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# Table of Contents

## AN AJA White Paper

76  Minding the Court: Enhancing the Decision-Making Process  
*Pamela Casey, Kevin Burke and Steve Leben*

## Articles

100  The Emotionally Intelligent Judge: A New (and Realistic) Ideal  
*Terry A. Maroney*

114  Heuristics and Biases in Judicial Decisions  
*Eyal Peer and Eyal Gamliel*

## Departments

74  Editor’s Note

75  President’s Column

120  The Resource Page
EDITOR'S NOTE

Day after day, judges make decisions. Given the amount of time judges devote to decision making, its logical for an organization devoted to helping judges do a better job—and its flagship journal—to focus on the subject. And we are.

Last year, the American Judges Association obtained a grant from the State Justice Institute so that we could hire a researcher to help us look at this issue. Pamela Casey, a researcher with the National Center for State Courts, worked with AJA judges throughout 2012, jointly exploring the science of decision making, how what's known about that science is likely to have the greatest impact on judges, and how judges might take this information into account in their daily work. The result was the third white paper produced by the American Judges Association since 2007—a paper presented at the AJA's annual educational conference in New Orleans in October 2012. That paper is the lead article for this special issue on judicial decision making.

Our second article comes from Vanderbilt law professor Terry Maroney, who has done a great deal of work over the past two years considering how judges deal with their emotions. As Maroney explains, judges must expect to have emotional reactions to the cases and people they encounter while doing their job. She looks at the strategies judges might try to regulate their emotional responses, suggesting that some won't help much and some probably will be harmful—and that even when it is necessary, behavioral suppression (like a judge hiding emotional responses) comes at a cost to the judge. Maroney concludes with some practical suggestions.

Our third article comes from two Israeli social scientists, Eyal Peer and Eyal Gamiliel, who consider one specific aspect of judicial decision making—the use of heuristics. As they describe them, heuristics are cognitive shortcuts, or rules of thumb, by which people make decisions without having to consider all the variables, relying on only a limited set of cues to make a decision. Peer and Gamiliel consider how judges use heuristics, along with common situations in which the use of heuristics may lead to errors. They also provide an overview of ways in which judges might counter such errors.

Given the importance of judicial decision making, this will be the first of two Court Review issues on the topic. In our next issue, we’ll have an article examining how well judges can make decisions about who’s telling the truth in a trial. We’ll also have an article looking at how judges use experts in making decisions. And we’ll have articles describing several specific experiments involving judicial decision making, along with articles about the problems in evaluating judicial performance given the difficulty of evaluating decision making.

We hope you find the discussion of value. We’d also note that Professor Maroney will be speaking at our educational conference in September, and there will be a session based on the AJA decision-making white paper as well. We hope to see you there. —Steve Leben & Alan Tomkins

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President’s Column

Toni M. Higginbotham

AMERICAN JUDGES ASSOCIATION 2013 ANNUAL CONFERENCE

I invite you to join the American Judges Association as we gather for our 2013 Annual Educational Conference. The conference will be held September 22–27 at the luxurious Fairmont Orchid on “The Big Island” of Hawaii. Every year I look forward to the AJA conference, and this year is no exception. Not only do I get a chance to attend fascinating educational sessions on a variety of topics of interest to me as a judge, but also to see friends I have made over the years and to make new ones. The contacts I have made through AJA have provided me with an invaluable network across the United States and Canada — I can send an e-mail or pick up the phone and get ideas on how to address many of the problems we all face on the bench. Please take a few minutes to read the conference brochure (http://goo.gl/SklRK), and then register as soon as possible for this great conference.

Toni M. Higginbotham, President
Scientists carefully study how our brain processes information, though judges rarely consider these studies. But this research has great potential significance to judges, who spend much of their time making decisions of great importance to others. Although the study of how the brain processes information is an evolving one, the information now available can help judges to make better decisions.

Much of the processing for simple tasks—called reflexive processing—occurs in the background, while most of us solve riddles or math problems through reflective processing, which is deliberate and conscious. The reflective system has a limited capacity, so we operate on a principle of least effort, tending to rely on the reflexive system when possible. To do so, we often use what scientists call schemas, in which characteristics of objects, people, or behaviors coalesce into an easily recognizable pattern (like our ability to tell that a red octagon in the distance is a stop sign).

Heuristics are schemas that are based on only part of the information available—letting us make decisions more quickly. But heuristics can be faulty in a variety of ways. And since heuristics (like all schemas) operate in the world of unconscious, reflexive processing, we can easily make errors without recognizing the source of a faulty decision. Anchoring is one of these heuristics: for example, a person is likely to give a higher or lower estimate of damages if a particularly high (or low) figure is introduced early in the process. That number—even if far off the mark—tends to act as an anchor around which later estimates are formed.

Implicit biases, another type of schema, also threaten fair processes and just outcomes. They are based on implicit attitudes or stereotypes that operate below the radar, and judges have been shown susceptible to them as well.

But most behaviors and decisions result from a combination of both reflexive and reflective processes, so there are ways to lessen the effects of faulty heuristics and implicit biases. One step is to understand some of the causes of diminished decision-making abilities, which include fatigue (like sleep deprivation), other depleted resources (like glucose levels), mood, fluency (i.e., ease of processing information), and multitasking. Fatigue, diminished resources, and multitasking all diminish performance. Fluent, easy-to-understand information will seem more accurate than more dense, hard-to-understand information, but that isn't necessarily the case. And mood affects the way we process information,
with those in a positive mood generally more likely to engage in reflexive, automatic processing and those in a negative mood more likely to engage in more reflective, deliberative processing.

Several techniques can help judges to be more mindful and aware of the decision-making process so that they make better decisions. First, focus on the higher purpose of the proceeding—hearing and properly deciding a case with a real impact on someone, not just processing a court docket. Second, formalize and critique heuristics used to make repetitive but important decisions. For example, a judge might consider what factors are leading to bail decisions or probation conditions: Are they based on accurate information? Third, be mindful and periodically “read the dials.” Are you tired? Is noise in the hallway a distraction? Is a break in order? Taking a break or engaging in even brief meditation can restore awareness and reduce stress. Fourth, decision aids, like checklists, can help. Doctors and pilots have shown that even well-trained professionals can improve performance by following checklists. Fifth, seek feedback and foster accountability. Judges often operate in isolation and without feedback. Competitive athletes improve performance through constant coaching and feedback, and judges can improve performance by getting objective feedback too.

This paper builds upon our 2007 American Judges Association white paper on procedural fairness. Litigant satisfaction is dependent upon judicial adherence to the four components of procedural fairness: voice (allowing litigants to be heard), neutrality (making decisions based on neutral, transparent principles), respectful treatment, and trust (the perception that the judge is sincere and caring). Focusing on procedural fairness can help a judge to be more mindful and focused on accurate decision making. For example, a judge may feel that he or she has heard a similar case before, but the judge focused on procedural fairness will try to listen carefully to the case now at hand. To show that the judge has heard what the litigants have said, the judge will repeat key themes from the parties’ testimony or argument. By doing so, the judge has the opportunity to see how this case may differ from others he or she has heard before. And the mindful judge will be careful to consider that possibility.
The fundamental role of judges is to ensure a fair process and a just outcome for each case they hear. Although much has been written about how judges go about their decision-making process, for most judges that literature is not on their reading list or a part of their judicial education. Speculation about whether judges use a more inductive, bottom-up approach to review information and arrive at a decision or a more deductive, top-down approach that starts with a decision and finds the information to support it has interested many social scientists, but only a few judges.\(^1\) The press of heavy caseloads or shrinking budgets seems far more imperative for judges to focus on. But a significant and growing body of research from the fields of cognitive psychology and neuroscience provides important insights about the decision-making process. How information is processed can affect fair processes and just outcomes. Judges who aspire to be great—not just good—at their profession need to focus on how to become better at making good decisions.

This white paper reviews research about decision making and discusses its implications for helping judges ensure fair processes and just outcomes. The paper builds on the 2007 American Judges Association (AJA) white paper, *Procedural Fairness: A Key Ingredient in Public Satisfaction*, that encouraged judges to incorporate the principles of procedural fairness (see sidebar), or procedural justice, to help ensure a decision-making process deemed fair by litigants.\(^2\) Procedural fairness increases compliance with court orders and is critical to positive public perceptions of the court system.\(^3\) But for a variety of reasons, the legitimacy of judicial decisions is under attack. People believe, for example, that to a moderate or significant extent, judges make decisions based upon their personal or political beliefs rather than the rule of law.\(^4\) Nearly the same percentage of people believe judges make decisions to a moderate or significant extent based on their desire to be appointed to a higher court.\(^5\) The times dictate that judges become even more committed to procedural fairness, and a better understanding of how to improve the decision-making process is imperative to achieving that goal. Moreover, judges must provide both a process recognized for its fairness and good, fair decisions.

Footnotes
4. In a 2007 survey, respondents were asked, “To what extent do you think a state judge’s ruling is influenced by his or her political views—to a great extent, moderate extent, small extent, or not at all?” Thirty percent said to a great extent, and forty-five percent said to a moderate extent. The survey had 1,514 respondents and a reported margin of error of 3%. 2007 Annenberg Public Policy Center Judicial Survey, available at http://www.annenbergpublicpolicycenter.org/Downloads/20071017_JudicialSurvey/Survey_Questions_10-17-2007.pdf.
5. In a 2006 survey, respondents were asked “To what extent do you think a desire to be promoted to the next higher court would affect a judge’s ability to be fair and impartial when deciding a case—to a great extent, moderate extent, small extent, or not at all?” Thirty-five percent of respondents said to a great extent, and forty percent said to a moderate extent. The survey had 1,002 respondents and a reported margin of error of 3%. Annenberg Public Policy Center Judicial Independence Survey, available at http://www.annenbergpublicpolicycenter.org/NewsFilter.aspx?mySubType=PressRelease&.
Being a great judge all of the time is not easy. Judges are mortals with all of the accompanying frailties. Implementing procedural-justice principles in the courtroom demands the judge’s “mindful” or conscious focus and attention but also demands good decision-making practices in general. Understanding how the brain processes information and the various factors that can influence decisions and courtroom behaviors is a first step to practicing more mindful decision making.

There is a compelling body of knowledge accumulated by social and cognitive science on information processing and decision making. More recently, advances in neuroscience have helped scientists further expand their understanding of how the brain processes information. Although this continues to be a robust area of inquiry, there is much that scientists do not yet know. Thus this white paper is a snapshot in time, offered with the understanding that advances in technology and neuroscience promise continued refinement of current knowledge and its implications for the decision-making process. This paper offers a summary of some of the key findings applicable to judicial decision making and provides references for those readers interested in learning more.

THE SCIENCE OF DECISION MAKING

At any point in time, an individual is bombarded with a host of sensory information. Most of this information is processed “behind the scenes” with little or no knowledge on the part of the individual. Much like a computer continues to work in the background while a word-processing program is on the screen, individuals also constantly process a barrage of sights (e.g., the glare on the screen), sounds (e.g., the click of the keys), smells (e.g., the coffee on the desk), and other information—sorting, categorizing, and storing it—even as the individuals intently focus on a specific task (e.g., reading a case file or writing an opinion).

This dual system of information processing is the mechanism through which judgments and decisions are made. Neuroscientist Matthew Lieberman refers to the automatic, rapid, unconscious system that operates in the background as reflexive, and the deliberative, slow, and conscious system as reflective. Through neuroimaging, he has identified different areas of the brain associated with each system.6

The reflexive, automatic system relies on patterns that develop based on the individ-

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6. Matthew D. Lieberman, Reflective and Reflexive Judgment Processes: A Social Cognitive Neuroscience Approach, in SOCIAL JUDGMENTS: IMPLICIT AND EXPLICIT PROCESSES 44 (Joseph P. Forgas, Kipling D. Williams, & William Von Hippel eds., 2003). Scientists are still exploring whether there are, in fact, two different systems, multiple systems, or multiple processes that make up one system, but most agree on “processes that are unconscious, rapid, automatic, and high capacity, and those that are conscious, slow, and deliberative.” Jonathan St. B. T. Evans, Dual-Processing Accounts of Rea-soning, Judgment, and Social Cognition, 255 ANN. REV. PSYCHOL. 255, 256 (2008). The white paper relies on Lieberman’s model because of his extensive work mapping areas of the brain in which each system predominates and because the labels he uses are more descriptive of decision-making processes than, for example, Daniel Kahneman’s system 1 and system 2 labels. Compare Burke & Leben, supra note 2, and Lieberman, supra, with DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).
The individual learns over time how to distinguish different objects, people, actions, and situations based on features that coalesce into patterns. These patterns, referred to as schemas, help the brain process information quickly and efficiently. Based on prior experiences, for example, individuals know that a red octagon means stop and an outstretched hand is a greeting.

The reflective, controlled system relies on intention and effort to perform a task. Memorizing a new phone number or computer password requires concentration. Once the phone number is repeatedly practiced, however, it becomes a readily accessible schema that comes to mind with little effort. For a judge with a domestic-violence docket, for example, a bit of study up-front would teach the judge the elements of domestic battery—with no need to look it up again as each case is called.

