."); cf. Michael J. Yelnosky, *If You Write It, (S)He Will Come: Judicial Opinions, Metaphors, Baseball, and "The Sex Stuff"*, 28 CONN. L. REV. 813, 837 (1996) (referring to "three strikes, you're out" rule "[s]ome trial judges, in exercising their discretion, appear too willing to use the arbitrary number three to justify their decisions").

163. Reportedly, these illusions can be valuable to strengthen one's ability to shift between the right and left hemispheres of the brain, which makes individuals more receptive to the task of self-analysis at a deeper level. WONDER & DONOVAN, *supra* note 34, at 70-71. Mathematician David Perkins explains that these types of puzzles can exercise the mind in a mental "gymnasium." PERKINS, *supra* note 149, at 56.

164. PARNES ET AL., *supra* note 138, at 4.

165. CHARLES BOULEAU, *THE PAINTER'S SECRET GEOMETRY: A STUDY OF COMPOSITION IN ART* (Jonathan Griffin trans., Harcourt, Brace & World, Inc. 1963) [hereinafter *PAINTER'S GEOMETRY*].

common to the works of all great painters over the centuries.<sup>166</sup> He clarified that these hidden patterns presented a new language for communicating messages, which revealed a great deal about the very nature of art.<sup>167</sup> “The framework of a painting or carving, like that of the human body or that of a building,” he explains, “is discreet; sometimes, indeed, it makes one forget its existence.”<sup>168</sup> In accordance with this view, Bouleau has depicted such works as Poussin’s painting “Finding of Moses” much like an architect.<sup>169</sup>

Other artists found it surprising and even “strange” that Bouleau’s interpretive approach to art was left “unattempted” for centuries until the 1960s.<sup>170</sup> Although countless scholars had been exposed to the same works, their common ways of approaching the works caused them to neglect a crucial element. Just like the vision of the words in the triangles above, the alternative theoretical framework existed but no one expressed awareness of it until Bouleau.

Judges are not unlike these artists. Unfortunately, to identify views alternative to their own, judges must often wait for appellate courts to rule on the matter or scholars to analyze their opinions. One judge explained how he often encountered alternatives discussed in articles that a combination of his peers and his law clerks were still unable to achieve.<sup>171</sup> The better answer was clear to the critic and made more sense in hindsight: “I will see the opinion emerge as a subject in a law review article, usually to be dissected and criticized for weaknesses of logic, law, or policy that had never occurred to me, my clerks, or my fellow judges or their clerks.”<sup>172</sup>

A noteworthy canon of self-awareness holds that “you have to see and feel what you are experiencing as it *is*, and not as it is named.”<sup>173</sup> The process can be very unsettling.<sup>174</sup> Judges, whose de-

166. *Id.* at 9-10.

167. *See generally id.*

168. *Id.* at 9.

169. *Id.* at 46 (depicting the hidden geometry of Nicholas Poussin’s *Finding of Moses* (Louvre)).

170. Jacques Villon, *Preface* to PAINTER’S GEOMETRY, *supra* note 165, at 7.

171. COFFIN, *supra* note 147, at 94.

172. *Id.*

173. ALAN W. WATTS, *THE WISDOM OF INSECURITY: A MESSAGE FOR AN AGE OF ANXIETY* 75-76 (Vintage Books 1951).

174. *See* BROOKFIELD, *supra* note 135, at 89 (“Admitting that the fact that [the assumptions by which we live] might be distorted, wrong, or contextually relative is often profoundly threatening, for it implies that the fabric of our personal existence might rest upon faulty foundations.”).

isions are driven by rules usually operate within a very confined creative space.<sup>175</sup> Epic judging pushes the judge into foreign territory. The section below discusses aspects of self-awareness and how judges can ease into this new realm of insight.

### C. Components of Awareness

To practice judicial mindfulness, judges must understand precisely what they are trying to gain awareness over. It could be an alternative theory or a reason why they are physically or emotionally disturbed whenever they think about one of the lawyers they had never before met. It could be awareness of a litigant's unfamiliar situation in life, which they had never considered or experienced. It could also be the most suitable definition of a word used by the parties to a contract when the dictionary offers multiple conflicting meanings of the word.

Psychologists and other scholars often explain that there is no such thing as consciousness except for consciousness of an object, which could be an infinite number of things.<sup>176</sup> Note the following comments of Professor Stephen LaBerge, "When we say, a person is 'conscious,' that is a shorthand for is 'conscious of *x*.' What's the '*x*'? What is consciousness? That's a very difficult question."<sup>177</sup> Under different circumstances judges may find the need to gain awareness of multiple factors, or only one.

What is necessary as a first step is to consider the nature of the limitation(s) that may be influencing the judge at a given time. This step begins the process of selecting the correct intervention for in-

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175. See, e.g., Roger J. Traynor, *The Limits of Judicial Creativity*, in JUDGE'S HANDBOOK, *supra* note 4, at 151-52. cf. Leonard L. Riskin, *Meditation and Lawyers*, 43 OHIO ST. L.J. 29, 44-45 (1982) (describing a limiting "standard philosophical map" to which legal practitioners, including judges, subscribe); Rubinson, *supra* note 105, at 4. Professor Rubinson describes judicial dependence on a "rhetoric of inevitability":

[T]he vast majority of opinions are written like briefs with the chosen result as a client. An opinion will perfunctorily dismiss or diminish alternative analyses, present facts as determinate and finite when in fact they are carefully chosen to present a given story, [and] articulate standards in a manner favorable to the result . . . . The prevailing model offers judges no incentive to openly explore meaning because of the operating fiction that there is no meaning to be explored, only the 'right' meaning to be articulated and explained.

176. See DAVID JAY BROWN & REBECCA MCCLEN NOVICK, MAVERICKS OF THE MIND: CONVERSATIONS FOR THE NEW MILLENNIUM (Crossing Press, 1993).

177. *Id.* at 284. See discussion *infra* Part III (on awareness); see also ROBERT E. ORNSTEIN, THE PSYCHOLOGY OF CONSCIOUSNESS vii (2d ed. 1977) (recognizing a circular analysis in defining "consciousness").

creasing awareness of alternatives that judges may be missing. The process is similar to calibration, in which the judge searches for imbalances, anomalies, or other disruptions to his thinking. During this initial stage, the judge will take an assessment of each of the areas of his conscious awareness by asking himself directed questions. He may do this on three different occasions: (1) during preparation for the case, while reviewing the pleadings and preliminary evidence; (2) during the trial; and (3) in reaching a decision regarding the dispute. While conducting these assessments, the goal will be no more than to sense an unexplained influence at work during self-questioning. The anomaly sensed may be inexplicable beyond the notion that "something just doesn't fit."<sup>178</sup> But this explanation is still sufficient because the aim here is merely to categorize for the sake of selecting the most appropriate interventions. The techniques in the following sections will introduce tools of self-awareness geared toward specific categories of interference. This step of locating a problem is probably the most important of them all.

In the first step of mindfulness, the judge will gain awareness of his life-world, which relates to the specific elements of one's present experience commonly analyzed by phenomenological psychologists.<sup>179</sup> Professor Peter Ashworth has summarized seven major characteristics of the life-world that will assist judges by providing a context for awareness and helping judges detect impositions on their decision-making.<sup>180</sup>

Before commencing the analysis, it is crucial to note the importance of detecting imbalance in specific areas, even before attempting to find the root source of a problem. A rule of thumb in detecting a possible limitation on one's decision-making is that the decision-maker may, at first, only be able to sense that something does not fit in the interpretive process or product.<sup>181</sup> Eugene Gendlin, the originator of the concept of focusing, addressed *infra* Part V, explains how these signals, especially physical ones, can identify behavioral factors that detract from our awareness. An example of such an anomaly in the judicial decision-making process would be Judge Lasswell's description of how he felt that something was not right about one of the attorneys arguing before him during a lawsuit; throughout much of

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178. See discussion *infra* Part V (presenting Gendlin's concept of focusing).

179. Ashworth, *supra* note 30, at 18-19.

180. *Id.* at 19-23.

181. See *infra* Part V.

the trial, he had no idea exactly why he felt this way.<sup>182</sup> He sensed an imposition in his analytical process, which, through reflection, he later connected to past feelings he had toward someone who looked similar to the attorney.<sup>183</sup> Like Lasswell, all that a judge may be able to notice at first is that some facet of his decision is inexplicable or unwarranted by the circumstances. During the judging process, a portion of a judicial decision may lack a connection with the items presented. The judge may feel very strongly about part of the decision that he would consider normal in most other circumstances. As in the above example, there may be a strong connection with emotionally charged events experienced by the judge or others in the past.

This awareness of anomalies is only the *first step* for the judge, and hardly the anticipated goal for improving decision-making. In relation to the other techniques discussed, judges can use the calibration process before or after clearing the mind, muscle relaxation, or meditation. These methods constitute a foundation to build on, rather than a final objective for self-awareness. Research has shown that limiting the effect of a subconscious impulse requires more than knowing of its existence; it requires an active process.<sup>184</sup>

The following seven characteristics constitute awareness of the judge's life-world.

### 1. *Selfhood*

The dimension of selfhood represents a sense of "agency" and feeling of one's own "presence and voice in [a] situation."<sup>185</sup> Selfhood to the judge would be experienced in his perceptions about the role he is playing in a particular litigation. Recognition of selfhood comes in the judge's own answers to the following questions:

- *While undertaking the role of judge in this particular case before me, what is my function?*
- *What am I trying to resolve with respect to the positions litigated?*

182. Harold D. Lasswell, *Self-Analysis and Judicial Thinking*, 40 INT'L J. ETHICS 354, 359 (1930).

183. *Id.* at 360.

184. *E.g.*, Philip G. Peters, Jr., *Hindsight Bias and Tort Liability: Avoiding Premature Conclusions*, 31 ARIZ. ST. L.J. 1277, 1285 (1999) ("Early efforts to eliminate the hindsight biases focused on relatively simple steps such as warning the study subjects about hindsight bias and encouraging them to resist it. These motivational strategies failed. Neither warnings about the bias nor exhortations to try harder reduced the bias substantially.")