While the reflexive system can process information on an ongoing basis, the reflective system has a limited capacity. It works for a while but eventually runs out of gas. Thus the brain is somewhat miserly about its use of the reflective system. This “principle of least effort” means that decision makers initially tend to rely on the automatic retrieval of schemas to process incoming information and engage the reflective system only when motivated to do otherwise by, for example, learning a new skill or solving a complex problem.

Gary Klein refers to this reliance on schemas as recognition-primed decision making.\(^7\) Klein’s premise is that experts develop schemas, based on their experience, that they subsequently use to size up a situation and decide how to move forward. Thus a firefighter does not enter a burning building and proceed to analyze all the potential options for action. Rather, the firefighter instantaneously takes in a variety of information about the current situation and matches it to a response option that has worked in similar situations. The initial option (i.e., decision) may not have been the best option if there had been enough time to generate and analyze all possible options, but it usually works. In this sense, Klein says his model relies on what Herbert Simon referred to as “satisficing”—finding the first option that works rather than the most optimal option.\(^8\) Judges, particularly when confronted with large dockets, heavy calendars, or pressing “emergency” motions, can tend to use the same process as the firefighter. Sometimes using the first option that works rather than the optimal option actually might be okay—but not always.

Schema-based, reflexive decision making works for countless choices an individual makes throughout the day.\(^9\) And in some instances, such as those requiring a quick deci-

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10. “Most of the time we solve problems without coming close to the conscious, step-by-step analysis of the deliberative approach. In fact, attempting to approach even a small fraction of the problems we encounter in a full, deliberative manner would bring our activities to a screeching halt. Out of necessity, most of problem-solving is intuitive.” PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS 14 (2010).
Cognitive Heuristics

Heuristics are schemas individuals use to solve problems and make decisions quickly. They work rapidly by attending to only some of the information available. A judge relying on only some of the information available to make a decision that needs to be made quickly is not necessarily bad. Research shows that reliance on heuristics in some circumstances can lead to more accurate decisions and judgments than reliance on more rational models. However, research also shows how heuristics can lead decision makers to jump to conclusions and make errors in solving problems. Surely every experienced judge has at one point jumped to a conclusion that ultimately proved to be wrong.

The anchoring heuristic predicts that an individual’s estimates or comparison judgments are influenced by an initial value—even if the value is selected at random and has no connection to the task at hand. A low initial value elicits estimates lower than a high initial value. In a classic study demonstrating anchoring, participants watched as a researcher spun a wheel of fortune, wrote down the number observed, and then estimated the number of African countries in the United Nations. The wheel of fortune was rigged to stop only on the numbers 10 and 65. The median response of participants who wrote down 10 was 25 countries; the median response for participants who wrote down 65 was 45 countries. Thus the initial random value anchored participants’ subsequent estimates of the number of countries.

How applicable is this research to the courtroom? Do judges who have been specifically trained to follow procedural rules designed to minimize the influence of irrelevant information succumb to anchoring in the same way as the study participants estimating the number of African countries in the United Nations? Birte Englich and her colleagues explored this question and discovered the answer is yes. In a series of studies with Ger-
man judges, they examined whether a criminal sentencing decision could be influenced by irrelevant anchors that judges knew to be irrelevant. In the studies, the irrelevant anchor was presented by (a) a journalist’s question about the sentence, (b) a prosecutor’s acknowledged, randomly determined sentencing demand, and (c) a prosecutor’s sentencing demand obtained by the judge throwing a pair of loaded dice. In all cases the judges’ decisions were influenced by the anchor. The judges sentenced more harshly when exposed to the higher rather than lower randomly determined anchor. A fourth study by the researchers also demonstrated that judges exposed to a high anchor responded to incriminating evidence faster than exculpatory evidence (measured by response latencies on a timed categorization test), suggesting that the anchor primed the judges to look for anchor-consistent information. In addition, the criminal-law judges were more certain about their decisions than those who were not experts in criminal law, suggesting that “experts may mistakenly see themselves as less susceptible to biasing influences on their sentencing decisions.”

Another heuristic is the reliance on small samples as indicative of the larger population. A set of ten coin tosses, for example, might yield ten heads in a row and thus not be representative of the larger population of tosses across many small samples that would yield an even distribution of heads and tails. Nonetheless, individuals frequently view small samples as representative and adjust their expectations accordingly. Many individuals fall prey to the gambler’s fallacy, erroneously believing, for example, that “black” is due after a run of “red” on the roulette wheel.

Uri Simonsohn and Francesca Gino explored the influence of this heuristic on professionals who make a set of decisions every day. They postulated that professionals would try to align each daily set of decisions to reflect their overall distribution of decisions. To test this hypothesis, the researchers reviewed data from over 9,000 MBA interviews and found that interviewers’ daily subsets of scores tended to reflect their overall distribution of scores. That is, the interviewers took into consideration their previous scores for the day in formulating their subsequent scores, and the effect was stronger as the day progressed. Thus even though four interviewees on a given day may all be highly desirable, interviewers will be reluctant to score all highly, and the interviewees at the end of the day will be more likely to be ranked lower. The researchers consider what this might mean for judicial decisions:

Imagine, for example, a judge who must make dozens of judgments a day. Given that people underestimate the presence of streaks in random sequences, the judge may be disproportionately reluctant to evaluate 4, 5, or 6 people in a row in too similar a fashion, even though that “subset” was formed post-hoc.

17. The same was not true for exculpatory information. The researchers found this consistent with prior research indicating that negative information tends to be more salient for individuals in general, and they hypothesized that judges focus on the incriminating information because they are charged with determining whether the defendant is guilty beyond a reasonable doubt. Id. 18. Englich et al., supra note 16, at 194.


21. Id. at 10-11 (citing Thomas Gilovich, Robert Vallone, & Amos Tversky, The Hot Hand in Basketball: On the Misperception of Random Sequences, 17 COGNITIVE PSYCHOL. 295 (1985)).
Further evidence that judges are susceptible to heuristics comes from a series of studies by law professors Chris Guthrie and Jeffrey Rachlinski and Judge Andrew Wistrich.\(^{22}\) They explored judges’ use of five different heuristics: (a) anchoring, (b) framing—the same information presented differently (e.g., the glass is half full or half empty) affects interpretation of gains and losses, (c) hindsight—the sense that specific outcomes were more predictable once the outcomes are known (e.g., “Monday-morning quarterbacking”), (d) representativeness—ignoring statistical base-rate information, and (e) egocentricity—overconfidence in one’s abilities. They found that judges’ decisions were influenced by each of the heuristics. For example, in a test in which some judges were told about a clearly meritless motion to dismiss for lack of jurisdiction in a diversity case (based on the idea that damages were less than $75,000), judges who were aware that such a motion had been filed awarded a lesser damage amount (30% less overall) than judges who didn’t know about the motion to dismiss.\(^{23}\) But they also found that judges showed less susceptibility to the framing and representativeness heuristics than other experts and laypersons, and, in a subsequent study, found that hindsight did not affect judges’ decisions in a specific scenario involving a probable-cause determination.\(^{24}\)

The findings of a myriad of scientists are that people—judges assuredly included—are susceptible to heuristics. But we may be able to overcome them. The ability to overcome heuristics starts with understanding the concept, understanding yourself, and being inquisitive enough to frequently ask questions—of yourself.

**IMPLICIT BIASES**

Implicit biases offer another example of how schemas can threaten fair processes and just outcomes. Implicit biases are based on implicit attitudes or stereotypes that operate below the radar. As a result, individuals are not aware that implicit biases may be affecting their behaviors and decisions. Indeed, research shows that even individuals who consciously strive to be fair and objective can nonetheless be influenced by implicit biases.\(^{25}\)

Scientists use a variety of methods to measure implicit bias, but the most common is reaction time. Reaction-time measures are based on the reflexive system’s pairing of two stimuli that are strongly associated (e.g., elderly and frail) more quickly than two stimuli that are less strongly associated (e.g., elderly and robust). Project Implicit, begun in 1998 by researchers from Harvard University, the University of Virginia, and the University of Washington, offers web-based reaction-time tests, referred to as Implicit Association Tests, in over fifteen areas such as weight, age, race, and religion that anyone can take.\(^{26}\)

A review of the results of over 2.5 million Implicit Association Tests taken on various Project Implicit demonstration sites between 2000 and 2006 revealed the pervasiveness of implicit preferences for socially privileged groups such as white over black and straight

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over gay. Research also shows that implicit biases can influence decisions in a variety of real-life settings such as employers hiring job applicants, police officers deciding to shoot, healthcare workers providing medical treatment, and voters making voting choices.

Are judges influenced by implicit biases—despite their training and conscious efforts to be fair and objective? Of course one would hope not, but perhaps the safest answer is to concede there is that potential. Research by Rachlinski, Wistrich, and Guthrie, joined by Sheri Lynn Johnson, suggests that judges actually may be influenced by implicit bias. The researchers found, for example, a strong white preference on the Implicit Association Test among white judges. In keeping with the general population findings of the Implicit Association Test, the black judges showed no clear preference overall (44% showed a white preference but the preference was weaker overall). The researchers also reported some evidence that implicit bias affected judges’ sentencing decisions, though this finding was less clear. Most importantly for this white paper, the researchers found that “when judges are aware of a need to monitor their own responses for the influence of implicit racial biases, and are motivated to suppress that bias, they appear able to do so.”

Scientists generally agree that most behaviors and decisions result from a combination of both reflexive and reflective processes. The question is the extent to and way in which the two processes work together for any particular decision. Several researchers postulate what psychologist Jonathan Evans refers to as “default-interventionist” models of judgment and decision making. These models propose that initial intuitive or reflexive responses are generated, which are then modified or endorsed by the reflective system. The reflective system routinely endorses the initial responses, reserving more deliberative, effortful processing to when the individual is motivated to do so and working memory and time are sufficient.

In many arenas, default processing is good enough. But in the courtroom, where individuals face possible restrictions of liberty and we consider other life-altering issues—such as family preservation, personal safety, economic security, and adequate housing—fair processes and just outcomes demand a more deliberate approach. Procedural-fairness principles that call for giving litigants voice, ensuring neutrality, demonstrating respect and dignity for the litigant, and presenting a trustworthy character all require an actively engaged decision maker.

30. Id. at 1221. For judicial-education resources on implicit bias, see PAMELA M. CASEY, ROGER K. WARREN, FRED L. CHEESMAN II, & JENNIFER K. ELEK, HELPING COURTS ADDRESS IMPLICIT BIAS (2012), available at www.ncsc.org/ibreport.
Even so, deliberative decision making does not mean that judges always override their initial intuitive reactions. As with firefighters, judges gain expertise over time that will become part of their reflexive schemas for judging certain cases and will help them move through their often unwieldy calendars. The problem is that judges, like everyone else, also rely on faulty schemas (e.g., anchoring and implicit bias) in some circumstances and thus need to check their thinking for these schemas as well. Guthrie and his colleagues call this approach the “intuitive-override” model of judging:

[W]e do not suggest that judges should reject intuition in all cases. Rather, we suggest that judges should use deliberation as a verification mechanism especially in those cases where intuition is apt to be unreliable either because feedback is absent or because judges face cues likely to induce misleading reliance on heuristics.34

Competitive athletes believe that training, adequate sleep, and proper diet are essential for good performance. But being a judge is a pretty sedentary job, so it is understandable that many, if not most judges do not view the requirements of good judicial performance as a competitive athlete might. Even judges should consider how to prepare for the key components of their work, just as an athlete would. Purposeful engagement of deliberative processing is the essence of good judging—being more attentive and open to each individual matter and ensuring that fair processes are guiding its outcome. Being attentive and open, however, is not easy when a judge is facing a long docket, complex hearings, particularly contentious parties, or all of the above. In addition, a number of emotional, physical, cognitive, and social or cultural factors can interfere with a judge’s ability to be mindful. Examples of some of these follow.

**FATIGUE**

In their article published in 2000, researchers Yvonne Harrison and James Horne reviewed studies on the effects of sleep deprivation and identified several areas of concern, including “communication, lack of innovation, inflexibility of thought processes, inappropriate attention to peripheral concerns or distraction, over-reliance on previous strategies, unwillingness to try out novel strategies, unreliable memory for when events occurred, change in mood including loss of empathy with colleagues, and inability to deal with surprise and the unexpected.”35 Much of the research they reviewed was based on deprivation of one or more nights’ sleep.

A subsequent article published in 2003 by researchers from the University of Pennsylvania, the Beth Israel Deaconess Medical Center, and the Harvard Medical Center explored whether reduced hours of sleep each night, rather than no sleep at all, might also affect

32. Evans, supra note 6, at 266.
34. Guthrie et al., supra note 23, at 33.
They found that individuals whose sleep was reduced to 6 hours or less across a 14-day period produced problems in cognitive performance equal to individuals who had experienced up to 2 full nights of sleep deprivation. The researchers also found that individuals reported being only slightly sleepy at the end of the study, when their performance was worst, suggesting that individuals are unreliable at assessing their lack of sleep or that they do not experience tiredness despite poor performance.

Talking about how much sleep a judge gets or suggesting that more sleep leads to better judicial decisions may seem trite to some and downright preposterous to others. But why not ask to what extent sleep deprivation does interfere with real-life decision making? Dr. Christopher Landrigan and his colleagues investigated the effects of sleep deprivation on medical interns with longer shifts and discovered that they made 36% more serious medical errors than their counterparts who did not have shifts of 24 hours or more and worked 20 fewer hours per week. On a larger scale, the Association of Professional Sleep Societies’ Committee on Catastrophes, Sleep, and Public Policy reviewed several disasters such as the Three-Mile Island and Chernobyl nuclear plant incidents and the Space Shuttle Challenger accident and concluded that “sleep and sleep-related factors appear to be involved in widely disparate types of disasters.” The report reviewed research demonstrating that the tendency to want to sleep is greatest in the early morning hours and, to a lesser extent, in the midafternoon; during the disasters, individuals made critical judgment errors in the early morning hours. The Committee noted that during the two “vulnerable” periods of the day, neural processes controlling alertness and sleep lessen the capacity of an individual to function and that “inadequate sleep, even as little as 1 or 2 [hours] less than usual sleep, can greatly exaggerate the tendency for error during the time zones of vulnerability.”

**DEPLETED RESOURCES**

Glucose fuels the brain, and research shows that reflective processes demand more fuel than reflexive processes. When glucose levels are low, individuals have a tendency to rely more on reflexive decision-making strategies and have more difficulty summoning their reflective system to check their decisions. Glucose is also depleted when exercising self-control: Controlling attention, regulating emotions, resisting impulsivity, and coping with stress have all been found to consume relatively large amounts of glucose. Thus both decision making and exercising self-control require glucose, and both can also deplete glucose stores. Research shows that making many decisions can subsequently interfere with an individual’s ability to exercise self-control, and conversely, that exercising self-control can lead to less likelihood of engaging the effortful, reflective system in making decisions.
This research may explain the findings of a recent study that examined decision fatigue among Israeli judges. The study found that the experienced parole-board judges’ decisions fluctuated based on when cases were heard during the day. Cases heard early in the morning and just after breaks (with meals) were more likely to end with a parole grant than cases heard shortly before breaks and at the end of the day. That is, decisions tended to default to the status quo of denying parole as the number of cases increased until judges took a break. Because each break included a meal, it is not possible to say with certainty that it was the meal and not the “timeout” that affected subsequent decisions. But research in this area suggests that the meal replenished glucose stores and thus contributed to the change in “default” processing in cases following a break. In either case, the study does suggest that “judicial decisions can be influenced by whether the judge took a break to eat.”

**MOOD**

Mood affects how an individual processes information. In general, those in a positive mood engage in more reflexive, automatic processing, and those in a negative mood engage in more reflective, deliberative processing. One explanation is that positive moods enhance the default processing approach—the status quo—and negative moods inhibit it. In many instances, as has been described earlier, individuals “default” to reflexive processing; thus positive moods often are associated with reflexive processing. If things are good, there is little motivation to engage in more effortful processing. Reliance on stereotypes comes easily. A negative mood, on the other hand, signals a problem situation that needs more focus and attention to detail.

Based on their review of the literature, researchers Kimberly Elsbach and Pamela Barr suggest that different moods are more suited for some purposes than others: “[P]ositive moods are best suited for decision-making tasks that are interesting or require creativity or efficiency, while negative moods are best suited for decision tasks that are effortful and/or require careful consideration and analysis of a number of different issues and potential outcomes.” The researchers also cite studies finding that individuals in a good mood tend to be overly optimistic and self-confident in their own abilities.

This is not to suggest that judges purposely summon a negative mood before taking the bench. Individuals can override their spontaneous reliance on reflexive processing when in a positive mood by being more vigilant. Research shows, for example, that specifically instructing individuals to pay attention and holding individuals accountable for their decisions can induce more effortful processing.

44. Id. at 6890.
**FLUENCY**

Fluency refers to the ease with which individuals process information. People generally consider information that is processed more fluently as more accurate and true than less fluent information. This holds true for a range of sensory and cognitive information. For example, information written in an easy-to-read type is considered more accurate than the same information written in a more difficult-to-process font. Likewise, information that is familiar, easier to pronounce, and easier to retrieve from memory is judged more true and likeable and individuals express more confidence in it, whatever its actual content (and accuracy) may be. Much of advertising is based on the idea of fluency—repeatedly showing the same information in easily processed ways.

Psychologist Adam Alter and his colleagues demonstrated that fluency is associated with reflexive information processing and disfluency is associated with more reflective processing. In one of their studies, they asked participants to complete the Cognitive Reflection Test, a series of three questions that seem to have initially easy answers but, upon further reflection, require more systematic processing to obtain the correct responses. For example, one question reads:

A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost? _____ cents

The automatic response is 10 cents, but more careful consideration of the problem reveals the correct answer to be 5 cents: If the ball costs 10 cents and the bat is $1.00 more than the ball (i.e., $1.10), the total cost would be $1.20 rather than $1.10.

The researchers gave some of the participants in the study the questions in an easy-to-read font and other participants received the questions in a difficult-to-read font. Those in the latter, disfluency group answered more items correctly. The researchers suggested that the difficult font served as a cue to the reflective system that the task would require more effort to process. Those in the easy-font group had no cue that more effortful processing was required.

In the courtroom, Nancy Pennington and Reid Hastie have demonstrated the potential effects of fluency. In general, their research found that when individuals read case materials and were asked to come to a decision at the end (similar to the typical juror’s task), the individuals develop narrative stories to understand the evidence. The researchers manipulated the order of the evidence provided, making it easier or harder to develop a coherent narrative. Consistent with the research on fluency, they found that the ease in creating a narrative story affected “perceptions of evidence strength, judgments about confidence, and the impact of information about witness credibility.” Decisions shifted in the direction of the narratives that were easier to construct.

53. Id. at 26-27.
The influence of fluency on information processing is complex and situation specific. For example, at least in some situations, individuals will discount fluency when they are aware that it could be influencing their judgments. Thus it is important for judges to learn about and be aware of the potential effects of fluency on their decisions. The potential for error based on fluency provides one more reason for judges to check their reflexive processing.

**MULTITASKING**

We live in a society where multitasking is too often the norm. Teenagers often multitask when driving and texting, with dangerous results. The same may be true for the results of decisions made by multitasking judges.

For the brain, multitasking is not performing two or more tasks simultaneously; rather, multitasking involves the rapid switching from one task to another. Done in milliseconds, the brain postpones one task and sets up for the next. For more than 97% of the population, this task switching has a cost in performance. Despite numerous studies to the contrary, however, most individuals think they are good at multitasking and that they are more efficient as a result. Many judges are the same: even if they concede that multitasking has a cost, many judges are quite good at articulating that—for them—the cost is negligible and worth it.

But researchers consistently find diminished performance by those who multitask. For example, psychologists Jason Watson and David Strayer tested the performance of 200 individuals on a driving simulation task, a cognitive task involving memorization and basic math problems, and a dual-task condition involving both the driving simulation and the cognitive tasks. Performance measures on the individual tasks were significantly better than those in the dual-task condition. The researchers found that a very small percentage of the participants (2.5%) did not see their performance degrade in the dual-task condition. However, they noted that these individuals are the exception and cautioned readers about assuming they are one of the “supertaskers”:

Indeed, our studies over the last decade have found that a great many people have the belief that the laws of attention do not apply to them (e.g., they have seen other drivers who are impaired while multitasking, but they themselves are the exception to the rule). In fact, some readers may also be wondering whether they too are supertaskers; however, we suggest that the odds of this are against them.

Other studies have shown that more multitasking does not necessarily improve multitasking skills. For example, a study from Stanford University researchers demonstrated

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58. Id.
59. Id. at 482-83.
that individuals who commonly multitasked using different types of media had less attentional control than light media multitaskers and were worse at task switching. High media multitaskers had difficulty filtering out extraneous information and suppressing task switching. Another study explored whether avid videogame players are better at multitasking and found they, like nonvideogame players, performed worse during dual-task conditions.

Despite information that multitasking is less efficient, degrades performance, and may be dangerous—Strayer and his colleagues found that the crash risk of using a “hands-free” cell phone while driving is comparable to driving while intoxicated—individuals still find it difficult not to multitask. Why? At least one reason is that it feels good. Ohio State University researchers Zheng Wang and John Tchernev asked college students to record their activities across 28 days and note why they were engaged in the activity and what they experienced as a result. Though cognitive needs (e.g., gaining knowledge and understanding) drove many media multitasking activities, the students did not report that the activities satisfied those needs. Rather, the multitasking addressed emotional needs (e.g., having a pleasurable experience). The researchers concluded that the emotional gratification resulting from multitasking serves to reinforce more multitasking behavior: “In this sense, the ‘myth’ of multitasking actually is partially caused by the ‘mis-perception’ of the efficiency of multitasking and by positive feelings associated with the behavior, which is emotionally satisfying but cognitively unproductive.”

Task switching in the courtroom has the potential of distracting the judge and reducing performance, but it also carries with it the sense that the judge is not fully engaged with the matter at hand. A central tenet of procedural fairness is that the judge is an active listener. If the judge seems distracted with other matters, litigants will not feel that their voice has been fully heard. A recent study by Harvard psychologists demonstrated the importance of giving people voice. The researchers found that regions of the brain associated with reward are activated when individuals are allowed to talk about themselves to others. In an interview, Stanford multitasking researcher Clifford Nass also mused about giving people attention: “[W]hen I grew up, the greatest gift you could give someone was attention, and the best way to insult someone was to ignore them. . . . The greatest gift was attention.”

60. Eyal Ophir et al., Cognitive Control in Media Multitaskers, 106 PROCEEDINGS NAT’L ACADEMY SCI. 15,583 (2009).
64. Id. at 509-10.
Almost everything a judge does involves processing information and making decisions. So if we are to improve our performance as judges, we must focus on improving our performance of those tasks.

Doing so can offer additional benefits as well. One aspect of being more mindful is finding ways to relieve stress, which can interfere with information processing and decision making. Some judges may regard job stress as part of the job, but job stress also leads to diminished physical health. Of course, consistent with our discussion in this paper, stress also leads to a diminished capacity for good decision making.

In the remainder of this paper, we suggest some strategies that may help judges be more mindful and make better decisions:

- **Focus on purpose.** Sometimes the sheer press of business makes it difficult for a judge to focus on the individual case. The primary purpose of court work becomes moving cases as opposed to hearing them. Former Minnesota Chief Justice Kathleen Blatz, for example, once compared the court’s work to a vegetable factory:

  Instead of cans of peas, you’ve got cases. You just move ’em, move ’em, move ’em. One of my colleagues on the bench said: “You know, I feel like I work for McJustice: we sure aren’t good for you, but we are fast.”

  It is hard to be mindful when the focus is on getting through a docket, signing orders, writing opinions, preparing a speech for a local community group, and any number of other responsibilities that fall on a judge’s plate. The tendency is to focus on the next task around the corner rather than the current one. Taking time—even just a few minutes—to bring full attention to the matter at hand offers a check on reflexive, automatic decision making and a step toward ensuring a fair process and a just outcome. Administrative Judge Judy Harris Kluger makes this point in her story about working in the busy New York City Criminal Court:

  You know, for a long time my claim to fame was that I arraigned 200 cases in one session. That’s ridiculous. When I was arraigning cases, I’d be handed the papers, say the sentence is going to be five days, ten days, whatever, never even looking at the defendant. At a community court, I’m able to look up from the papers and see the person standing in front of me. It takes two or three more minutes, but I think a judge is much more effective that way.

  In addition, judges who see their work not as the sum of the cases they move in a particular day but as contributing to a fair and just court system are likely to find

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68. Id.


70. Id. at 81.
more satisfaction in their work. Research shows that individuals who perceive their work as significant and serving a greater purpose are likely to experience greater levels of meaningfulness. Judges who see themselves as cogs in the system may benefit from remembering their contributions to the larger system goals. Efficiency and timeliness are important, but not at the expense of reflective decision making and procedural fairness.

- **Formalize and critique decision heuristics.** Although the law may assume that decision makers review and weigh all relevant information in a systematic manner to reach an optimal judgment, research demonstrates that is not the case. In a study of bail decisions in England and Wales, for example, researchers found that a simple “matching heuristic” explained decisions better than a more complex, integrated model of decision making. The matching heuristic relied primarily on three factors: bail decisions could be predicted 92% of the time in one court, for example, by relying on (a) whether the prosecutor opposed bail, (b) whether a previous court imposed conditions or remanded in custody, and (c) whether police imposed conditions or remanded in custody. If the answer was yes to any of these, the magistrate’s decision was to deny bail. In another study, the findings showed that magistrates’ beliefs about their decision-making process differed from their practice (i.e., relying on a simple heuristic), as indicated by the following comments:

> For example, a lay magistrate wrote to us stating that “the situation . . . depends on an enormous weight of balancing information, together with our experience and training.” The chairman of the council said that “we are trained to question, and to assess carefully the evidence we are given.”