185. Ashworth, *supra* note 30, at 19-20.

- *What is my application of the law supposed to do in changing the dynamics of the actual dispute on the litigants in their own lives?*
- *What is my relationship to the litigants as individuals beyond the fact that one is a defendant and the other a plaintiff?*

## 2. Sociality

Sociality is about awareness of one's relatedness to others.<sup>186</sup> Unlike selfhood, this aspect of awareness is not about how the judge views his own role. It, instead, addresses the influence of others on the judge. The influence of sociality is clear in the judge's responses to the following sorts of questions:

- *How do my perceptions of the parties, the witnesses, and their attorneys in this case presently before me influence or frame the way I relate to the issues and evidence before me?*
- *What about these people causes me discomfort as I evaluate?*
- *What would I need to know about the relationships causing discomfort in order to feel more comfortable with my functions as a judge in relation to these participants in litigation?*

## 3. Embodiment

Embodiment encompasses physiological aspects of a person's existence. It can relate to the physical reactions of a judge to stress, boredom, lack of energy, irritability. But it also can include emotional reactions based on physical aspects of another person like his gender, race, or physical disability.<sup>187</sup> Answers to the following types of questions can reveal the dimension of embodiment:

- *Am I aware of how my physiological state is influencing my analysis or relationship with the participants or evidence in this trial?*
- *Is stress, boredom, tiredness, or fixation on events external to the task at hand influencing me to want to get on with this part of the trial so that I can better tend to my*

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186. *Id.* at 20.

187. *Id.* at 20-21.

*needs?*

- *Am I irritated by any aspect of a party's physical appearance or behavior before me?*

#### 4. Temporality

This dimension of awareness relates to a person's sense of time and duration in reference to his own personal biography.<sup>188</sup> Judges can reach these issues with questions of the following nature:

- *Do the events leading to this dispute resemble particular disputes I've already ruled on?*
- *Is the outcome from these past decisions something that my mind has been returning to?*
- *Have I experienced similar disputes in my own past? Is there something inexplicable about any aspect of this case, such as a feeling of déjà vu?*

#### 5. Spatiality

The dimension of spatiality encompasses the geography of places the person has to go and act within.<sup>189</sup> Judges addressing this aspect of awareness will want to address issues of the following type:

- *Is there something about the setting or context of the events constituting the subject matter of this dispute which take me out of the courtroom in my thoughts regarding the events linked to these settings?*

#### 6. Project

This dimension of the life-world encompasses the ability of a person to carry out activities central to their own lives.<sup>190</sup> To a judge, one related practical inquiry would be:

- *When I consider cases that remind me of the reason why I became a judge—why I choose to continue to bare with the not so favorable cases—and then consider the bad experiences, where do I place the instant dispute along this spectrum?*

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188. *Id.* at 21.

189. *Id.*

190. *Id.*

## 7. Discourse

Finally, we come to the aspect of the life-world that relates to the very “terms” the person uses to view a situation.<sup>191</sup> As applied to judges, related practical inquiries could be:

- *In the litigants’ own words, or in the words and theories of their counsel, are concepts being introduced for my review which can take on alternative meanings, e.g., cross-cultural perceptions of what is timely for an acceptance of an offer?*
- *Have matters been presented which require an analysis of what is reasonable from a person’s subjective viewpoint or according to community standards, where I am required to select a conclusion with great leeway, still within the confines of the law? Or, must I use a dictionary definition to define a term?*
- *If the answer is yes to any of these prior inquires, am I content with the justifications I have provided or the choices I have made in terms of my role as the final arbiter of this dispute?*

When judges perceive an impediment in any of the seven areas of the life-world, they should use techniques to explore their thoughts and determine whether it poses a danger to their deliberative process. There is no formula to determine the best method to use. Some methods addressed in this article require more resources than others. Therefore, judges may desire to begin with the simplest processes, such as journaling, focusing, or cognitive therapy. In further exploration, they might advance to psychodrama if needed. Alternatively, judges may desire to select a method that is aligned with the category of impediment they have sensed.

In her book *The Open Mind*, Dr. Dawna Markova explains the three levels of symbolic thought through which we perceive and express: auditory, kinesthetic, and visual.<sup>192</sup> For example, the judge who senses discomfort in his stomach when considering a fact would be receiving this input at the kinesthetic level.<sup>193</sup> Sensations would

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191. *Id.* at 22.

192. DAWNA MARKOVA, *OPEN MIND: EXPLORING THE SIX PATTERNS OF NATURAL INTELLIGENCE* 34-37 (Conari Press 1996) (1991).

193. *See id.* at 37 (referring to table illustrating the symbolic languages of thinking).

lead him to certain imagery.<sup>194</sup> He could most naturally express this sensation through movement of his hands and other parts of his body.<sup>195</sup> Alternatively, sensing something through visual images could naturally be expressed and addressed through an act of writing or diagramming.<sup>196</sup> At the auditory level, however, the sensations we detect are best expressed through the act of speaking out or discussing the subject matter.<sup>197</sup>

In evaluating the seven categories of the life-world, the judge may want to select techniques based on whether they are kinesthetic or visual. For problems in the areas of embodiment, for example, the judge may wish to explore psychodrama techniques involving movement, discussed *infra* Part VI. For impediments sensed in the area of spatiality, the visual aspects of journaling may be of use, discussed *infra* Part VII. With these variations in mind, the diagram appearing at Figure 2 offers comparisons between life-world categories and specific techniques. Judges may use the methods in the Figure or any methods they desire to evaluate and address unexplained feelings.<sup>198</sup>

**Figure 2**  
**Hierarchy of Awareness Techniques**

Life-world Dimension	Self-Awareness Technique
Selfhood	Psychodrama, Journaling
Sociality	Psychodrama, Journaling
Embodiment	Focusing, Relaxation Warm-ups
Spatiality	Journaling
Temporality	Psychodrama, Journaling, Focusing
Project	
Discourse	Psychodrama, Journaling

To benefit from the techniques presented in the following sections, judges who detect unexplained anomalies in the life-world categories appearing in the first column can use the corresponding strategies listed in the second column.

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194. *See id.*

195. *See id.*

196. *See id.*

197. *See id.*

#### D. *Preparing for Epic Judging*

In the creativity literature, authors provide many interesting suggestions on how to bring unknown thoughts to the surface of one's conscious awareness. They will often direct a reader to become another person or have a conversation with an inanimate object as if the task could be performed with little or no difficulty. Consider the directions of cognitive researchers Wonder and Donovan, who describe the technique of the "inside out":

*Be someone else.* Example: You have a fractious employee who is surly on the phone with clients but extremely efficient in other areas. Conceiving of yourself in his or her body can help you correct the situation . . . . Even if you can't solve personal problems, you will gain information to help you make a rational decision about the situation.<sup>199</sup>

Because of the premium on logic and legal reasoning in the judicial practice, such imperatives to be spontaneous, creative, and flexible in self-analysis can appear impossible, laughable, or downright intimidating at times. However, judges can benefit from exercises like "inside outs" if they understand how unconventional methods can reveal otherwise unknown aspects of the judge's thinking process. Importantly, these techniques do not require the judge to reject the familiar paradigm he has relied on for a great many years.

Turning to the fields of phenomenology and improvisational theatre will assist judges in understanding how they can meet these high expectations to be fully aware of their own subconscious tendencies and impulses. Phenomenological researchers seek to answer questions by immersing themselves in the environments to be studied. In conducting such research, "the investigator must begin by bracketing, or setting aside, all prior assumptions about the nature of the thing being studied. We are to practice an epoché, or suspension, of our presuppositions, so that the phenomenon is not distorted and can be described 'in its appearing.'"<sup>200</sup> In the various attempts at grounded research, numerous scholars have acknowledged the value and effectiveness of the process.<sup>201</sup>

One legal scholar described the phenomenological evaluation of

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199. WONDER & DONOVAN, *supra* note 34, at 105.

200. Peter Ashworth, *Presuppose Nothing! The Suspension of Assumptions in Phenomenological Psychological Methodology*, 27 J. PHENOMENOLOGICAL PSYCHOL. 1, 2 (1996) (discussing the immense value of suspension of presuppositions in psychological research).

201. *Id.* at 3-4 (surveying various research studies by phenomenologists).

a living room couch as follows:

One must first bracket the object; thus, the phenomenological description would not include statements such as the sofa is six feet long and four feet high. Instead, one must describe the noemata or meanings of the experience of the sofa. Such a phenomenological description might include the following: the sofa is something that can be the centerpiece of a room or pushed against the wall; the sofa can be used for sitting, lying down, relaxing and reading; and the sofa can comfortably seat between one and three people. Thus, one is not concerned with the mere physical characteristics of the sofa or of any other objects; rather, one is concerned with the objects only “as [they are] intended to in one’s awareness of them.”<sup>202</sup>

Although phenomenology has certain rules, it would be difficult to develop any general approach for conducting phenomenological bracketing because the process inevitably becomes personalized to each researcher who uses it. As Professor Peter Ashworth explains, “I suspect that people with a phenomenological outlook would be suspicious of any attempt to make the process of suspending assumptions *mechanical*, believing as they [we] do that to bring a freshness of approach to each new inquiry is very much to be desired.”<sup>203</sup>

This is where improvisational theatre assists. Similar to phenomenology, in doing improvisation, it is understood that predispositions must be suspended for effective communication with an audience.<sup>204</sup> As one accomplished theatre instructor notes, “[i]t is difficult to understand the need for a ‘blank’ mind free of pre-conceptions when working on an acting problem. Yet everyone knows that you cannot fill a basket unless it is empty.”<sup>205</sup> It is this process of filling the basket we will explore in detail with techniques that overcome the inherent limitations of the judicial role.

When the novice actor first attempts to do improvisation work, he is expected to tap into his unconscious, trust himself, and master the art of spontaneity, all of which are basic characteristics of epic

202. Feldman, *supra* note 2, at 673.

203. E-mail from Peter Ashworth, Professor, Learning and Teaching Institute, Sheffield Hallam University, to Evan Seamone (May 28, 2003) (on file with author).

204. See generally VIOLA SPONLIN, *IMPROVISATION FOR THE THEATRE: A HANDBOOK OF TEACHING AND DIRECTING TECHNIQUES* 4 (Northwestern University Press 1983) (1963) (suggesting that “free[dom] . . . from handed down frames of reference” that accompanies spontaneity contributes to a more “talented” improvisational actor).

205. *Id.* at 44.

judging.<sup>206</sup> According to Professor Gary Izzo, actors must learn to use their imaginations.<sup>207</sup> When they do, even the novice actor can recognize these qualities, no matter how distant they are from the person's routine behavior.<sup>208</sup>

Before exploring the specific techniques that will achieve such heightened levels of awareness, the following exercise will demonstrate that there exists in the reader, untapped potential to achieve these core objectives. After you read the description of a neighborhood party in the passage below, take three deep breaths to relax, and spend about two minutes visualizing the scene. Fred Miller, who trains lawyers how to meditate, has described the art of taking three breaths in the following way, which he has linked to the necessary stage of calming a person for just about any method of self-reflection.<sup>209</sup>

**Figure 3**  
**Fred Miller's Process of Taking Three Deep Breaths**<sup>210</sup>

Inhale.

Now exhale.

Feels good, doesn't it?

Inhale again—a little deeper this time.

Now Slow down your exhale. Stretch it out.

One more time—a long, slow inhale.

Pay attention as your breath comes in.

Don't think about it; just watch your breath as it fills your lungs.

Now the exhale—feel it, watch it. Exhale completely.

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206. GARY IZZO, *THE ART OF PLAY: THE NEW GENRE OF INTERACTIVE THEATRE* 144-45 (Lisa A. Barnett ed., 1997).

207. *Id.* at 139.

208. See, SPONLIN, *supra* note 204, at 3 ("Everyone can act. Everyone can improvise. Anyone who wishes to, can play theater and learn to become stageworthy.")

209. MILLER, *supra* note 35, at xv-xvi.

210. *Id.*

After taking these three preparatory breaths, visualize the following scene and make an effort to see the described events as they would actually occur in real life. It may help to close your eyes or draw a diagram. The most important thing is to reserve that short period of visualization to *experience* what is occurring.

### **The Block Party Exercise**

Today, the house at the end of the block seemed busier than most houses in the neighborhood. Balloons danced above a sign that read, "Welcome." While the front door was wide open, no one could be seen inside the house. Everyone seemed to be drawn to the back yard by the festive music that played on the radio. The food on the barbecue was just about ready as the neighbor who was cooking the food shouted out a menu of choices. Children were playing in a corner of the yard near a tree house while their parents mingled about various topics.

### **Questions About the Visualization Exercise**

1. What color were the balloons tied to the sign?
2. What type of music (genre or song) was playing on the radio?
3. What types of foods were cooking on the barbecue?

Surely, there are no wrong answers to the above questions because they all depend entirely on your own perceptions. To one reader, the balloons were blue. To another they were red. And, others perceived balloons of several colors flying above the sign. This simple exercise should draw our attention to the source of those details rather than any particular details recalled. The color of the balloons, the music playing, and the type of food cooking were all images drawn entirely from the confines of the unconscious. Exercises such as The Block Party are common in improvisational theatre because they show new actors that "every detail [is] filled in . . . automatically and effortlessly by using his or her imagination."<sup>211</sup> While these activities show us that it is possible to access some aspects of our unconscious thinking, the question that naturally follows is of a

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211. IZZO, *supra* note 206, at 140.

deeper degree. How are our own thought processes influenced?

#### IV. METHODS TO CLEAR THE MIND AS A PRIMARY STEP

Traditional methods of meditation, borrowed from different cultures, have influenced the practice of law as attorneys and judges have recognized the value of being able to focus on their objectives with greater clarity. This Part does not attempt to replace insight that would take years to develop. Instead, it recognizes the reasons why these methods have enjoyed increasing popularity in legal circles. Certain of the simpler techniques used to “clear the mind” are required before a person can graduate to more intensive methods of self-awareness. Importantly, the exercises below are necessary precursors to the intensive techniques addressed by this article, such as creative dramatics or journaling.

Professor Leonard Riskin is an advocate for the position that attorneys should practice mindfulness meditation in order to help themselves feel better about their jobs and to assist their clients.<sup>212</sup> Mindfulness meditation is a term that covers attempts to develop “bare attention,” which includes awareness of “sensations, emotions, sounds, and thoughts” passing through a person’s mind at the given time.<sup>213</sup> Awareness of thoughts helps attorneys recognize how they may be influenced at a given time. Studies note that “the human mind is capable of over 60,000 thoughts a day [and often] more than 90 percent of them are the same ones that you had the day before.”<sup>214</sup> By recognizing the nature of many useless thoughts, thinkers can disregard them more easily in favor of more productive considerations.

To Professor Riskin, the enhanced ability to “pay attention, calmly, in each moment” is the goal of mindfulness meditation.<sup>215</sup> While it may take years to develop the clarity necessary for meditative techniques to work, it is important to consider two facts about clearing the mind as contemplated in this article. First, meditation is often the foundation for the use of other self-awareness techniques, rather than an end state. We find this not only in psychodrama techniques, but additionally in journaling exercises, which often require

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212. RISKIN, *supra* note 16, at 8 (recommending the techniques address a problematic state in which attorneys “miss opportunities to provide the most appropriate service to some clients”).

213. *Id.* at 23.

214. MILLER, *supra* note 35, at 13-14.

215. RISKIN, *supra* note 16, at 26.

“entrance meditations” for the purpose of “quiet[ing] down your head chatter and prim[ing] the internal pump.”<sup>216</sup>

Second, in order to benefit from other exercises, like the ones explored below, a person does not need to practice meditation skills that it takes years to develop.<sup>217</sup> Rather, the judge will be better suited using shortened relaxation exercises for *temporary* clarity in approaching a new task. These are often called “point of focus” exercises because they require the practitioner to engage in a specific task while clearing the mind rather than meditating with no objective whatsoever.<sup>218</sup> For this reason, the exercises offered below are the short-term techniques, which can be practiced with ease and flexibility with the expectation of quick results.

One of the first methods of achieving further clarity is simply to “count backward from fifteen to zero with your eyes closed.”<sup>219</sup> Miller provides a series of steps to achieve this goal:

**Figure 4**  
**Fred Miller’s Quieting the Mind by Counting Backward**<sup>220</sup>

Sit comfortably and close your eyes. Then take three deep breaths to calm down and clear your mind.

Breathing easily, inhale. Now exhale, silently saying, “Fifteen.”

Inhale again. This time while exhaling, silently say, “Fourteen.”

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216. KATHLEEN ADAMS, *JOURNAL TO THE SELF: TWENTY-TWO PATHS TO PERSONAL GROWTH* 29 (1990). See also IRA PROGOFF, *AT A JOURNAL WORKSHOP: WRITING TO ACCESS THE POWER OF THE UNCONSCIOUS AND EVOKE CREATIVE ABILITY* 77-78 (Jeremy P. Tarcher/Perigee Books rev. 1992) (1975) (describing the essential nature of sitting in stillness and feeling the moment before engaging in a journaling activity); EUGENE T. GENDLIN, *FOCUSING* 51-52 (Bantam Books 2d ed. 1981) (1978) (recommending that people “[f]ind a time and a place to sit quietly for a while” before commencing the focusing process and requiring, as the first step of the process, “clearing a [mental] space” by isolating specific types of troubling thoughts).

217. See MILLER, *supra* note 35, at 10 (“I didn’t have to become a Hindu or a Buddhist or a yogi to learn to relax, and neither do you.”).

218. See *id.* at 41, 86.

219. *Id.* at 23.

220. *Id.* at 24.

Continue inhaling and counting down a number with each exhale.

After you reach zero, take a few gentle breaths, all the while noticing how you feel. When you are ready, open your eyes.

Another technique involves an exercise with a candle that progresses from seeing to visualizing. Start by lighting a candle and follow these steps.

**Figure 5**  
**Fred Miller's First Seeing, Then Visualizing**<sup>221</sup>

Part 1

Sit back and take three deep breaths. Begin to breathe gently, and as you do, watch the flicker of the candle flame.

When you become distracted by a thought, "watch" it go by as if watching a bus, rather than jumping on it and going for a ride. As the thought passes, bring your attention back to the flame.

For a few seconds, keep your concentration on the candle flame, your one point of focus.

Part 2

Close your eyes and "see" the image of the flame—not behind your eyelids, but in your mind's eye, the place in your head where thoughts play out like movies.

Hold your concentration on the image of the flame.

Anytime you notice that your mind has drifted away

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221. *Id.* at 55-56.

from this image, invite it to come back.

Do not be harsh with yourself or judge your ability. Your mind will drift—there's no way around this phenomenon, as you well know.

Similar to the above methods, the entrance meditations recommended by Kathleen Adams in preparation for psychodrama sessions take on a similar note and spirit. For example, the following is an entrance meditation for conducting an improvised dialogue with another person, such as an attorney, a party or a juror.<sup>222</sup>

### Figure 6

#### Kathleen Adams's Psychodrama Entrance Meditation<sup>223</sup>

Find a comfortable position, and close your eyes.

Take a slow, deep breath ...

hold it ... and release it.

Do it again ...

and again.

Now, imagine yourself walking on a beach.

It's a warm day ... just a hint of a breeze.

The sun feels good against your cheek.

You can hear the gulls.

The waves tickle your bare feet.

You're on the way to a meeting with [the subject].

Notice how you feel inside as you prepare to meet [the subject].

Notice any sensations in your body . . . and any feelings you may be having, too.

And as you walk down the beach, you can see [the subject] in the distance . . . waiting for you.

You can barely make out some physical details.

Like, how big [the subject] is.

222. ADAMS, *supra* note 216, at 120.

223. *Id.* at 120-21.

And whether [the subject] is a man, or woman, or animal, or other.

Check in with your feelings.

Now, you're almost there. [The subject] is waiting for you.

You're close enough now to notice the details of [the subject's] appearance.

And you can sense [the subject's] attitude.

Notice the expression on [the subject's] face . . . .

[his/her/its] posture . . . attitude . . . mood.