The use of simple heuristics to make complex decisions is not limited to law. Physician Clement McDonald, for example, writes that doctors often rely on a subset of information and extrapolate based on experience to make diagnoses and treatment decisions. He notes that the lack of scientific information available on some drugs and diseases requires doctors to develop heuristics. Rather than ignoring the use of heuristics, he calls for the medical community to formalize them:

> Exposing these heuristics to critical review so that they can be clarified, improved, and standardized may reduce practice variation, thereby making it easier to optimize the care process. Furthermore, we know that many of the “everyday” heuristics described by Tversky and Kahneman are dysfunctional; careful examination of medical heuristics may reveal similar problems and provide corrective insight.

As an example of an everyday heuristic, he discusses how doctors tend to prescribe a new drug when an older drug in the same class would do as well. He refers to this “heuristic” as “newer is automatically better.” However, there are many examples of

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new drugs that eventually were found to have additional side effects (or worse) only after their widespread use across time. As a result, he proposes that the heuristic should be to always use an old drug unless the patient cannot tolerate it or if specific symptoms or other indications suggest that the old drug will not work.

In the same way, judges can consider the “rules of thumb” they may be using to process their cases, whether traffic, small claims, family, civil, or criminal. Are there specific factors that cause one judge to put the defendant in custody at sentencing while another does not? Does a defendant’s marital status have any bearing on a bail decision? Like the English magistrates, do individual judges rely on certain primary factors to decide cases? If so, what are they, and do their colleagues use the same ones? One of the studies on bail decisions revealed that the magistrates sometimes were inconsistent in their own decisions and disagreed with some of their colleagues on the same cases. Taking time to reflectively identify and rely on decision heuristics that are transparent and predictable across cases and judges could go a long way to enhancing litigant perceptions of fairness.

- **Be mindful and read the dials.** Practicing the principles of procedural fairness requires focus and attention, which may be hard to come by if a judge is tired or hungry, is multitasking, or is not in a mood to engage in effortful processing. Taking stock of such distracting factors serves as a reminder that more concentration may be necessary. Periodically “reading the dials” helps identify distractions and potential ways to lessen their effects. For example, does the temperature in the courtroom need to be adjusted or noise in the hallways reduced? Is it time for a break? Sometimes little annoyances become irritating distractions and unwittingly raise the level of tension in the courtroom. Sometimes the judge just wants to “push through” the remaining cases when a break would be best for all.

Some judges and lawyers have adopted a practice of “mindfulness” to strengthen their ability to read the dials. Researchers from Harvard describe the practice of mindfulness as meditation that “encompasses focusing attention on the experience of thoughts, emotions, and body sensations, simply observing them as they arise and pass away.” Other researchers note that “mindfulness is thought to enable one to respond to situations more reflectively (as opposed to reflexively).”

Mindfulness practice is essentially exercise for the brain. Meditation can be done while sitting, standing, or walking. A common meditation practice involves sitting quietly and concentrating on the breath. Individuals try to identify when their mind wanders from focusing on the experience of breathing; and, once they do, they return the mind’s focus to the breath. As they practice this sequence over and over, they...

75. Dhami & Ayton, supra note 73.
76. Gerd Gigerenzer, Heuristics, in HEURISTICS AND THE LAW 17 (Gerd Gigerenzer & Christoph Engel eds., 2006).
gradually learn to recognize the thoughts and emotions that pull their attention away and are able to regain focus more easily. Research by psychologist Amishi Jha and her colleagues shows that the ability to focus attention is evident after just thirty minutes of practice a day for eight weeks. As with physical exercise, the longer individuals practice mindfulness meditation, the more skilled they become.

Bob Stahl and Elisha Goldstein offer another mindfulness practice to help individuals take a quick look at the dials. They refer to it as the STOP meditation. The STOP acronym reminds individuals to:

Stop what they are currently doing,
Take a deep breath and focus on the sensation of breathing,
Observe what they are thinking, feeling, and doing, and
Proceed with new awareness.

Judges can use this quick pause throughout the day, especially when they find themselves getting distracted, bored, or overwhelmed. The pause helps to refocus attention and reaffirm the priority to ensure each case is given a fair process.

In 2002, attorney Douglas Codiga expressed concern that judges and attorneys’ misconceptions about mindfulness being mystical or otherworldly, requiring a commitment to Buddhism, or amounting to just another stress-reduction technique would lessen its potential to impact the field. Contrary to these misconceptions, he argued that mindfulness is compatible with legal principles of reason, analysis, and skepticism; does not conflict with preexisting religious beliefs and requires no commitment to Buddhism; and, in addition to reducing stress and improving lawyering skills, would help legal professionals develop insights regarding their entire lives.

Since Codiga’s article, additional research has been undertaken demonstrating the potential for mindfulness meditation to improve psychological well-being in addition to its effectiveness in treating a range of physical and psychological disorders. No doubt these good findings have contributed to the adoption of mindfulness practices in a variety of settings such as medicine, education, business, the military, and, as noted earlier, by some in the legal profession. And recently Supreme Court Justice Stephen Breyer revealed to CNN’s Amanda Enyati that he routinely “pauses” twice each day:

82. See STOP meditation demonstrated at http://www.youtube.com/watch?v=EiuTpeu5xQc. See generally Elisha Goldstein, The Now Effect: How This Moment Can Change the Rest of Your Life (2012); Bob Stahl & Elisha Goldstein, A Mindfulness-Based Stress Reduction Workbook (2010).
84. Hölzel et al., supra note 78.
I don’t know that what I do is meditation, or even whether it has a name. For 10 or 15 minutes twice a day I sit peacefully. I relax and think about nothing or as little as possible. And that is what I’ve done for a couple of years. . . . And really I started because it’s good for my health. My wife said this would be good for your blood pressure and she was right. It really works. I read once that the practice of law is like attempting to drink water from a fire hose. And if you are under stress, meditation—or whatever you choose to call it—helps. Very often I find myself in circumstances that may be considered stressful, say in oral arguments where I have to concentrate very hard for extended periods. If I come back at lunchtime, I sit for 15 minutes and perhaps another 15 minutes later. Doing this makes me feel more peaceful, focused and better able to do my work.86

• Use decision aids. At first blush the idea of using a decision aid, like a checklist or benchcard, seems so mundane. But lessons from other professions such as medicine and aviation demonstrate their incredible potential for improving performance. Physician Atul Gawande, for example, tells the story of how simple checklists (requiring steps such as washing hands with soap and fully covering the patient with sterile drapes) implemented in Michigan hospital intensive care units saved over 1,500 lives and an estimated $175 million dollars in costs.87

Judges sometimes use checklists to decide substantive issues, but judges might also benefit from having procedural checklists.88 In busy courtrooms with crowded dockets, a judge can easily fail to cover an essential piece of information that a defendant must be told before a plea may be voluntarily entered. Even so, this is one of those areas in which the judge should think carefully about both procedural fairness and crossing off all the necessary subjects on the checklist. It’s important that the defendant actually understand the rights he or she is giving up, not just answering “yes” to a series of questions obviously intended to get an affirmative response (“Do you understand . . . ?).

Other tools based on evidence-based practices, such as risk and needs assessments, can be helpful to judges in making sentencing and probation-revocation decisions.89 Research demonstrates that standardized, objective assessment instruments enhance decision making across a wide variety of professional decisions.90 Researchers Stephen Gottfredson and Laura Moriarty suggest the following reasons, in part based on reflexive processing, for the superiority of statistical methods of prediction compared to intuitive methods: decision makers may not use information reliably, may not attend to base rates, may inappropriately weight predictive items, may weight items that are not predictive, and may be influenced by causal attributions or spurious correlations.”91

86. Enyati, supra note 77.
88. For examples of substantive-law checklists, see Guthrie, Rachlin-ski & Wistrich, supra note 22, at 40.
91. Id.
Some of the Michigan doctors in Dr. Gawande’s report balked at having to follow checklists, complaining that they were too busy, already knew what the procedures were, or were more interested in trying out new techniques and procedures. Judges may feel that way, too—concerned about slowing the process down to follow a checklist or thinking they can handle the process fine without the tool. But appellate judges see the other end of the process when they reverse decisions because simple steps were not followed. No one benefits when a case is sent back a year or two later because a simple step was missed.

Decision tools are just that—tools. Used properly, they can help ensure fair procedures and just outcomes; used incorrectly, they can impair the process. A judge who goes on automatic, for example, merely reading off a checklist and not giving eye contact or listening to litigants and lawyers will not be practicing procedural fairness even if he or she is not overturned on appeal.

- **Seek feedback and foster accountability.** Judges suffer from a lack of feedback. They seldom know the results of their decisions. Even when a judge’s decision is reviewed by an appellate court, the lag time between making the decision and getting appellate feedback diminishes the value of the information. Individuals benefit the most when feedback is immediate.

  Because feedback is essential to learning and developing expertise, judges should seek and courts should provide opportunities to obtain feedback. Judges cannot improve decisions when they do not know what is and is not working. Does the court have access to outcome data on, for example, pretrial release, sentencing, and probation revocation decisions? What are the trends in the data? What cases most often result in failure to appeal or rearrest, and what decision heuristics might be guiding the cases? The court could also collect information on litigant satisfaction using a survey such as the National Center for State Courts’ CourTools Access and Fairness Measure.92 The results of the survey would indicate whether judges’ assessments of their practice of procedural fairness principles are consistent with litigants’ assessments.

  Judges also could be videotaped periodically or observed by a mentor or colleague. A neutral observer more likely will be able to identify mistakes in reasoning or instances where procedural fairness practices could be strengthened.93 Dr. Gawande found that, after eight years as a surgeon, he seemed to have reached a plateau, so he sought out one of his former teachers—since retired—to observe him and act as a coach. The “coach” spent 20 minutes explaining what he observed that Gawande wasn’t aware of, giving Gawande “more to consider and work on” than Gawande had come up with on his own for several years.94 Judges might well benefit from a similar practice. More specifically, sentencing roundtables where judges discuss hypothetical cases also could reveal different patterns of decision making and use of heuristics. The

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93. Brest & Krieger, supra note 10, at 635.  
purpose of such reviews is to analyze and reflect on the information; research shows that the combination of reflection and feedback enhances subsequent performance.\textsuperscript{95}

In addition, research shows that accountability can lead to more effortful, reflective processing of information. Researcher Eileen Braman explains:

Put another way, accountability tends to heighten accuracy motivations. When we know others are watching, we want to “get things right” and we also strive to use appropriate decision criteria to avoid criticisms that may be raised down the line.\textsuperscript{96}

There are exceptions to the positive influence of accountability on performance such as when decision makers conform their decisions to the known views of those reviewing their decisions or when decision makers lack the knowledge to make specific decisions.\textsuperscript{97} Generally, however, accountability attenuates bias in decision making.

One suggestion for holding judges accountable is to require that they provide an explanation for their decision, preferably in writing. Guthrie and his colleagues argue that “the discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions.”\textsuperscript{98} Research also shows that individuals who were required to justify each step in a decision process performed better.\textsuperscript{99} To the extent that judges ask themselves “why” at each point in their decision process and consider alternatives, their decisions will be the result of more effortful and deliberate processing. And to the extent that they are willing to engage in obtaining and using feedback from others, as discussed above, they will enhance a culture of accountability.

\section*{ABOUT THE AUTHORS}

Pamela Casey is a Principal Court Research Consultant of the National Center for State Courts (NCSC) and has a Ph.D. in psychology. Since joining the NCSC in 1986, she has conducted numerous national-scope research and policy projects on a variety of court topics such as the measurement of court performance, public trust and confidence in the justice system, court security and emergency management, and court responses to individuals in need of services. Dr. Casey has served as the Associate Director of Research for the NCSC, the director of the NCSC’s Best Practices Institute, and currently directs projects on access-to-justice issues, the use of evidence-based practices in sentencing and community corrections, and judicial decision making. She also provides support to the Access, Fairness and Public Trust, and the Criminal Justice Committees of the Conference of Chief Justices and the Conference of State Court Administrators in their work to develop and disseminate national policy statements and recommendations for state courts.

\footnotesize{95. Baumeister, Masicampo & Vohs, supra note 31.  
98. Guthrie, Rachlinski & Wistrich, supra note 23, at 37.  
99. Baumeister, Masicampo & Vohs, supra note 31.}
Kevin Burke was the president of the American Judges Association in 2011-2012 and has been a Minneapolis trial judge since 1984. He served several terms as chief judge of the Hennepin County (Minn.) District Court, a 62-judge court, where he instituted social-science studies examining—and reforms improving—procedural fairness. Burke coauthored the American Judges Association’s white paper on procedural fairness in 2007 and, along with his white paper coauthor, Steve Leben, has presented educational programs on procedural fairness to more than 2,000 judges since 2007. Burke received the William H. Rehnquist Award from the National Center for State Courts in 2003, an award presented annually to the state judge who most exemplifies the highest level of judicial excellence, integrity, fairness, and professional ethics. In addition to regularly providing educational programs to judges and court personnel throughout the United States and Canada, he also teaches at two law schools: he teaches trial practice at the University of Minnesota law school and criminal procedure at the University of St. Thomas law school.

Steve Leben is a past president of the American Judges Association and a member of the Kansas Court of Appeals, where he has served since 2007. Before that, he was a Kansas state trial judge for nearly 14 years. Leben coauthored the AJA white paper on procedural fairness with Kevin Burke and has presented educational programs around the United States on that topic, among others. Leben has published 14 law-review articles in the areas of procedural justice, administrative law, civil procedure, family law, and evidence. He teaches a class on statutory interpretation at the University of Kansas law school and received the Distinguished Service Award from the National Center for State Courts in 2003 for his work toward the improvement of the American judiciary.
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The Emotionally Intelligent Judge: A New (and Realistic) Ideal

Terry A. Maroney

As a Supreme Court Justice once wrote, “dispassionate judges” are “mythical beings,” like “Santa Claus or Uncle Sam or Easter bunnies.”1 Judges have emotions, and emotions influence decision making. These observations may seem obvious, even banal. But their implications are broad-reaching. Judicial emotion is more common than most people—certainly laypeople, and perhaps judges as well—would like to believe. Further, emotion almost certainly has a substantial impact on judicial decision making and behavior—and that is not necessarily a bad thing.

The ideal of the emotionless, “dispassionate” judge has a very long pedigree. More than three centuries ago, Thomas Hobbes wrote in Leviathan that the ideal judge is “divested of all fear, anger, hatred, love, and compassion.”2 To a modern ear such a blunt statement sounds, perhaps, antiquated. To the extent this is so, it is because the Legal Realists of the early twentieth century largely convinced us of the importance of the person wearing the robe. Law is not certain, and judges have discretion, no matter how much they may try to blind themselves to the emotional forces at play.3 As the great Benjamin Cardozo once mused, “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”4

In our post-Realist world, such frank acknowledgment of judges’ humanity is relatively commonplace. As other contributions to this special issue make clear, judges are affected by factors as diverse as fatigue and life experiences, and they deploy common (but sometimes misleading) decision-making shortcuts known as heuristics. Judges are likely no better than ordinary humans at multitasking or truth-telling. An entire academic cottage industry is devoted to ascertaining the decisive influence of personal characteristics such as gender and political party. But we still seldom talk about the emotional aspect of judges’ humanity. And when we do, we run into a fairly solid wall of opposition. Judicial emotion generally is seen as an unfortunate consequence of having to populate the legal system with fallible, biased, real people. Indeed, emotion traditionally has been counted among the primary sources of fallibility and bias. A Maryland judge expressed this well: “Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species.”5 The task of the legal system, under this contemporary view, is to systematically reduce the opportunities for judicial emotion to insert itself; the task of the good judge is to prevent emotion from exerting any influence wherever such opportunities remain.

We saw this view vividly articulated during the 2009 nomination of now-Justice Sonia Sotomayor, who some feared would have an overly “empathic” judging style. One senator implied that judges’ emotions posed a threat to liberty; 6 a prominent professor declared that a “compassionate, empathetic judge was very likely to be a bad judge”;7 a journalist noted that the mere suggestion that emotion might affect judging was “radioactive.”8 Even among Sotomayor’s supporters, defense of empathy (or any emotional influence) was tepid at best. She was finally able to put the issue to rest by offering a standard post-Realist narrative: that while judges are not “robots” and do have feelings, a good judge recognizes those feelings and puts them aside.9

Certainly, judges are not robots, so the first half of that story is correct. But what if the latter part is wrong? What if emotion—at least sometimes—offers something of value to judicial decision making? Judge Richard A. Posner has suggested as much, writing that judges ought not try to become “emotionless, like computers,” because feelings might sometimes be necessary to good judging.10 Justice William J. Brennan similarly asserted that good judgment flows from a “dialogue of Footnotes

Many of the ideas expressed in this article are explored in much greater depth in my prior works, all of which are available at my Vanderbilt Law School faculty website and on SSRN. See Terry A. Maroney, Angry Judges, 65 Vand. L. Rev. 1207 (2012); Emotional Regulation and Judicial Behavior, 90 Cal. L. Rev. 1485 (2011); and The Persistent Cultural Script of Judicial Dispassion, 99 Cal. L. Rev. 629 (2011). This article is by design lightly footnoted; I refer the interested reader to the extensive citations in those longer publications.
7. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 111th Cong. 13 (2009) (statement of Sen. Orrin Hatch). See also id. at 17 (statement of Sen. Lindsay Graham) (a judge's most critical qualification is “the capacity to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all”).
reason and passion."12 If that is so, what might that dialogue sound like?

These are questions that law need not—indeed, cannot—answer on its own. A rich and fast-growing body of literature on the role of emotion in human life offers insight and guidance. Indeed, the study of emotion is one of the fastest-growing sectors within psychology and neuroscience. This explosion in the "affective sciences" joins a resurgence of interest in the topic within philosophy, history, and sociology. The consensus from outside law is clear. Emotions’ impact on decision making and behavior can be (and usually is) positive, even indispensable. Emotion’s impact can also be detrimental, depending on factors such as intensity, duration, and—most critically—context. Drawing on these interdisciplinary insights, we can think in a coherent way about when emotion might help a judge perform her job better, when it might hinder job performance, and how a judge might tell the difference.

This short article offers the judge a roadmap for thinking about the role of emotion in judicial decision making. It first presents the limited empirical evidence drawn from judges themselves, demonstrating that coping with emotional challenges is an unrecognized aspect of judges’ work. It goes on to describe what the affective sciences teach us about emotions’ impact on human decision making and behavior. To make the discussion concrete, the article periodically applies those insights to the phenomenon of judicial anger. Finally, an analysis of emotional regulation strategies offers a concrete path by which judges can learn to maximize helpful iterations of emotion and minimize destructive ones.

COPING WITH EMOTIONAL CHALLENGES: AN UNDER-APPRECIATED ASPECT OF JUDGING

Judges, particularly trial judges, often have to manage the emotions of other people. Distraught victims and witnesses have to be attended to; disruptive family members or criminal defendants must be cautioned, disciplined, or removed; angry disputes between lawyers need to be mediated or broken up.13 Judges are asked to filter out emotional influences, such as disturbing evidence and provocative buttons or t-shirts worn by spectators, if there is a risk that a jury’s emotions might be manipulated or inflamed.14 Indeed, trial judges may be called upon to instruct jurors about how to handle their emotions during deliberations.15

While the legal system recognizes that handling the emotions of others is part of a judge’s job, it tends to ignore something just as important: the fact that judges, too, have emotions to handle.16 Misbehaving lawyers and litigants can make judges angry. Disturbing evidence may affect a judge as much as it does a juror. The stories of litigants’ unhappy lives can trigger sadness. Judges might feel frustrated, even depressed, when they are unable to fix all the ills paraded before them. As one has written, “[s]ometimes [the judge] has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn’t know what to do about it, and it makes him feel sad. . . . Sometimes he even gets angry about it.”17 Litigation generally follows harm or grievance, meaning that such unpleasant emotions are nowhere in short supply.

Fortunately, judges also experience more pleasant emotions. They may feel joy when a suffering child is placed with a family, or hope when a drug-court defendant completes treatment and begins to turn his life around. Presiding over naturalization ceremonies for new Americans is an occasion for gratitude, even a soaring feeling that psychologists call “elevation.”18 Crafting a tightly reasoned, well-written opinion can generate pride. Simply feeling like you are doing a good job, even under trying circumstances, can be a source of deep satisfaction. The emotions a judge feels will be as varied as the cases she hears.

Because our legal culture expects judicial “dispassion,” however, judges do not often disclose their emotional reactions or discuss how they process them. As that taboo breaks down, we may see increased space for much-needed empirical work exploring those issues. As things stand today, we must glean clues from rare moments of candor.

Those moments show that emotion infuses many aspects of judges’ work. Judges sometimes note their emotions before declaring an intention to override them.19 With the proliferation of cameras in courtrooms, coinciding with the growth of social-media outlets, the public has developed an appetite for intertemperate displays, gleefully referred to as “benchslaps.” In burial disputes, which often involve grisly details and vitriolic
While trial-level work in the state criminal and family courts may provide the steadiest flow of emotion-triggering situations, no judge is immune. Highly publicized instances of intra-court animosity, including in the appellate courts, sometimes shine an unflattering light on the role of personal feelings. Even the highly cloistered appellate environment of the U.S. Supreme Court has an emotional life. Justice David Souter reportedly cried during the process of deciding Bush v. Gore, and Justice Clarence Thomas, not known for public displays of emotion, has said that "some cases...will drive you to your knees." Data from two small case studies further illuminate the reality of judicial emotion. In the first, Australian magistrate judges answered a survey about various aspects of their work. Much like state trial-court judges in the U.S. system, Australian magistrates handle the majority of civil and criminal actions. These judges reported expending significant effort to manage their emotions, most of which were negative. One, for example, characterized his work as “seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out.” Another reflected thus on working with child-welfare cases:

I have a problem walking away and just erasing everything I’ve heard about families and the stress that they’re under, the treatment children have been dished out, what will happen to them for the rest of their lives. I just find it difficult to walk away from that and go home to my own children and look at them and think “Oh, God”, you know. I usually find I try to be more patient with my own children when I go home after a day in the [family court]. So it’s just the sadness; there is no good news.

Similar sentiments were expressed by a small group of Minnesota state judges asked to reflect on victim-impact statements. The researchers described one response thus:

One judge...recalled a DWI case in which a young child [had] almost lost his life. His mother delivered an impact statement in which she described how she thought her son was going to die. “I remember thinking,” the judge said, “I am going to cry.” But he regained what he thought was necessary composure because “you are not supposed to cry on the bench when you are a judge.”

Other Minnesota judges reported feeling frustration, anger, and compassion, emotions prompted both by the underlying facts and by the victim-impact statements.

Importantly, both the Australian and Minnesotan judges reported that they found the work of regulating their emotions to be difficult. One magistrate offered a particularly stark assessment:

Now, there’s two things that can happen to you. Either you’re going to remain a decent person and become terribly upset by it all because your emotions—because your feelings are being pricked by all of this constantly or you’re going to become—you’re going to grow a skin on you as thick as a rhino, in which case I believe you’re going to become an inadequate judicial officer because once you lose the human—the feeling for humanity you can’t really—I don’t believe you can do the job.

This perception of nothing but bad options was, unfortunately, echoed by the Minnesota judges. Some reported feeling that, as the legal system tends “to strip away emotions,” they were “working in a factory of sorts in which we are just grinding these cases out,” causing them to worry that they were becoming “insulated and numb” in the process.

These windows into judges’ experience suggest that their work often prompts an emotional response; that such responses are often unpleasant; that managing those emotions is difficult; and that these challenges have an impact on how the judge acts in the moment and on how she feels about her work in the longer term. These voices also strongly suggest that judges feel inadequately trained and supported in this aspect of their work.

Fortunately, insights from the affective sciences can help change this rather bleak assessment.
EMOTION AND DECISION MAKING: INSIGHTS FROM PSYCHOLOGY AND NEUROSCIENCE

The first insight the legal system would do well to internalize is that we need not ask judges to “strip away” their emotions, because those emotions offer something of value.

Contemporary scholarship outside of law has generated a consensus that emotion is an evolved, adaptive mechanism, necessary for survival, social cohesion, and practical reason. This consensus is rapidly eroding the stark division between reason and emotion that traditionally has held sway in both the sciences and in law. As I explain briefly below, emotion reveals reasons, motivates action in service of reasons, and enables reason.

Emotion reveals reasons. This insight flows from what psychologists refer to as the “cognitive-appraisal” theory. This theory focuses on the “aboutness” of any given emotion. Emotions are not random; rather, they are directed at objects. We love our mothers, for instance, and the specificity of that love is how we experience the concept of “love.” Further, every emotion has a basic underlying thought and belief structure—an “appraisal”—which is an important way in which we distinguish them from one another. Anger, for example, reflects a judgment that someone has wrongly threatened or damaged something or someone that we value. In contrast, we feel sad when we perceive an irreversible loss, or guilty when we perceive ourselves to have done wrong.

It is helpful to think of appraisal structure as akin to the theory of universal grammar. Human language is built of a relatively constrained set of grammatical elements—nouns versus verbs, function versus lexical words, and so on—but different cultures fill in different content, making our languages distinct. Similarly, all humans appear to have a common core of basic emotions underlain by highly similar appraisal structures, but how we fill in those structures can vary. What makes one person afraid might make another person happy. This is not because these two people have radically different concepts of fear and happiness; rather, they have radically different ideas as to what states of the world satisfy the conditions that trigger those emotions. In the case of anger, what constitutes a perceived wrong will vary, who we consider part of the group on whose behalf it is right to be angry will vary; even the proper goal to be advanced by anger—for example, vindicating honor or broadcasting moral judgment—will vary.