Notice your own mood as well.

Take as long as you want to communicate with [the subject] nonverbally . . .

and when you are ready, you can say hello.

After breathing calmly to clear the mind, the judge can embark on the exercises listed below. With these brief exercises, the judge can begin to see with the mind's eye to enhance his capacity for creative visualization and deeper introspection. These exercises are supplements to the traditional types of advice given to judges, such as the recommendations of Isaiah Zimmerman's *Personal Burnout Prevention Plan* for judges, which underscores daily breaks and nutrition.<sup>224</sup> After achieving a calm and reflective state, the next step will be use of a specific tool to explore unclear behavioral impediments. The following sections explore four intensive measures that permit judges to access these uncomfortable sensations and emotions.

## V. FOCUSING

In common terms, "focusing" generally means concentrating one's attention on something.<sup>225</sup> However, clinical psychologist Eugene Gendlin uses the term in quite a different context.<sup>226</sup> The focusing process represents the steps of self-analysis Gendlin observed

224. ZIMMERMAN, *supra* note 19, at 129-30. In the *Personal Burnout Prevention Plan*, noteworthy recommendations include conducting "alternating tensing and relaxing exercise[s]," taking daily naps in the office "or as soon as you come home," and engaging in physical activities.

225. RANDOM HOUSE COLLEGE DICTIONARY 339 (rev. 1980) ("to concentrate").

226. See generally GENDLIN, *supra* note 216, at 4 (describing *focusing* as a skill which will "enable you to change—to live from a deeper place than just your thoughts and feelings").

in countless therapy patients who experienced the greatest amount of personal growth and insight.<sup>227</sup> After years of researching these characteristics, Gendlin identified a six-step method that anyone can use to gain higher levels of understanding.<sup>228</sup>

When focusing, a person asks himself a series of progressively narrow questions for the purpose of noting his own bodily reactions to the questions.<sup>229</sup> Eventually, these physical reactions will point to the specific dilemma that originated the discomfort and allow the person to experience a mental release after coming to terms with the issue.<sup>230</sup> The steps of focusing are deliberate and extremely different from common experiences of searching inward.<sup>231</sup> This mode of self-analysis recognizes that the bodily discomfort we experience when dwelling on certain issues provides extremely useful forms of feedback. At the initial stages, we can only sense discomfort without knowing its source.<sup>232</sup>

When considering the common experiences of judges, focusing is an ideal tool for addressing the “embodiment” aspect of the judge’s life-world.<sup>233</sup> The six steps or “sub-acts” involved in focusing are described below using Gendlin’s illustrative example of Peggy, a late

227. *Id.* at 3-4 (describing how the theory was derived from successful patients who “show[ed] real and tangible change on psychological tests and in life,” and analyzing how they approached their problems “inside themselves.”)

228. *Id.* at 51-64 (titled the six steps: Clearing a Space, Felt Sense of the Problem, Finding a Handle, Resonating Handle and Felt Sense, Asking, and Receiving).

229. *Id.* at 10 (describing the focusing process as “a process in which you make contact with a special kind of internal bodily awareness,” which Gendlin calls a “felt sense”). See discussion *infra* pp. 56-62 Part V.

230. GENDLIN, *supra* note 216, at 67-68:

When focusing produces a real problem-solving step, [a] body shift signals that some inside stuckness has changed. With each step, the problem feels slightly different from and better than the way it felt before. The felt sense of it has changed—which is another way of saying *you* have changed. When you next meet the problem in a life situation, your reaction will be different. A successful focusing step usually gives a much better, truer understanding of what has been wrong.

See discussion *infra* pp. 56-62 Part V.

231. GENDLIN, *supra* note 216, at 69 (“Focusing is not just getting in touch with ‘gut feelings’ . . . [t]o let [the felt sense of a problem] form, you have to stand back a little from the familiar emotion.”); *Id.* at 66 (suggesting that focusing is not merely about taking to yourself or asking yourself what is wrong at a given time: “Instead of talking at yourself from the outside in, you listen to what comes *from you*, inside”).

232. *Id.* at 10 (observing that bodily sensations are “at first *unclear*, fuzzy”). See also *id.* at 69 (“A felt sense is the broader, at first *unclear*, *unrecognizable* discomfort, which *the whole* problem (*all that*) makes in your body.”).

233. See *supra* Part III.C.3 (addressing this aspect, which involves the physical dimension of the judge’s awareness).

twenties part-time teacher who just learned that her husband has been offered a job promotion.<sup>234</sup> As the two meet and speak, in her husband's excitement, he knocks a plate off the table, and Peggy leaves the room crying in a state of discomfort.<sup>235</sup> She then attempts to focus to understand the nature of her feelings.<sup>236</sup>

### A. *Clearing a Space*<sup>237</sup>

In this first stage, the person will want to be silent and take a moment to relax. He will pay attention "inwardly" to his stomach or chest when inquiring about how his life is progressing at a given time.<sup>238</sup> Gendlin poses the question, "How is my life going now?"<sup>239</sup> In answering this question, usually, there will be three or four issues that create difficulty for a person.<sup>240</sup>

At this first stage of focusing, the person should avoid the temptation to go deeply into the first problem that presents itself.<sup>241</sup> Instead, he should take the time to gain appreciation of all the major issues confronting him at the inner level. In the example of Peggy, at this stage, she washes her face and goes to an unoccupied room.<sup>242</sup> She envisions that she is stacking all of her problems to the side of the room in a specific place that exists in another realm, far away from her usual daily concerns. Upon attaining this level of awareness, Peggy asks, "Why don't I feel terrific right now?"<sup>243</sup>

234. EUGENE T. GENDLIN, FOCUSING: MORE THAN MEDITATION OR VISUALIZATION (Audio Renaissance Tapes 1990) (1978) [hereinafter GENDLIN TAPE].

235. *Id.*

236. *Id.*

237. GENDLIN, *supra* note 216, at 52.

238. GENDLIN TAPE, *supra* note 234.

239. *Id.* See also GENDLIN, *supra* note 216, at 52 (suggesting that related questions include "How do I feel? Why don't I feel wonderful right now? What is bugging me on this particular day?").

240. GENDLIN TAPE, *supra* note 234. See also GENDLIN, *supra* note 216, at 52 (estimating "that perhaps half a dozen problems keep you tense inside").

241. GENDLIN TAPE, *supra* note 234. See also GENDLIN, *supra* note 216, at 52 ("DON'T GET SNAGGED ON ANY ONE PROBLEM. Just list the problems mentally, the big and the small, the major and the trivial together. Stack them in front of you and step back and survey them from a distance.").

242. GENDLIN TAPE, *supra* note 234.

243. *Id.*

### B. *Getting a Felt Sense of the Problem*<sup>244</sup>

This stage of focusing involves choosing only one of the three or four problems presently influencing the individual. It requires the person to “stand back” from the issue and to approximate where the problem lies in relation to the larger array of concerns.<sup>245</sup> This process will make the problem unclear in its relation to others, but it will also help in allowing the body to react to the problem easily during later stages of the focusing process:

[D]on't go inside the problem . . . [s]tand back from it and sense how it makes you feel in your body when you think of it as a whole just for a moment. Ask, “What does this whole problem feel like?” But don't answer in words. Feel the problem *whole*, the sense of *all that*.<sup>246</sup>

In the applied example, at this stage, Peggy does not have full comprehension over the answer to the question she posed; the sense is unclear in a “large, vague, formless” way.<sup>247</sup> She stays with the feeling for at least 30 seconds in order to see what transpires.<sup>248</sup> She is unsure, but thinks the problem has something to do with the dish.<sup>249</sup>

### C. *Finding a Handle*

This stage involves asking oneself about the “quality” of this unclear felt sense.<sup>250</sup> Gendlin instructs the person who is focusing to let a word or image come to the forefront as a description for the sense, such as “sticky,” “heavy,” “jumpy,” “helpless,” “tight,” “burdened,” etc.<sup>251</sup> Whether it is a phrase or a picture, the person should attempt to invoke additional pictures or phrases until one fits most appropriately, at which time the person should feel a small bodily shift.<sup>252</sup>

244. GENDLIN, *supra* note 216, at 53.

245. See GENDLIN, *supra* note 216, at 53.

246. *Id.*

247. GENDLIN TAPE, *supra* note 234.

248. *Id.*

249. *Id.*

250. GENDLIN, *supra* note 216, at 55.

251. *Id.*

252. *Id.* at 56:

It is like the old children's game of hide-and-seek. Someone who knows where the object of the search is hidden says “cold, colder, ice cold!” when you move in the wrong direction, and “warm, warmer, still warmer” as you move in the right direction. In this case it isn't another person but your own felt sense that will say “cold,

This will be an internal sense from within one's body.

In the example, for Peggy, she questions, "What is the quality of this felt sense," expecting that the sense will name itself.<sup>253</sup> She begins to sense the answer as anger over the broken dish.<sup>254</sup> However, her body tells her that it is not anger over the dish.<sup>255</sup> Instead, she now feels a sense of shifting within, pointing to anger over her husband's sense of jubilation as the root of the problem.<sup>256</sup> In this way, the problem has changed through the process of her self-questioning. Again, as she asks herself whether this word "anger" fits, she experiences a second shift pointing more toward the word "tense," then "tight," then, finally, "jealous."<sup>257</sup>

#### D. Resonating

At this stage, which comports with the element of dialectical/transitional thought,<sup>258</sup> the individual is instructed to "move back and forth between the felt sense and the word or image."<sup>259</sup> Gendlin calls the process "resonating," which calls for the person to check how the image or the phrase matches-up with the feeling.<sup>260</sup> When the feeling is "just right," this is when the individual can move to the next stage:

To do this resonating you must experience the felt sense again. You must touch it again as a feeling. Many people keep hold of the felt sense quite well until they get the very first words for it. Then, somehow, the feeling disappears and they have only the words. If that happens, obviously you cannot check the words against the feeling directly. So you must let the felt sense come back—not necessarily the same feeling as it was, but the felt sense as it now is (perhaps a little changed). You say the words to yourself *gently* over and over, in the spirit of trying to feel directly what the words were about. Usually, after ten or twenty seconds,

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cold, cold" (by not changing one bit) and then by saying "ah . . .warmer . . .hot! hot!" (by releasing, or shifting just slightly in how your body feels it.)