Thus, emotion embodies thought, often complex and even culturally scripted thought, and those thoughts can be evaluated just like any others. Again, the example of anger is helpful. Whether we approve or disapprove of an angry person depends on whether we think her perception of the triggering event is accurate—that is, whether the event really occurred as she believes it did—and whether her judgments strike us as warranted—that is, whether the event really constitutes a wrong of which a person rightfully should disapprove.

Thus, emotion reveals what a person is thinking. It reveals her reasons.

Emotion motivates action in service of reasons. Emotions do not simply reflect passive assessment of what we perceive to be happening in the world; they prompt us to respond to that world. The idea in the sciences is that we evolved capacity for emotion in order to maximize survival chances, and we now use that capacity to propel us in the direction of a wider variety of goals. Fear provides a nice example. If you perceive that a grizzly bear is approaching, your perceptions and resulting thoughts will spur fear. Fear will focus your attention on the bear and prompt you to evaluate its relevance to your goals—for example, the desire not to be mauled or killed. Fear then enables responsive action, including patterns of bodily response (like fleeing), as well as typified facial expressions (grimacing) and verbalizations (screaming) that signal your emotional state to others. This is a rather primal example, but the same principle holds for all emotions. Feeling love toward an infant, for example, tends to motivate actions designed to keep the baby alive and thriving, and feeling guilty about having wronged a friend tends to show itself in a pained face, which can communicate a desire to repair the relationship.

Thus, emotion not only reflects thoughts; it serves as an adaptive signal that something of import to a person’s flourishing is at stake and activates a real-time response.


33. Though evolved “biological universals link the if with the then,” individual and cultural factors “affect the if” by determining which circumstances are thought to constitute, for example, “a demeaning offense” (for anger) or an “irrevocable loss” (for grief). Richard S. Lazarus, Universal Antecedents of the Emotions, in THE NATURE OF EMOTION, supra note 32, at 167-68.

34. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12 (2008) (emotions “are on a par with beliefs and judgments, decisions and resolutions,” for they are “states that one can regard as rationally warranted or unwarranted, justified or unjustified by the circumstances in which they occur or the beliefs on which they are based”).
Emotion enables reason. Finally, one of the most cutting-edge implications of modern research is that emotion and reason are intertwined, such that the latter can't fully be realized without the former. Neuroscience, for example, has shown that people with particular sorts of brain disease and injury show a decline in both emotional capacity and substantive rationality. Extreme emotional deficits in such people are strongly correlated with inability to engage in vital forms of reasoning—evidenced, for example, by inability to make appropriate, self-interested choices in a simple gambling task. They become unable to suppress inappropriate actions, to understand and respond to social cues, and to advance their own interests and preferences. In other words, social and emotional competence can be devastated while more purely cognitive capacities, like logic, remain intact.

Emotion also appears necessary to moral judgment. A creative series of experiments involving the classic philosophical “trolley problem” illustrate that phenomenon. In the trolley problem people are asked to choose between two options. The first is to flip a switch to divert an out-of-control trolley, killing a worker on the diversion track but saving five people in its original path. The second option is to push a human being off a bridge so that he lands in front of the trolley, saving the five but killing him. In either case the cold calculation is the same: save five lives by sacrificing one. Most normal people, though, think option one is moral, even necessary, while option two is immoral. The differential? Emotion. The heightened emotional salience of person-pushing accounts for an overwhelming preference for switch-flipping. Psychopathy provides another example of emotion's relevance to morality. The antisocial and amoral behavior typifying serial murderers and other psychopaths correlates at the neural level with a lack of normal emotional response. Psychopaths' moral indifference mirrors their emotional indifference.

In short, emotion is not the enemy of reason. They are interdependent. Not only does reason facilitate and shape emotion, but each plays a vital role in our ability to navigate the world.

Emotion is not always a positive force. The prior discussion has highlighted the overall positive contribution of emotion. Given the generally negative narrative we have inherited in our legal culture, it is important to spell out the parameters of that contribution. But, of course, the negative narrative has to have some truth to it.

Indeed, it often has a lot of truth to it. Another insight from the sciences is that all human tendencies and capacities that are adaptive most of the time are maladaptive some of the time. The common decisional heuristics described elsewhere in this special issue fit into that category: quick, efficient guides to judgment that work quite well in many situations but predictably lead to error in a small set of others. This is certainly true of emotion.

By way of illustration, recall the story of the approaching grizzly bear. Fear quickly narrows attention to sources of threat (the bear) and opportunity (escape routes), to the exclusion of other stimuli. That attentional effect is vital, but it has costs. For example, you will be far less able to perceive and remember less emotionally vivid aspects of the situation, like an important conversation you were having just before you saw the bear. The emotion needs to be intense to do its job, but as a result you might not notice the ditch standing between you and the escape route.

Similarly, different emotionally infused mood states tend to dispose us to different decisional styles, which might be disadvantageous in particular situations. Moods are experiential states that are more generalized, longer-lasting, and less objectively driven than emotions: think of the difference between feeling “down” and being concretely sad about the death of a beloved pet. Because emotions and moods are so closely related, though, they often are studied together. Often what starts as a discrete emotion will morph into a mood (you are sad that your dog died, and it makes you feel down for a long time for no particular reason), or our moods predispose us to experience discrete emotions (you feel down, so you find more things to be sad about). Moods, unfortunately, can be mismatched with the decisional demands we face at any given moment. This, too, is a nice insight raised elsewhere in this special issue, in which it is noted that certain moods “are best suited for decision-making tasks that are interesting or require creativity or efficiency,” while others are “best suited for decision tasks that are effortful and/or require careful consideration and analysis.” In an example of particular relevance to judges, people in sad moods tend to scrutinize evidence more carefully than do happy or angry people, meaning that happiness, anger, and their associated moods can sometimes contribute to blind spots. This is why Judge Posner once warned...
that we ought to “beware the happy or the angry judge!”

Finally, very intense emotion can sometimes lead us astray and even defeat our goals. Fear can paralyze; sadness can overwhelm; love can blind. This reality is so evident from our lives that it needs no further comment here.

A full understanding of emotion’s impact, then, requires us to consider both what it offers and what it might take away. Recognizing emotion’s value is critical, given how thoroughly we’ve disparaged it to date. That does not mean we should give it free rein. The capacity to regulate emotion is a skill every bit as critical as is the capacity to feel emotion.

THE PLUSES AND MINUSES OF EMOTION FOR JUDGES

These fundamental understandings about the nature and function of emotion clearly matter to judges as people. An emotionally well-adjusted judge is likely to have better physical health, happier work-life balance, and more functional personal relationships. Like caring for the body, caring for emotional health helps us achieve more satisfying lives.

The remainder of this article, though, focuses how these insights affect judges as judges—that is, in the concrete context of judicial work settings. After extending the prior discussion to judicial emotion, using anger as the primary example, the article goes on to explain how judges can most effectively regulate the emotions they are bound to have.

First, one benefit of an emotion for judges is that it signals seriousness, both internally and externally. Consider anger. Angering events are vivid, which sends a signal that something important is happening. Whereas some emotions have a strong withdrawal tendency—for example, disgust makes us back away—anger keeps us engaged, meaning that it focuses the judge’s attention to the offending person and situation. Anger also communicates seriousness to others. Its typical physical manifestations—raised voice, clenched eyebrows, narrowed eyes, a scowl, and tensed muscles—are extraordinarily potent communicative devices. Anger conveys power. Thus, the emotion sends important signals both to the judge and from the judge.

Second, anger motivates us to assign blame and consequences. It is tightly bound up with an urge to restore justice. Further, anger makes us more willing to take risks, in part because it is associated with optimism and feelings of being in control. Indeed, experimental studies show that people prefer being in an angry state when faced with a confrontational task, because anger helps them take on and succeed at the confrontation. It also literally heats us up, to prepare the body and mind for action—think of that telltale “boiling” feeling. Thus, anger facilitates both judgment and action.

These attributes are of obvious utility to judges—indeed, one is tempted to say they are necessary, or even that anger is quintessentially judicial. A judge often is asked to assign blame and consequences, which anger can help her do. It can also help her take necessary risks. Judges sometimes have to alienate powerful interests, upset potential voters, disappoint decent people who have been wronged, and even jeopardize public safety. The late Judge John Sprizzo of the Southern District of New York, for example, once expressed fury at having to release high-level drug dealers because of fatal flaws in the indictment. Similarly, some judges reported recently that they hesitated in sanctioning police officers who had committed blatant perjury, citing a fear of ruining careers or conferring undeserved benefit on defendants. Anger at the officers’ abuse of the system helped them do what was right, not what was easy.

Anger can also keep the judge’s mind in the courtroom, so to speak. Given the welter of stimuli and stressors to which judges are exposed, they may need emotion to flag possible misconduct, direct attention to it, and keep attention from sagging. Moreover, anger’s expressive benefits are strategically invaluable. Consider the difference between quietly suggesting that a lawyer stop making improper objections despite repeated instructions not to do so and smacking your hand on the bench and using a sharp tone.

Anger is not the only emotion that can serve judges well. Expressions of sorrow, for example, may demonstrate respect to present victims. A nice example from recent events: In a display remarkable enough to be extensively covered by the media, a New York City trial judge presiding over the sentencing of a serial killer cried when pronouncing sentence. One of the things that made this moment remarkable was that the sentence made no practical difference; the defendant was already serving multiple life terms in California. The judge’s tears drove home its symbolic and emotional importance. The victims’ families reported that those tears meant a lot to them: they felt that their suffering had been acknowledged, turning a proceeding that could have been painfully pro forma into one that was meaningful.

If the tears-at-sentencing example shows that judicial emotion can convey compassion and respect, other emotions might instill motivation. Much of the drug-court model, for example, is premised on the idea that if the defendant feels that the judge cares about his future, he will be motivated to change. That defendant, we hope, will internalize some of the judge’s hopes for him. Judges also report reciprocal benefits; feeling such hope, at least from time to time, can make the more difficult

Anger can lead to decisions that are premature or overly punitive—or both.

The flip side of this coin, of course, is the danger posed by judicial emotion. Anger again provides our primary example. First, as suggested by the prior discussion of moods, anger tends to trigger shallow patterns of thought, such as reliance on schemas and heuristics. Stereotypes are a particularly pernicious sort of schema, raising the danger that when a judge is angry she will be more prone to two-dimensional judgment of litigants, lawyers, or witnesses. Of course, we are most worried about negative stereotypes, like racial bias, but positive stereotypes, like thinking police officers tend not to lie, are equally worrisome. The point is that to the angry judge, people may appear as types rather than as individuals.

Another shallow thought pattern typical of the angry person is quick endorsement of information that confirms the initial anger appraisal. This means that the angry judge is likely to give potentially important counter-evidence short shrift. Interestingly, angry people tend also to be disproportionately persuaded by angry-sounding arguments, regardless of whether those arguments are actually better.

Next, anger can lead to decisions that are premature or overly punitive—or both. The heightened sense of certainty it brings can make a judge feel confident in the correctness of her decisions very quickly. That tendency confers an obvious advantage when further deliberation will be of no utility or quick action is essential. Judges frequently confront those situations—for example, a witness may start to testify about something off-limits and need to get shut down. But the tendency is just as obviously disadvantageous where information-gathering and reflection would disrupt an unwarranted assumption or uncover a previously overlooked point.

A case example illustrates this danger. In a complex civil case, a district court judge was reversed for having dismissed the plaintiffs’ case with prejudice as a sanction for discovery abuse. The lawyers’ conduct was legitimately infuriating: they played games, provided misleading information, and evaded discovery orders. But the judge’s anger eventually took the case down a bad road. He appeared to become predisposed to interpret every dispute in the way least favorable to the plaintiffs; possible lies became clear ones; investigation increasingly seemed futile. Things finally came to a head in a heated exchange in which a lawyer addressed the court in a way best described as snarky, and the plaintiff had produced certain documents, the lawyer retorted, “To them?,” provoking this response:

THE COURT: Well, hell, yes. Why would you ask a question like that? Hell, yes, to the defendant. . . . I kept telling you to produce stuff. . . . You ducked. You wove. You did everything to keep from producing them. . . . Now what the hell do you not understand? You must produce them. Jesus Christ, I don’t want any more ducking and weaving from you on those 58 documents. That’s unbelievable. That gives credence to everything I just heard from the defense. Now, tell me why else you don’t think that I ought to dismiss this case . . . You better tell me. I’m about ready to throw this thing out. When you tell me that you still haven’t produced those goddamn 58 documents after four times, four times I’ve ordered you to produce them. You are abusing this Court in a bad way. Now tell me.

MR. STARRETT: Well, may I start with the fact—

THE COURT: Yes.

MR. STARRETT: —that you have not ruled four times to give them those 58 documents—

THE COURT: That’s it. I’m done. I’m granting the defendant’s motion to dismiss this case for systematic abuse of the discovery process. Mr. Harris [defense counsel], I direct you to prepare a proposed order with everything you’ve just put on that presentation. I’ll refine it and slick it up. [Plaintiff’s witness] has abused this court, has misled you, has lied on his deposition. It’s obvious he’s lying about that e-mail. This case is gone. . . . What a disgrace to the legal system. . . . We’re done. We are done, done, done. What a disgrace. . . . We’re done.