253. GENDLIN TAPE, *supra* note 234.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. See *supra* discussion accompanying note 133.

259. GENDLIN TAPE, *supra* note 234; GENDLIN, *supra* note 216, at 56 ("Take the word or image you got . . . and check it against the felt sense. Make sure they click precisely into place—a perfect fit. Ask (but don't answer): 'Is that right?'").

260. GENDLIN, *supra* note 216, at 57.

the feeling—as it is—is back.<sup>261</sup>

For Peggy, she takes the word “jealous,” and begins to check it against her feeling. “Is this the right word?” she ponders.<sup>262</sup>

### E. Asking

In this stage, the individual moves to greater awareness of the source of the problem by asking the sense, directly, what it is.<sup>263</sup> “For example, if your handle was ‘jumpy,’ say ‘jumpy’ to yourself till the felt sense is vividly back, then ask it: ‘What is it about this whole problem that makes me so jumpy?’”<sup>264</sup> According to Gendlin, the asking person will perceive a bodily signal similar to an easing or releasing after identifying the correct issue.<sup>265</sup>

In the example, for this stage, Peggy begins to ask about the type of jealousy she is experiencing. She begins to sense that she is “sort of jealous.”<sup>266</sup> Then, she asks herself why, “What about this whole problem makes me sort of jealous?”<sup>267</sup> The answer comes to her as a feeling of release.<sup>268</sup> The answer is that she is feeling sort of jealous because it is as though her husband has left her behind in all of the excitement.<sup>269</sup>

### F. Receiving

This is the process in which the person recognizes and “stays” with the change, realizing that there has been a transition in answer to the line of questioning.<sup>270</sup>

Whatever comes in focusing . . . [y]ou need *not* believe, agree with, or do what the felt sense just now says. You need only receive it. You will soon deeply experience that once what comes with a shift is received, another shift will come . . . . So permit it to

261. *Id.* at 57.

262. GENDLIN TAPE, *supra* note 234.

263. GENDLIN, *supra* note 216, at 58.

264. *Id.*

265. *Id.* at 59 (“The body shift is mysterious in its effects. It always feels good, even when what has come to light may not make the problem look any better from a detached, rational point of view.”).

266. GENDLIN TAPE, *supra* note 234.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

tell you now whatever it must say first.<sup>271</sup>

In the example, now that Peggy realizes she feels left behind, she asks herself additional questions and begins the focusing process in relation to the new concept.<sup>272</sup> She goes through the process again, this time exploring the question, "What is this left behind feeling?"<sup>273</sup>

While focusing did not do away with Peggy's feelings of discomfort, the process allowed her to identify the nature of her emotional reaction in a meaningful way. For the judge, the process can help uncover the basis for feelings of irritation with aspects of a case. Armed with this knowledge, the judge can take conscious steps to prevent further interference with the decision-making process or evaluations of the claims before the court.

Importantly, the act of focusing is estimated to take no longer than thirty minutes.<sup>274</sup> Aside from the other techniques addressed here, focusing provides an approach that relates directly to the calibration process as well, acknowledging the initial discomfort that appears, which alerts a person to his decisional anomalies.

## VI. PSYCHODRAMA AND CREATIVE DRAMATICS

Psychodrama is a method that therapists often use to help people understand their underlying motivations for taking certain actions. It has been implemented in both clinical and non-clinical settings.<sup>275</sup> Oftentimes, it is called "creative dramatics," when addressed in the non-clinical context of decisional enhancement.<sup>276</sup> In clinical settings, the process usually involves a client (protagonist) who acts out emotionally charged or otherwise significant aspects of his life with the aid of a therapist (director), various people who have volunteered to play different roles (doubles or auxiliaries depending on the circum-

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271. GENDLIN, *supra* note 216, at 60.

272. GENDLIN TAPE, *supra* note 234.

273. *Id.*

274. *Id.*

275. *E.g.*, MARION J. HEISEY, CLINICAL CASE STUDIES IN PSYCHODRAMA 2 (1982) (explaining that psychodrama "has great potential for helping the normal functioning person" and "[i]t is used not only as therapy, but for everyday living").

276. PARNES ET AL., *supra* note 138, at 217-18 ("There are *not* many well-known methods for increasing awareness and concentration, for developing control of the physical self, for sharpening the sense, for learning to discover and control emotion, for developing pride in individuality, and for strengthening self-confidence in speaking and performing. Creative dramatics helps with these too."). *See also* Cole, *supra* note 17, at 37 n.115.

stances), and an audience.<sup>277</sup> It normally takes clinicians about two to three years to master the techniques of psychodrama, all of which require group interaction for the exercises to be successful.<sup>278</sup> While there has been some success applying a few of the techniques to individual therapy, for the most part, guidance from trained professionals remains an essential component.<sup>279</sup>

The creativity literature provides a greater degree of license for individuals wishing to use psychodramatic techniques unsupervised.<sup>280</sup> In the creativity literature, scholars recommend psychodrama exercises that implement the use of writing and diagramming as well as acting. Although some of the written exercises are similar to journaling exercises or exist as hybrids, as addressed in this section, they retain their character as psychodrama because they require some degree of physical or mental action on the part of the user. If, indeed, these techniques duplicate journaling exercises, they will not be repeated in the journaling section. This article assumes that the methods described below will be most effective when judges feel free to use them alone. This is true especially because of the sensitive and private nature of the exercises, which might reveal emotions that the judge would not want to be shared with other members of his family or staff.

Individual judges can benefit in numerous ways from practicing modifications of popular psychodramatic techniques. To begin exploring these methods, it may be helpful to conduct the exercises in front of a mirror. However, for those who would like to explore the techniques at a deeper level, they should use a video camera. Steven Brookfield, who has studied role-playing, recommends using video because of its value in debriefing and evaluating after the action has been completed.<sup>281</sup> The benefit of psychodrama as opposed to journaling is the added insight that comes when a person acts something out. This concept is known as "action-insight," and it exists as a dis-

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277. Cole, *supra* note 17, at 13-14.

278. Telephone Interview with John Nolte, therapist and facilitator, The Trial Lawyer's College, in Dubois, Wyo. (June, 2003).

279. See generally Stein & Callahan, *supra* note 142 (recommending the use of certain methods with individuals, rather than groups). But see Cole, *supra* note 17, at 36-38 (discussing the concerns of professionals who believe that psychodramatic techniques are too risky to be used by attorneys without therapeutic supervision); Leach et al., *supra* note 17 ("Attorneys should not attempt to organize a psychodrama session by themselves.").

280. WONDER & DONOVAN, *supra* note 34, at 105.

281. BROOKFIELD, *supra* note 135, at 105 ("Video-taping the role play is particularly helpful for effective debriefing.").

tinct method of self-awareness because the protagonist is actually doing an activity as if it were actually occurring. As one scholar puts it, "Action-insight is non-cognitive in that it does not involve intellectualizing. It is a 'gut-level' learning that involves processing at the bodily and perceptual-motor level—a process that favors feelings over thought, emotion over intellect, intuition over analysis."<sup>282</sup> A combination of these factors makes it possible to learn by "actual experience and not written and verbal information."<sup>283</sup>

Although specific techniques will vary as applied to different judges, they should follow certain fixed stages of progression during their sessions. Experts in psychodrama recognize the warm-up period, the action period, and the closure period.<sup>284</sup> Among all of these, the period of closure is a time for reflection about the experience of the protagonist in working through various roles. This cooling-down time provides a "sense of balance" and a "transition point between the action and the moment that the client will [return] to the every day world."<sup>285</sup>

#### A. Warm-Ups

Even if a judge has spent time clearing his mind with meditation techniques, and generally feels relaxed, this does not mean he is ready to engage in psychodrama.<sup>286</sup> For all persons, certain preparatory activities will make them more receptive to action-insight. These activities will force them to think creatively. For example, a judge can begin warming-up to psychodramatic techniques by finding a recent newspaper and selecting a random item from the ads page. To increase his receptivity to acting in an unfamiliar way, the judge should generate a commercial for the selected product. However, the commercial should promote the object for use in a manner that would not

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282. PETER FELIX KELLERMANN, FOCUS ON PSYCHODRAMA: THE THERAPEUTIC ASPECTS OF PSYCHODRAMA 93-94 (1992).

283. Cole, *supra* note 17, at 18.

284. LANDY, *supra* note 33, at 127-33.

285. *Id.* at 132-33.

286. E.g., ADAM BLATNER, FOUNDATIONS OF PSYCHODRAMA: HISTORY, THEORY, AND PRACTICE (4th ed. 2000); ADAM BLATNER, ACTING-IN: PRACTICAL APPLICATIONS OF PSYCHODRAMATIC METHODS 86 (3d ed. 1996):

In general, one becomes creative not just by sitting and thinking, but rather by becoming gradually more involved with a given problem, improvising, experimenting, talking, dialoguing, and especially physically moving about, all foster the flow of imagination, intuition, and the psychic mixing process that gives birth to insights and new ideas.

normally be considered.<sup>287</sup> For instance, he could advertise tennis shoes as bookends or paperweights.<sup>288</sup> Warm-up exercises, such as this, are readily available in a number of primary texts on the topic.<sup>289</sup> It is crucial here that the judge prepares to think and act in an unconventional and creative way. Without developing a nonjudgmental creative space, he cannot simply jump out of character, as many exercises require.

### *B. Role Reversal*

It has been said that role reversal is the most important of all the psychodrama techniques because it allows a person to see himself through the eyes of others.<sup>290</sup> Not only can he relate to the person being acted, he is enabled to understand the aspects of who he is by stepping into that person's shoes.<sup>291</sup> Role reversal does not simply mean pretending to be another person. It involves taking on the role of another person in respect to their relations with you. This requires one to understand aspects of the other person's history and the factors that led to the person's current outlook. In the context of journaling, expert Ira Progoff recommends that the writer should identify certain major life events that shaped the development of the person from his birth. To help establish a necessary connection between the actor and the acted, the following steps are borrowed from Progoff:

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287. This combines a common activity in psychodrama—acting out an advertisement—with a common technique in creativity literature, which involves developing alternative uses for objects. See EVA LEVETON, *A CLINICIAN'S GUIDE TO PSYCHODRAMA* 35 (3d ed. 1999) (discussing the use of props and different uses). See also PARNES ET AL., *supra* note 138, at 4-5 (describing how a person who, at first glance, sees a stool, can see the same item as a coffee table when adopting a different perspective).

288. Leveton, for example, notes how a walking cane “can be used to walk or dig with, as a sword . . . to beat rugs, [or] to threaten.” LEVETON, *supra* note 287, at 35.

289. *E.g.*, *id.* at 27-45 (describing verbal and non-verbal warm-ups, many of which can work effectively for individual judges).

290. Stein & Callahan, *supra* note 142, at 123-24 (explaining that, through role reversal, “it becomes possible not only to take the role of the other but also to see oneself from the point of view of another”).

291. *Id.*

**Figure 7**  
**Progoff's Steps to Identify with a Character**<sup>292</sup>

- Sit in stillness and think of that person.
- Write his name on a blank page.
- Write a statement that summarizes the thoughts and feelings that come to mind when you think of that person.
- Read the statement back to yourself, and make changes to it by adding rather than editing aspects you noted in the prior step.
- Write the major life events that occurred to this person from birth to the present. Perhaps 12 would suffice.

Progoff directs the writer in the journaling exercise to begin a dialogue with the person after following the above steps. In psychodrama, the best vehicle for this type of back-and-forth communication is represented by the "empty chair" method, a technique that requires the protagonist to set up an empty chair and conduct a dialogue with the other person by switching chairs every time roles are reversed.<sup>293</sup> The director instructs, "Before you talk to [this person], why don't you tell us who you see sitting there. Visualize her sitting on that chair. Tell us what you see."<sup>294</sup> As the perceptions become more real, the protagonist "addresses the empty chair."<sup>295</sup> Although the process can be tiresome and draining on the protagonist, such dialogue is valuable because it "avoid[s] the deadening intellectualization of 'talking about' problems and conflicts" and achieves actual results.<sup>296</sup> The flexibility inherent in the exercise is also indicative of the dialectical thought idealized by judicial mindfulness.

Depending on the goals of the protagonist, it may be more important to stay in the character of the person being acted rather than switching roles constantly. For example, Professor Dana Cole shared the value of role reversal in the legal setting. He described the situation where an attorney's direct examination seemed to lack force, perhaps due to her failure to identify with aspects of the case.<sup>297</sup> To improve the direct examination, the attorney acted the part of her cli-

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292. PROGOFF, *supra* note 216, at 131-40.

293. LEVETON, *supra* note 287, at 87-92.

294. *Id.* at 88.

295. *Id.*

296. *Id.* at 89.

297. Cole, *supra* note 17, at 24-25.

ent and spoke in detail about what it was like to suffer the particular injury complained of.<sup>298</sup> This exercise helped her begin to identify with the case on a personal level, improving her ability to hone in on key issues with a greater degree of clarity. Her actions revealed that “[t]he lawyer will have a deeper understanding of the ‘truth’ involved” because she “is able to ‘experience’ the event.”<sup>299</sup> In other contexts, some have suggested that lawyers reverse roles with judges to better understand aspects of in-court exchanges.<sup>300</sup>

Judges will want to reverse roles with different people for different reasons. To better understand theories that may be eluding them during legal or factual analysis, judges should also seek to reverse roles with appellate judges who would review their decisions for error. This suggestion is similar to Professor Brookfield’s recommendation to identify aspects of one’s own vocation as if someone new was about to assume it, which often helps people identify with their duties and functions as employees.<sup>301</sup> As the role player, it will be important for the judge to take on many characteristics of the reviewing authority. The judge-actor will strive to ask the same questions he would expect the appellate judge to ask him. He will make the same gestures, read the opinion in the same manner, and circle in red ink the same phrases that might seem problematic. Eventually, he will reach a conclusion just as the real appellate judge might.

Judges may also want to reverse roles with litigants in a case. The decision to do this is complicated in part because there exists a risk that the judge may become emotional or impassioned about some aspect of the litigant’s life that interferes with his partiality. However, depending on his goals, the acting judge may desire this type of

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298. *Id.* at 25.

299. *Id.* at 23.

300. Leach et al., *supra* note 17, at 46:

A lawyer having difficulty with a judge or having difficulty finding his own authority in the courtroom often benefits from enacting the situation psychodramatically . . . . Role reversal with the judge allows him to take on the power the power he experiences the judge as having over him.

301. BROOKFIELD, *supra* note 135, at 95:

Another useful approach is to ask people to imagine that they are required to judge the performance or abilities of someone who is to take over their role or function. One might say “Imagine that you are leaving your job and have been appointed to the search committee to look for your replacement. What would you tell the members of the committee were the most important qualities they should look for in your replacement?”

role reversal simply to understand the party's perspectives about his own performance as a judge during the trial. He can similarly act the role of a juror, witness, counsel, or spectator sitting in the audience. Based on each of these distinct roles, the judge-actor should encounter completely different perspectives about himself.<sup>302</sup>

Before sentencing, however, and at other more vital stages where it would be important for the judge to better understand the motivations and experiences of a defendant, role reversal can achieve further insight. In the literature on psychodrama, much has been written on the use of role reversal to identify with others' perspectives. In a noted case, law enforcement officers, who participated in such exercises, gained important insights:

[I]n one session recruits were instructed to act out a situation in which a patrolman was required to have a group of juveniles move away from a street corner. Recruits played the part of the juveniles and communicated to the class how they were likely to be feeling and how they would respond to different approaches by the officers. When the roles were reversed, it was apparent that the recruits who had played the juvenile roles were much more aware of the other's point of view and could handle the situation more effectively and spontaneously.<sup>303</sup>

In legal circles, Professor Robert Rubinson has suggested that judges attend court out of role and visit neighborhoods that they have never seen in order to better identify with litigants and their common experiences.<sup>304</sup> Similarly, the efforts of judicial educators at the National Judicial College emphasize the importance of this vital perspective. In the 1970s, for example, judges were often placed behind bars on sham charges so they could better identify with the incarcerated.<sup>305</sup> Today, while less invasive programs still exist to acquaint judges with the interiors of jails and prisons, much can be said for the added insight provided by these similar experiences. At least one bias task force has suggested the use of the technique specifically for judicial

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302. *E.g.*, IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE AND COMMITMENT* 361-62 (Free Press 1977) (demonstrating the effectiveness of the role-reversal technique on a prison warden, which permitted him to "fully explore the implications of fresh challenges [suspected to be] unjustifiably dismissed by means of [biased] rationalization").

303. Hannah B. Weiner, *Psychodrama in Law Enforcement Community Relations*, in *PSYCHODRAMA: THEORY AND THERAPY* 349, 355 (Ira Greenberg ed., 1974).

304. Rubinson, *supra* note 105, at 36-38.

305. JACKSON, *supra* note 44, at 19.

debiasing.<sup>306</sup>

The importance of reversing roles with attorneys may be especially important, as jurisdictions often find difficulty addressing opening lines of communication about problems experienced by the attorneys. In one jurisdiction, administrators developed a “Judicial Alter Ego” program to allow attorneys to vent their frustrations through appointed “confidants” of the judge.<sup>307</sup> For jurisdictions lacking such innovative programs, judges can gain important insights about attorneys’ perceptions of them by using psychodrama.<sup>308</sup>

Ultimately, role reversal and related techniques can assist judges by providing them with effective methods to gain awareness of their own behaviors. While scholars have reviewed tapes of judges’ expressions and nonverbal responses while on the bench to discover aspects of the judges’ unconscious tendencies,<sup>309</sup> judges wishing to learn the same lessons would be forced to parse through hours upon hours of tape. Role reversal used in the proposed manner can provide the judge with the same, if not more information, in a quick and efficient manner.

### C. Role Plays

In a role-play, the judge can remain the person he is or act the role of another person in a specific situation.<sup>310</sup> Unlike role reversal, he will not be dialoguing with himself or reacting to his true role. Instead, his major goal will be to observe his reactions to different hypothetical stimuli while acting the part. One exercise that can be helpful in making a judge more aware of problems experienced during the trial of cases is a technique called “another path.”<sup>311</sup> This

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306. MASSACHUSETTS REPORT, *supra* note 11, at 165 (recommending that judges “role play an ‘us’ or ‘them’ situation designed to bring about greater awareness of what it means to be sensitive to others of diverse backgrounds”).

307. Pamela Coyle, *Bench Stress*, A.B.A. J., Dec. 1995, 60, 62-63 (discussing the program developed in Montgomery County, Maryland).

308. Interview with Dana Cole, Professor, Akron School of Law, Faculty Member, Trial Lawyer’s College (May, 2003).

309. *E.g.*, Blanck, *supra* note 43.

310. Scholars note the difference between role-playing and role reversal as the absence of the requirement to “view the self from the role of the other” in role-playing exercises. Stein & Callahan, *supra* note 142, at 123. They note the value of role-playing as an aid to “help crystallize perceptions and feelings about the person that need to be given expression.” *Id.*

311. *See, e.g.*, LEVETON, *supra* note 287, at 31-32 (describing one use of the technique in which a person dreams up an alternative existence, as if his life moved along in an alternative manner than history dictated).

technique is helpful in understanding the likelihood that decisions in a prior case could unknowingly affect the judge's evaluation of a present case. In this activity, the judge will revisit a prior decided case. First, he will recall the factors that led him to the decision. Next, the judge will assemble the sources he consulted and place himself in the position of deciding the case from scratch.

Instead of retracing the steps that led to his actual decision, the judge will intentionally decide the case in a manner that produces a different result, even though the new result will rest on the same facts and law that supported the prior decision. Importantly, the judge will reach the decision in the customary way he decides all cases. By paying careful attention to their normal behaviors when deciding cases in alternative ways, judges can gain awareness of factors that may be influencing their decisions. Much like an audience member watching Brecht's style of epic theatre, the judge cannot help but to question additional aspects of the entire opinion-writing process since he is forced to second-guess his common behaviors by considering alternatives.