In this exchange, the final straw was counsel’s effort to explain that not all of the documents in question had been ordered produced four times. Though tin-eared and poorly timed, the assertion was basically true. But by that point, the judge was simply “done.” And once he was “done,” he went straight to the most punitive response, which left him open to reversal.

The point is not in any way to condemn the judge. Indeed, the appellate court clearly had sympathy for his understandable human reaction, and it probably is safe to say that every judge could think of at least one situation in which she has acted similarly. The point, rather, is to demonstrate how even well-placed anger can create a decisional cascade which, if not interrupted, may lead to error.

Third, judicial anger can bleed over into other situations. Being angry at one person for one set of reasons increases the odds of becoming angry at another person for another set of reasons, whether that person deserves it or not. This reality can lead to both misplaced and disproportionate blame. For example, experimentally induced, utterly irrelevant anger has been shown in mock-jury studies to correlate with more punitive judgments of tort defendants, as well as with greater levels of punishment.

47. Sentis Group v. Shell Oil, 559 F.3d 888 (8th Cir. 2009).
Fourth, intense judicial anger can manifest in a grossly disproportionate way that can feel literally involuntary. Stated colloquially, judges sometimes just lose it. A quick look at the “benchslap” market—a popular feature on Above the Law—makes this clear. Every major media outlet in the country reported on a Fifth Circuit oral argument in which Chief Judge Edith Jones slammed her hand on the bench and told a fellow judge to “shut up.” Just as much media coverage descended on the Wisconsin Supreme Court when one Justice was accused of choking another during a testy exchange in chambers. A top-trending video on YouTube (inelegantly but accurately called “Flipping the Bird to the Judge”) showed a judge at video arraignment coming down hard on a young defendant who disrespected him (he later reversed the sanctions when she apologized and explained she had been on drugs at the time). Type “angry judge” into the YouTube search engine and you will find an astonishing array of videos showing judges screaming, throwing things, even pulling out guns. From a judge’s perspective, one of the biggest downsides of losing is that suddenly you are the story.

Finally, there is reason for judges to worry about the heightened sense of power that anger can engender. Because judges have actual power over actual people, we might well worry that anger could help a judge feel justified in acting like an “absolute monarch,” or like “God in my courtroom.”

If the previously described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. Other emotions have evident downsides as well. Contempt, in particular, presents clear dangers. Contempt is much like anger but with one crucial difference. When we feel contempt for someone we are judging them to be our inferior, not just hierarchically but as a human being. For this reason it often is considered to be a mixture of anger and disgust. Contempt would appear to underlie the unfortunate insults judges sometimes lob at sentencing, such as “animal,” “lowlife,” or “scumbag.” Because a judge has no claim to superiority but only to authority, contempt is likely unsuitable in nearly every instance.

And now we find ourselves on the horns of a dilemma. Judicial emotion giveth and it taketh away. Anger, our recurrent example, is necessary to critical aspects of judging, but it simultaneously has tendencies that can impair judging. The same would appear likely to hold true for most emotions, though some will tend generally to be more positive (one nomination: compassion) or negative (one nomination: contempt). We therefore are a juncture at which judges need to call upon emotion regulation.

JUDICIAL EMOTION REGULATION

In the psychological literature, emotion regulation refers to any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed. Regulation typically entails changing the emotion-eliciting situation, changing your thoughts about that situation, or changing your responses to that situation. These are processes in which we all regularly engage, including when at work. How we do so is heavily influenced by professional norms: flight attendants and bill collectors, for example, have to meet very different expectations as to how they feel and display emotion. The ideal of dispassion supplies the background professional norm for judges. When judges report trying to act professionally, they are somehow engaging in emotion regulation in an attempt to experience and project neutrality. As the prior discussion revealed, not only is this not always a good goal, it is an unrealistic one. It is particularly unrealistic to expect judges to pull off this feat with precisely no guidance as to how. Justice Sotomayor stated...
The second step—about which we’ve displayed a remarkable collective silence—is to engage appropriate emotion-regulation techniques. Fortunately, that is something about which contemporary psychological research has a lot to say.

Such research shows that emotion regulation may be pursued by way of a diverse array of strategies, each with distinct costs and benefits. There is no such thing as a “good” or “bad” strategy: all have both occasional utility and maladaptive manifestations. However, some emotion regulation strategies tend more toward particular types of costs and benefits, not to mention paradoxical or unintended effects, and thus tend to be more or less well suited to particular contexts.

In the judging context, the ideal of dispassion has both obscured that necessary level of analysis and pushed judges toward strategies that tend to be maladaptive. Just because generations of judges may have handled emotion in a particular way—by, say, ignoring it—doesn’t make the approach effective. Poor regulatory choices can be remarkably impervious to correction through experience.

The most critical regulatory capacities for a judge, therefore, are sensitivity to her own experience, a deep bench of strategic options, and context-driven flexibility in how those options are employed. This combination allows her to exert far greater control over her emotions and how she chooses to express them.

Calling on the research literature illuminates which emotion-regulation strategies are unlikely to be helpful, are most likely to be harmful, and are most likely to be productive for judges.

**Unlikely to be helpful: avoidance.** One very common regulation strategy is avoidance. Avoidance comes in several different flavors. You can simply avoid situations because of their anticipated emotional effect; if that is not possible, you might try to modify the situation to alter its emotional salience; and if that is not possible, you might actively distract yourself. Imagine that you have a contentious relationship with your father-in-law, with whom you have to attend a big family dinner, and you know that talking with him always makes you angry. You might arrange in advance to be seated far away from him at dinner; if that is not socially acceptable, you might arrange for someone you like to be seated on your other side and engage that person in conversation whenever possible; and if you do have to talk with your father-in-law, you might pretend to listen while mentally going over your upcoming week’s schedule. Such avoidance techniques are terrifically helpful in regular life. If you avoid or significantly block out the emotion trigger, you never have an emotion to deal with.

Unfortunately, this strategy is very seldom appropriate for judges. Judges’ ability to choose the emotional situations to which they are exposed is extremely limited. Not only do you not choose your cases, but often you can’t even choose your court or the subject matter of your docket. This is, to be sure, sometimes possible: a judge who finds family court intolerably stressful might try to switch to a commercial docket, or a state-court judge might seek appointment to the federal bench because it will entail more variety and less exposure to violent crime. But no matter the court or its jurisdictional parameters, you can’t control who comes in the door, and you are guaranteed cases that will over time cover the emotional spectrum. A judge can (and generally must) excuse herself from a specific case if she has direct emotional involvement, such as a close personal connection to a party. Otherwise, avoiding unwanted emotion generally will not justify recusal unless it is so extreme as to pose a serious threat to fundamental fairness.

Nor can judges always modify situations in a meaningful way. Again, it is possible on the margins. You can delegate talking with an irritating lawyer to a clerk, or call breaks, or limit argument time, or otherwise tinker around with details to buy some time and relief. These small tweaks can be enormously helpful. The big emotion triggers, however, often can’t be worked around. This is so for two primary reasons.

First, part of the judge’s job is to orchestrate the exposure that other people have to those triggers. If, for example, you are deciding under the applicable rules of evidence whether to withhold autopsy photos from the jury because you worry that their emotional impact will outweigh informational value, you need to look at them yourself. Indeed, you need to both have and notice your own reaction, so it can serve as a rough barometer to what could be expected from the jury. By helping other people avoid triggers, you must face them yourself. Second, it is often the most emotionally vivid aspects of a case that demand your most careful attention. At criminal sentencing, or when setting damages in tort and mass-disaster cases, you must take close account of the precise harms caused. Even with lower-impact emotional triggers, like a particularly inept argument by a borderline-inept attorney, it is not professionally acceptable to literally tune out (tempting though it might be), as something important might happen. This relates to another point raised elsewhere in this special issue: judicial multi-tasking, which is one way of distracting yourself, has consequences. Not surprisingly, distracted people demonstrate impoverished recall of the situations from which they are distracting themselves—that’s the point, after all.

Avoidance therefore is available to judges only in a marginal way—ironically, because it works too well. It helps judges handle emotional challenges only by helping them disengage from what it is about the job that makes it emotionally challenging.

**Most likely to be harmful: experiential suppression and denial.** The strategy that is most obviously harmful for judges

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is to try to suppress emotion directly. Think of this as vowing as a matter of willpower not to feel what you do not wish to, or pretending—to yourself and others—that you are not feeling it. A California state judge, for example, once described his approach thus: “I’m not moved by emotion one way or the other. I’m just kind of like an iceberg, but there is no heating. I’m just here.”

The first problem with this strategy is that it does not achieve its intended purpose. (In the universe of problems, that is a pretty big one to have.) Attempts to suppress emotional experience or thoughts of an emotional event have not been shown to have any meaningful effect on the emotions themselves. In fact, suppression raises the danger of “ironic rebound.” Think of a rough parallel to the “don’t-think-of-a-pink-elephant” phenomenon, in which the more you try not to think of something the more you think of it. Research shows that we are somewhat better at suppressing emotions than other sorts of thoughts, but that is a relative, not absolute, facility. Emotional suppression can be followed by a counterproductive increase in the frequency and intrusiveness of emotional thoughts. Suppression also increases the physiological concomitants of the undesired emotion, such as elevated heart rate and sweating. It may give the illusion of calming the mind, but it does not calm the body.

These rebound and reactivity effects are especially pronounced when a person is under conditions of stress and cognitive load, which describes most moments in a judge’s working life. Adding denial to the mix tends to make matters worse, because combining greater physical reactivity with conscious disavowal of its source is dangerous. It creates a reaction in search of a cause, meaning a person can easily latch onto an unrelated, and sometimes innocent, target. The combination has also been associated with impulsive decision making.

Further, suppression and denial are highly effortful. Because of the internal resources they consume, these strategies impair memory, are associated with impaired performance on logical tasks, and lead to overly simplistic judgments.

Finally, these strategies take a toll on the judges who use them. People who regularly suppress and deny emotion can develop what psychologists call a “repressive coping style.” That style is characterized by (among other things) rigidity and arrogance, two qualities we clearly would like to discourage. Indeed, those qualities have unique potential to erode the public’s perception of the judiciary. People who habitually repress emotion also are far less able to handle emotion when they do experience it. One cautionary tale may be found in a Florida Supreme Court decision removing a trial judge from the bench. He repeatedly treated litigants and lawyers in a callous, rude, condescending, and abusive manner. His own psychiatrist testified that a repressive anger-management style had come to define the judge’s personality, such that he was in a constant state of “emotional over-control” that left him unable to “incorporate emotions into his life.” Instead, he displayed an utter lack of empathy and periodically exploded. Finally, a repressive coping style is associated with poor health outcomes, such as anxiety, hypertension, and coronary heart disease.

Caveats about the occasional utility of all regulatory strategies notwithstanding, it is hard to say much good about emotional suppression and denial. The best that can be said is that a judge might sometimes have no choice but to use them in extraordinary situations where the emotion threatens to overwhelm the judge, there is no way to alter the situation, and a temporary effort to completely ignore the reaction is the only way to act in a professionally necessary manner. One can imagine such situations. A judge who finds herself forced into that position, though, will be much better off if she recognizes it for what it is and gives herself time and space to cope with that emotion after the crisis is over.

**Often necessary, but comes at a cost: behavioral suppression.** Fortunately, emotion is not the only thing a judge can suppress. Another common strategy is to suppress only its external manifestation. Behavioral suppression involves inhibition of facial expressions (e.g., grimacing), verbalizations (e.g., groaning), or bodily movement (e.g., cringing). One masks the true emotional state with an expression reflecting either neutrality (as with a “poker face”) or a desired one (as with a fake smile). All judges likely spend a good deal of their time doing exactly that—and for some very good reasons. However, behavioral suppression takes a toll of its own.

The reasons why a person sometimes needs to hide emotion are rather obvious, particularly to judges. Selectively displaying

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67. McBaye, 264 E3d at 66 (“Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt.”)
68. In re Sloop, 946 So.2d 1046 (S. Ct. Fla. 2007) (per curiam).
Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.

Emotion can be highly strategic. A judge might want to keep an obnoxious attorney from knowing he has gotten to her, so as to discourage the behavior by refusing the attorney satisfaction. (Conversely, the judge may believe that a flash of anger might shut the behavior down, in which case she would opt for a controlled display.) She may need to model calmness and decorum to others, such as disruptive family members, which will make her courtroom management duties easier. She may need to prevent a jury from perceiving what she thinks of a witness, party, or attorney so as not to influence the jury’s independent evaluation. She may want to prevent other observers, including the public, from being able to guess what she thinks, lest it improperly broadcast an outcome. The good news is that inhibiting the outward signs of emotion is relatively effective, particularly if you are well practiced in doing so. Judges often can keep others from perceiving what they feel.