The other path method yields similar benefits as considering the opposite, but at a more personal and realistic level. Using the proposed method requires far more than preformulating and working backward from the contrary legal position. It additionally requires the judge to fully immerse himself in familiar behaviors and then defer his judgments until he has fully considered additional missed alternatives. Such analysis can enhance the judge's awareness of decisional impediments that arise on a regular basis.

Role-plays offer additional means of self-analysis. In another modification of this technique, the judge will act in a prohibited way specifically for the purpose of detecting personal manifestations of undesired behaviors.<sup>312</sup> For example, in a comfortable experimental

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312. The technique, which has been called "negative practice" and "paradoxical technique," in clinical settings recognizes that "deliberate entrance into insecure situations not only teaches new reactions, but also gets rid of a great deal of the fear associated with them." C. VAN RIPER, *SPEECH CORRECTION: PRINCIPLES AND METHODS* 85 (1939). As psychiatrist David D. Burns explains:

If a patient becomes anxious during a therapy session and tells me he's afraid he's about to crack up, I may reply "I know you've been afraid of cracking up for many years. This would be as good a time as any to go ahead and get it over with . . . . The patient usually looks shocked and protests that he doesn't understand what I am asking him to do. I tell him that he could stand up and flail his arms and legs about or babble gibberish and try his best to go crazy . . . . They usually laugh and feel relieved once it dawns on them that they can't crack up, even if they try with all their

environment, he could act his own part and decide a hypothetical case strictly on the basis of gender or racial characteristics of a party in the case. In a written decision (which would surely be destroyed after the completion of the exercise), the judge would justify the decisions using stereotypes that he, at times, has subscribed to in personal settings. Similarly, the judge could decide constitutional or statutory matters based solely on his emotional reactions and the past historical events that motivated the reactions.<sup>313</sup> The value in such exercises is the judge's use of actual experiences and feelings that could unknowingly surface during normal decision-making. These techniques move far beyond beliefs labeled by others as clearly "biased" or "wrong," and provide judges with incentive and ability to learn more about *their own* stereotypes.

#### D. Demonstrative Exercises

Even the act of arranging figures in a scene can give the judge important insight about how he sees himself in the judicial role. Psychodrama experts often use the term "sculpture"<sup>314</sup> to describe an exercise where the protagonist depicts himself in relation to the others.<sup>315</sup> In the "family sculpture" method developed by Virginia Satir, the director instructs the protagonist, "I'd like you to sculpt these people [in your family] into a picture that would tell me something about the way your family relates. If I were walking along in the park and saw your sculpture, what would it look like? What picture would you get?"<sup>316</sup> The sculpture is a form of "sociogram," which Professor Leveton describes as "a pictorial representation of an individual in relation to his group."<sup>317</sup> The exercises permit the protagonist to observe ways that his assumptions are shaped about depicted individuals and himself.

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DAVID D. BURNS, *THE FEELING GOOD HANDBOOK* 229-30 (1990).

313. Seamone, *supra* note 7, at 1076-77 (describing the psychological theory of negative practice as applied to judges).

314. *E.g.*, ADAM BLATNER, *ACTING-IN: PRACTICAL APPLICATIONS OF PSYCHODRAMATIC METHODS* 54-56 (3rd ed. 1996) (discussing various methods and contexts for the technique).

315. *Id.* at 55 (describing how, in a sculpture, individuals are "placed in positions that symbolically represent their perceived distance, attitude, and quality of relationship with the protagonist").

316. LEVETON, *supra* note 287, at 45.

317. *Id.* at 81.

A judge can benefit from the sociogram by depicting himself in relation to the jury, witnesses, attorneys, appellate judges, the media, and his own family. The task can be accomplished with pen and paper in the form of a drawing or clay in the form of three-dimensional figures. Ultimately, by displaying the cast of his courtroom and noting their position in relation to his own and other factors related to their placement, the judge can detect subconscious elements of his daily interactions.

While psychodrama offers a host of exercises, the following Part will explore the techniques of journaling.

## VII. JOURNALING TO ACHIEVE ENHANCED AWARENESS

When people initially think about the process of journaling, they may be reminded of a daily journal they kept at some time in the past. While this common form of recording past events may help a person gain new insights, there are more deliberate exercises that experts suggest to increase self-awareness. In his noted work *At a Journal Workshop*, Ira Progoff explains that various activities can permit our life experiences to "speak to us," opening the doors to the unconscious.<sup>318</sup> Kathleen Adams, a facilitator of journaling workshops, explains, "The journal is like a moon, emitting a magnetic tug that draws information from your subconscious and unconscious minds and brings it to the surface, where you can work at the conscious level."<sup>319</sup> While Progoff provides a more structured process for journaling, other experts in the field offer less structured methods.

The major aspect of journaling that makes it ideal for enhancing self-awareness is the absence of rules.<sup>320</sup> In the process of journaling, there are no constraints on an individual. He can dialogue with people, places, his own body, or life events if this is desired.<sup>321</sup> And, while it may be more difficult to accomplish some of these feats with a method like psychodrama, taking pen to paper offers unlimited access to one's creativity and spontaneous energy.

Among the numerous journaling exercises, the following methods offer judges opportunities to increase self-awareness in specific areas. Progoff's methods for journaling are ideal because almost all

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318. PROGOFF, *supra* note 216, at 124.

319. ADAMS, *supra* note 216, at 20.

320. *Id.* at 27 ("When it comes to your journal, there simply *aren't* any rules.")

321. *See generally* PROGOFF, *supra* note 216.

of the exercises follow the same format, even when a person desires to dialogue with events rather than people:

**Figure 8**  
**Progoff's Initial Journaling Steps<sup>322</sup>**

- Sit in stillness and clear your mind.
- Turn the event, idea, or object into a person. Progoff explains this step as “recogni[zing] the reality of the person unfolding within [the object of attention].”
- Write a clear, short statement summarizing the most salient aspects that you sense about the person.
- Expand on the statement by adding not editing.
- List the major “steppingstones” of that person or event’s lifespan from birth to the present.
- Greet the person.
- Begin to speak with the person but simultaneously without trying to force an intended response. As Progoff puts it, “We do not create a dialogue script. We do not think about it and deliberately write it. We let it come forth of itself.”
- Then, stop the exercise and read what you’ve written and record any additional thoughts or feelings that come to you. You may wish to extend the dialogue.
- Repeat steps as necessary.

These steps can be applied to any type of event. A person’s reactions to any specific elements of the writing can be noted later and incorporated into earlier recordings to enhance self-understanding.<sup>323</sup> Importantly, Progoff provides similar exercises for a person to dialogue with his own body, an interesting but related alternative to the focusing exercise which also addresses the life-world category of embodiment.<sup>324</sup> As long as the author attaches a persona to the event or object, he can attain a deeper understanding of it and his own relation to it. This can include amendments of the Constitution or editions of

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322. *Id.* at 131-40 (addressing dialogue with others during the journaling process).

323. ADAMS, *supra* note 216, at 53-54 (describing the process of indexing, cross-referencing, summarizing, and organizing portions of completed writings).

324. PROGOFF, *supra* note 216, at 154-66 (discussing journaling as it applies to one’s body).

the Federalist Papers, for example.

Separate from Progoff's writings, Adams presents other exercises intended to accessing information in one's subconscious and superconscious mind. These methods include the following.

#### A. *Topics du Jour*

This is a technique that helps a person monitor specific aspects of his behavior over the course of time. For judges who desire to understand the similarities in the way they treat parties and their counsel, or how they rule on similar types of cases, *Topics du jour* will offer the judge significant feedback. The process begins by numbering a page with 31 entries, listing each aspect of your life that it will be important to monitor.<sup>325</sup> It will help to list five aspects of analysis for each category noted. For example, if I wanted to know the nature of my relationship with witnesses, I would be interested in (1) whether they followed my directions; (2) the nature of their questions to me; (3) changes in their demeanor when I interact with them; (4) specific nonverbal expressions during our contact; and (5) reactions of other spectators in the courtroom before, during, and after my interactions with witnesses.

For each day listed, the judge should "look at the topic that corresponds in number with *today's date*," and make a conscious effort throughout the day to note aspects of the five dimensions identified previously.<sup>326</sup> The date, therefore, serves as a "springboard" for evaluating a specific issue. For example, if my concerns were interaction with witnesses, counsel, defendants, and other judges, I would repeat these four categories of concern on the list until the repeated list filled the 31 entries for days of the month. If the judge notes specific negative trends over time, he can then take action to reverse the trends. At the end of each day, the judge should list various "action steps" to improve that specific relationship.<sup>327</sup> After several months, it will be possible to determine successes in implementing specific action plans as well as changes in the dimensions. It may also be helpful to reserve entries number 15 and 30 specifically for analyzing progress over the month and interrelations between different entries. The *Topics du Jour* journaling technique can assist the judge in

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325. ADAMS, *supra* note 216, at 167.

326. *Id.* at 168.

327. *Id.* at 169-70.

documenting patterns of his behavior over time in a non-confrontational manner.

### B. Lists of 100

Oftentimes, writing a long list of 100 items in response to a question can offer deep personal insights.<sup>328</sup> Rather than merely including a few entries, experts recommend making the longest possible list because certain aspects of the task will begin to reveal trends in one's thinking and hidden truths about influences on a person.<sup>329</sup> When a judge is faced with a difficult case, merely writing "100 things I am stressed about right now" can help put the case in perspective in relation to other types of pressures on the judge, permitting the judge to see how these external factors may be interrelated with troubles experienced during the legal and factual analyses.<sup>330</sup> Simple rules to keep in mind are the following:

#### Figure 9

#### Kathleen Adams's Rules for Journaling Lists of 100<sup>331</sup>

1. "It's OK to repeat!
2. Write as *fast* as you can!
3. You *don't* have to write complete sentences!
4. Your entries do *not* have to make sense!
5. Just *get it down!*"

Within just 20 to 30 minutes, a judge can complete a list of 100.<sup>332</sup> The next step will be to search for themes and code them in the margins of the list, clustering each category and noting how frequently the category occurs.<sup>333</sup> These lists can give judges a reliable indication of how they are being influenced by subconscious factors at a given time, permitting judges to make adjustments and address any lingering issues.

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328. *Id.* at 124.

329. *Id.* at 125 (confirming that the repetition and process involved with generating 100 entries for the list permit further access into one's subconscious mind).

330. *Id.* at 127-30 (applied example).

331. *Id.* at 125-26 (emphasis added).

332. *Id.* at 126 ("If you're allowing yourself to repeat and writing the next thing in your mind, you can get through a List of 100 in 20 to 30 minutes!").

333. *Id.* at 127-28.

### C. *Unsent Letters*

In the unsent letter technique, the judge will write to a person with whom he is experiencing some difficulty on a professional level. Perhaps it is an attorney or a party in a case who inspires feelings of hostility in the judge. The purpose of the letter is to be as blunt and open as possible with this person, making every effort to explain, in detail, the anger and frustration, plans to settle the score, and everything discomfoting about the judge's relationship with that person.<sup>334</sup> The experts recommend, "Indulge yourself in all the perfect squelches that don't occur until after the moment is gone."<sup>335</sup> Then, the goal is simply to destroy the letter.<sup>336</sup> Although the unsent letter is a form of "one-way" communication, it provides one with the ability to gain clarity about his feelings at a very personal level without interruption.<sup>337</sup> It becomes not only a letter to the person with whom judges experience the problems, but also letters to the judges. Certain techniques which help to facilitate the process include beginning with a "springboard," such as "What I have been the most afraid to tell you is . . ." and recognizing the inherent flexibility of the exercise. Just as easily as you can write someone an unsent letter, you can also be someone else writing a letter to yourself.<sup>338</sup> This would be an ideal way to expand upon a role reversal or dialogue, for example.

For the judge, who writes in a solitary manner on a regular basis, journaling exercises such as the ones described above offer numerous advantages for self-insight.

## VIII. COGNITIVE THERAPIES TO ENHANCE AWARENESS

Self-awareness, as it has often been said, requires one to become his own "personal scientist."<sup>339</sup> No single approach explored in this article embodies this concept more than cognitive therapy. In many different settings, not only clinical ones, people have begun to use objective methods to test the validity and consistency of their moods and the thoughts that are related to them. Graphs, charts, and other visual depictions aid the decision-maker in keeping detailed thought records

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334. *Id.* at 173.

335. *Id.*

336. *Id.*

337. *Id.* at 175-76.

338. *Id.* at 179.

339. CARL E. THORESEN & MICHAEL J. MAHONEY, BEHAVIORAL SELF-CONTROL 9 (1974).

and conducting various thought experiments, which will be discussed below in some detail. These methods are different approaches from the other techniques explored above in that they permit a person “to test the meaning and usefulness of various thoughts” he experiences on a daily basis.<sup>340</sup>

Dennis Greenberger and Christine Padesky’s handbook *Mind Over Mood* describes several of the most powerful cognitive therapy techniques in a clear and easily accessible manner.<sup>341</sup> In pointing out common aspects of people’s problems, the authors note that thoughts are distinct from physical reactions, moods, behaviors, and the environment in which they are situated.<sup>342</sup> Whenever a person experiences a mood, a thought is directly linked to it.<sup>343</sup> Oftentimes, these thoughts are automatic in nature because they have become routine, and they leave us with words and images that we take for granted, which may end up influencing us nonetheless.<sup>344</sup> For judges, lack of awareness of interfering moods and thoughts can be detrimental. Psychologist Isaiah Zimmerman reveals that many judges will ignore certain moods and feelings to the point that these conditions decrease the judges’ ability to function optimally and eventually lead to stress-induced judicial burn out.<sup>345</sup>

The thought record is the primary tool of cognitive therapy. Greenberger and Padesky developed the following form to guide people through the process of generating such a record. The form consists of seven columns, as depicted below in Figure 10.

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340. GREENBERGER & PADESKY, *supra* note 111, at 2.

341. GREENBERGER & PADESKY, *supra* note 111.

342. *Id.* at 4 fig.1.1.

343. *Id.* at 15.

344. *Id.* at 49 (explaining that automatic thoughts “simply pop into our heads automatically throughout the day. We don’t plan or intend to think a certain way. In fact, we usually are not even aware of our automatic thoughts”).

345. Zimmerman, *supra* note 19.

**Figure 10**  
**Greenberger and Padesky's Thought Record Applied**  
**to Judges**<sup>346</sup>

Situation	Mood	Automatic Thoughts (Images)	Evidence Supporting the Hot Thought	Evidence that Does Not Support the Hot Thought	Alternative/Balanced Thoughts	Rate Moods Now
1	2	3	4	5	6	7

In the "Situation" column, the judge indicates the events leading to feeling, *e.g.*, "Counsel rolls his eyes at me."<sup>347</sup> The "Mood" column describes the type of mood that the judge feels and the percentage of intensity at which he feels a reaction between 0 and 100%, *e.g.*, "Irritated 60%; Angry 90%."<sup>348</sup> "Automatic thoughts" describes the spontaneous impressions that come to the judge when he experiences the indicated moods, such as thoughts in any of the following categories:<sup>349</sup>

- What am I afraid of might happen? *E.g.*, "Counsel will disregard all of my directions."<sup>350</sup>
- What does this say about me if this is true? *E.g.*, "I have lost control over my courtroom."<sup>351</sup>
- What does this say about other people? *E.g.*, "It means that other judges will doubt my abilities."<sup>352</sup> and
- What images or memories do I have in this situation?

346. *E.g.*, GREENBERGER & PADESKY, *supra* note 111, at 36-37 fig.4.2 (showing a similar completed thought record for the patient Marissa). For a similar concept, see also BURNS, *supra* note 312, at 258-60 tabl. "The Daily Mood Log."

347. *Id.* at 38 (suggesting that a person should list a situation occurring around him limited to "a specific timeframe that does not exceed 30 minutes," *e.g.*, "What situation has been troubling me over the last half-hour?").

348. *Id.* at 26-32, 38. (discussing the proper rating of one's moods).

349. For a listing of common incorrect automatic thoughts, see GARY EMERY, A NEW BEGINNING: HOW YOU CAN CHANGE YOUR LIFE THROUGH COGNITIVE THERAPY 54 tbl.4 (1981).

350. GREENBERGER & PADESKY, *supra* note 111, at 51 fig. "Questions to Help Identify Automatic Thoughts."

351. *Id.*

352. *Id.*

*E.g.*, “A memory of an attorney mocking me.”<sup>353</sup>

Among all of the Automatic Thoughts, the judge should circle the “hot thought,” which is the consideration that stirs the most emotion in the judge based on that single thought alone.<sup>354</sup> In the example, suppose the judge selects “I have lost control over my courtroom” as the hot thought.

In the fourth column, the judge will list evidence that supports the hot thought he selected.<sup>355</sup> He will write all of the reasons that justify the belief. For instance, “Counsel gives me negative looks every time I rule against him.” The opposite would be true of the fifth column, which directs the judge to provide reasons why the hot thought is not believable, such as, “Counsel made no disrespectful comments to me yet.”<sup>356</sup> Next, in the sixth column, the “Alternative/Balanced” thought should be written with a percentage indicating how likely it is that the judge believes the statement, *e.g.*, “I must rarely threaten counsel to gain their compliance 95%.”<sup>357</sup> In the final box, upon considering automatic thoughts and alternative viewpoints, the judge rerates old emotions and new ones. In this example, the new ratings are “Irritated 30%; Angry 20%.”<sup>358</sup>

The thought record permits the judge to free himself from automatic thinking, and identify and alter beliefs that generate stress.<sup>359</sup> To the experts who have used this method to increase people’s self-awareness, the experts hail the process as a means of identifying alternative viewpoints. This method of cognitive therapy is very similar to the process that judges already use to develop conclusions in cases, since it requires them to evaluate facts objectively before reaching a determination.<sup>360</sup>

## IX. CONCLUDING REMARKS

The maxim for judges to know themselves applies to every decision where behavioral influences can negatively interfere with the

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353. *Id.*

354. *Id.* at 57 (describing a hot thought as the “most emotionally charged” of them all).

355. *Id.* at 65-66 (noting that it is important to “temporarily suspend your conviction that your hot thoughts are true” in order to complete a full analysis). This suggestion also stresses the importance of bracketing one’s thoughts. *Supra* Part III.D.

356. *Id.* at 67.

357. *Id.* at 94-95.

358. *Id.* at 101 fig.7.3 col. 7.

359. *Id.* at 45, 109.

360. Interview with Dennis Greenberger, Clinical Psychologist (July, 2003).

judge's thinking process. While most cases afford the judge little room for the exercise of discretion, not all cases are easily decided. Judicial discretion can surface based on an alteration of one small fact in a case.<sup>361</sup> Faced with discretion, judges must have tools on hand to guarantee the integrity of their decision-making. As one noted judge observes, "A basic condition of the reasonable exercise of judicial discretion is awareness of the existence and exercise of judicial discretion."<sup>362</sup>

Judicial mindfulness presents a set of hands-on techniques to help judges determine precisely how they are influenced by their memories, emotions, and initial perceptions. These techniques overcome the pitfalls of many existing judicial debiasing methods, such as common checklists, by relying upon the judge's intuition and abandoning the notion that all judges think in the same predictable manner. It is possible to approach subconscious impulses mainly because the techniques all draw on a judge's own subjective feelings and experiences. Judicial mindfulness encourages judges to act well outside of their comfort zones in order to discover hidden truths about themselves. While many methods exist to accomplish greater self-insight, the starting point for judicial mindfulness rests in the proven techniques of meditating, focusing, psychodrama, journaling, and cognitive therapy. This beginning framework for self-awareness can be supplemented by other methods at any time.

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361. *Id.* at 42 (describing that the difference between a hard case and an easy case for a judge can, oftentimes, be distinguished by "a small change in the facts or in the law").

362. AHARON BARAK, JUDICIAL DISCRETION 138 (Yadin Kaufmann trans., Yale Univ. Press 1989) (1987).