Unfortunately, behavioral suppression is not very effective as an internal matter. It, too, is effortful, so it has some negative effects. Behavioral suppression impairs memory for information presented during the suppression period. Other cognitive capacities, like logical reasoning, also suffer. Those effects may not be as pronounced as with suppression and denial, but they remain significant; indeed, they are equivalent to those attending avoidance. As stated bluntly to this author by a prominent scholar, behavioral suppression makes a person temporarily “stupider.”

Further, keeping an emotion from showing does not keep a person from feeling it. Again, the profile is less extreme than with experiential suppression. Controlling your facial and bodily movements generally will blunt, but not eliminate, positive emotions. Interestingly, it has no such effect for negative ones. That is, suppressing a smile can make you a bit less happy, but suppressing a frown is not likely to make you less angry. Judges tend to be most concerned about displaying emotions such as sorrow, contempt, disgust, and anger, but it is not at all clear that behavioral suppression will have any effect on this cluster of feelings. Finally, suppressing expression does not lessen emotion’s physiological concomitants, and it may in fact increase them.

Judges can take some comfort that behavioral suppression is usually going to work in terms of how you are perceived. However, it is important to be aware that controlling outward signs of emotion comes at a cost and is not doing any work in terms of dealing with the emotion itself.

Most likely to be helpful: cognitive reappraisal and disclosure. Thus far the analysis has looked to one strategy (avoidance) that is seldom available; one (suppression and denial) that is counterproductive, even dangerous; and one (behavioral suppression) that is often necessary but generally costly and ineffective. Fortunately, two other strategies have a more positive profile. If the judge can neither avoid, alter, nor ignore an emotional situation, she may change how she thinks about it. She also can choose to enlist the perspectives of others by selectively disclosing her experiences. This final section takes up these approaches in turn.

Cognitive reappraisal. Recall that an “appraisal” refers to the thought structure that underlies any given emotion. A “reappraisal” therefore refers to a change in those thoughts, which then leads naturally to a different emotional response. If, for example, a person comes to believe that a harm was inflicted accidentally rather than deliberately or negligently, she has no more reason to be angry and may instead be simply sad.

The first way in which judges can leverage the power of reappraisal is by examining the reasons behind their emotions, so as to determine whether they represent a correct and appropriate response. The judge in the viral YouTube video, for example, may have reacted much less angrily had he considered the high probability that the defendant was under the influence of drugs. Her behavior would have been equally offensive to decorum, but would not have represented a personal insult. In contrast, it may be entirely appropriate to be angry at a defendant who uses sentencing as a forum to insult and taunt his victims. Reasons matter. Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.

While reappraisal may be engaged in real time, a good deal of thought realignment can happen during times of reflection. Consider trying the following exercise. Think about situations in which people you encounter at work—lawyers, litigants, witnesses, and colleagues—have made you mad. Any given judge’s anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, abusing others, disrespect, sloppiness, and so on. Then think about why those particular things make you angry. Finally, think about whether those reasons justify anger, taking care to examine why or why not. In a light-hearted but revealing article reflecting just such an exercise, a Los Angeles state-court trial judge identified reliable triggers for his anger, including “lack of civility,” tardiness, cell phones going off in court, “attorney incompetence,” and the “herding cats” work of trying to get everyone in the courtroom at the same time. He concluded that he would be much happier if he let some of those go—for example, by reminding himself that he is sometimes late, decent people sometimes forget to turn off their cell phones, and so forth.

Attorney incompetence, in contrast, is legitimately anger-


ing. This is an important conclusion to reach, too, but not because it changes the underlying emotion. Rather, deliberately accepting the underlying thoughts puts the judge at just enough distance to evaluate her possible responses, and to choose the most fitting one. The judge in Los Angeles learned to choose different patterns of response to unprepared or unskilled attorneys—typically by being direct, courteous, and brief—by focusing on what was within his power to change. Chief Judge Alex Kozinski describes engaging in a similar mental exercise after a prosecutor lied to him about a matter of consequence. After reflection, he concluded that anger was precisely the right response, and he therefore chose to name the prosecutor in a harsh written opinion so as to maximize the deterrent message.\(^73\)

The second cognitive appraisal technique that holds great promise for judges is committing to look at situations through a professional “lens.” This is best explained with an analogy to being a doctor. Like judges, doctors regularly encounter stimuli that naturally provoke strong emotions, like festering wounds. An important part of learning to be a doctor is learning to regard that festering wound as professionally relevant.\(^74\) It represents a source of information about what is wrong with the patient and an opportunity to display professional competence. The doctor thus learns to regard it without disgust, not by suppressing disgust but by thinking about the wound in a way that fails to satisfy the appraisal structure of disgust.

Judges have their own festering wounds to confront. Sometimes that is literally true—recall the example of the autopsy photos—but more often it is figuratively true. Courtrooms can be a theater for much that is broken and disturbing in our world and how we treat one another. For many judges, the most effective way of approaching that reality will be, when possible, to treat vivid stimuli as professionally relevant rather than personally provocative. Such a precommitment helps the judge stay focused on specific goals—for example, discerning the informational value of that autopsy photo, since she is the only one empowered to make that judgment call. That professional lens can dissipate the emotional salience of the stimuli.

Judges would likely report that when this works, it works well. The experimental literature shows that even laypeople can deliberately call on such a neutral-observer approach—tellingly, by pretending briefly to be doctors—with good results. When asked to look at disturbing images as a doctor would, and to think about them “objectively and analytically rather than as personally, or in any way emotionally relevant,” they feel less emotion; show less emotion; display enhanced, not diminished, memory; and show decreased physiological reactivity.\(^75\)

Of course, labs are labs. What an experimental subject can pull off for a short period of time, in a controlled environment, with an anticipated stimulus and explicit instructions, is instructive. To be pulled off by real judges in real situations, this species of reappraisal must be trained and practiced.

Reappraisal, in sum, is of enormous value to judges because it asks them to think differently, instead of simply commanding them to feel differently.

**Disclosure.** As the above discussion reveals, some amount of emotion is inevitable, no matter how skilled a judge is at regulation. Some situations cannot be avoided; behavioral suppression leaves emotions largely intact. Even cognitive reappraisal has limits, for not every situation can be rethought. Sometimes the elderly person really did lose her entire life savings to a fraud, or that parent really did brutally rape his child, or the defendant really does spit in your face.\(^76\) Nor would one want to rethink every situation. The warm glow that comes from helping families heal, for example, should be savored for what it is. And the professional lens sometimes will simply crack. No judge has truly seen everything, and everyone will be thrown from time to time, just as doctors are. The only way to prevent such moments is to become closed off and jaded—to grow that “rhino skin” feared by the Australian magistrate.

One highly effective strategy for coping with and learning from those inevitable emotions is disclosure. Disclosure, also known in the literature as “social sharing,” is the act of thinking and talking about your emotions and the experiences that triggered them.\(^77\) To be productive, it must be selective: a judge should not, for example, indulge in highly public expressions of vitriol against a colleague.\(^78\) But when done thoughtfully and with a prosocial motive, judicial disclosure of emotion can be invaluable.

This is not because social sharing eventually dissipates the

73. 30 United States v. Kojayan, 8 F.3d 1315 (9th Cir. 1993). The judge omitted the individual’s name once he was satisfied the message had been heard.


75. These results, consistent throughout the psychological literature, recently were confirmed in a meta-analysis. See Webb et al., supra note 58.

76. How to Piss Off the Judge, YOUTUBE (Aug. 13, 2009), http://www.youtube.com/watch?v=uCNo4ky6GXb.

77. Much of this discussion is drawn from Bernard Rimé, Interpersonal Emotion Regulation, in HANDBOOK OF EMOTION REGULATION, supra note 32, at 466-85; PSYCHOLOGY OF EMOTION, supra note 32, at 185-89; and the work of the James Pennebaker lab, http://homepage.psy.utexas.edu/HomePage/Faculty/Pennebaker/Off2000/JWHome.htm.

emotion, as if you were emptying a bag. To the contrary, it tends to reawaken the emotion, often quite vividly. Chief Judge Kozinski, for example, recounted to this author a story more than four decades old of his son nearly being run over, and he reported feeling as terrified, guilty, and shaken as if it had happened yesterday. Paradoxically, though, disclosure is a basic impulse that people overwhelmingly experience as a net positive. Why?

First, disclosure enhances self-knowledge. By talking or writing about emotional experiences, we help create a detailed internal data bank of those experiences. That data bank allows us to judge our reactions more coherently and consistently. This sense of heightened self-knowledge and control can help us live with emotion more comfortably, for we come to experience those emotions as an integrated aspect of the self.

Second, disclosure enlists insight and support from others. This is particularly true when we share emotional challenges with people who face similar circumstances. Imagine the exercise proposed earlier, in which you identified persistent anger triggers. Now imagine showing your list to another judge. That judge would be well-positioned to help with any necessary reappraisal by explaining whether and how she believes you are off base, overreacting, or right on the mark. Your spouse, friends, and other close confidants can serve a similar function. Perhaps most importantly, communicating with others helps us feel understood and supported. Numerous judges have reported to this author that they wish they could have this sort of communication with their colleagues but feel nervous about doing so, largely because of stigma. The more judges were to act on that impulse to disclose, the less stigmatized it would become.

Finally, public disclosure of judicial emotion also can be productive (and would go a long way toward dissolving the stigma). When the public sees the human underneath the robe, it has a better understanding of how a judge is doing her job. Disclosing emotion makes transparent an otherwise hidden input to judicial decision making and invites evaluation thereof. As the tears-at-sentencing example showed, the reaction can be quite positive, even enhancing respect for the judiciary. A rather different sort of public disclosure would be to write about it in an opinion, article, or book. For example, Chief Judge Kozinski wrote a law review article about a criminal sentencing that unexpectedly triggered those feelings he had when he inadvertently placed his son in danger, prompting him to show the defendant mercy. Once on the table, the propriety of such a motivation was open for debate.

Disclosure thus can help judges feel more comfortable with their emotions, and helps ensure that those emotions influence decision making in a deliberate, thoughtful, and transparent way.

CONCLUSION

Within law, we have inherited some hefty cultural baggage, weighted down with the belief that a good judge is emotionless. This article has unpacked that baggage and suggested that it is that belief, not emotion, that should be put aside. We need a new ideal: that of the emotionally intelligent judge. The emotionally intelligent judge is self-aware and is able to think coherently about her emotions and to be in control of their expression. She is willing to seek the opinions and support of others and approaches the emotional challenges of the job with openness and flexibility.

In attempting to thus shift our ideal, we are not alone. More than a decade ago pioneers in medical education came to realize that, by acculturating doctors to a similar ideal of dispassion, they inadvertently were training them to suppress and deny emotion, with bad results. Medical students lost empathy for patients with each year of training; many showed performance-imparing levels of emotional disengagement. These pioneers now are seeking to train medical professionals to improve their emotion-regulation skills. So far, all results are positive: among the important findings is that clinical performance improves as measures of emotional intelligence rise.

Even with these advances, the general pattern unfortunately persists. Describing her recent studies of the impact of emotion on Canadian oncologists, a health psychologist has emphasized the importance to doctors of acknowledging their feelings, especially grief:

Not only do doctors experience grief, but the professional taboo on the emotion also has negative consequences for the doctors themselves, as well as for the quality of care they provide. Our study indicated that grief in the medical context is considered shameful and unprofessional. Even though participants wrestled with feelings of grief, they hid them from others because showing emotion was considered a sign of weakness. The impact of all this unacknowledged grief was exactly what we don’t want our doctors to experience: inattention, impatience, irritability, emotional exhaustion and burnout. Even more distressing, half our participants reported that their discomfort with their grief over patient loss could affect their treatment decisions with subsequent patients. Oncologists are not trained to deal with their own grief, and they need to be.

If we were to replace the words “oncologists” and “doctors” with “judges,” I daresay most judges would nod in recognition. Whether in medicine or law, cultural baggage this heavy is not easily shed.

Fortunately, the psychology of emotion has done much of

81. Satterfield & Hughes, supra note 74; Grewal & Davidson, supra note 74.
the heavy lifting already. There is much we still need to learn about judicial emotion, but we know more than enough to get started. Judges can learn to prepare realistically for, and respond thoughtfully to, the emotions they are bound to feel. It’s time we integrated those lessons into how we train and support our judiciary.

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Heuristics and Biases in Judicial Decisions

Eyal Peer & Eyal Gamliel

A famous tale talks about three baseball umpires who were asked how they rule on a ball. One said, “I call it like I see it.” Another said, “I call it like it is.” And the last one (and this is attributed to umpire Bill Klem) said, “It ain’t nothin’ till I call it.” While the first umpire admitted he was an imperfect human observer, the second and third umpires claimed they were infallible and judged cases only based on their objective merits. So, what can be said about court judges? Are court judges such impartial rulers that they can “call it like it is”? Or, as the first umpire humbly confessed, are they limited human observers confined by the boundaries of human cognition?

In this article, we briefly review some of the accumulating evidence suggesting that in some cases judges could be prone to cognitive fallacies and biases that might affect their judicial decisions. We review several studies on cognitive biases relating to elements of the hearing process (considering evidence and information), ruling, or sentencing. These findings suggest that irrelevant factors that should not affect judgment might cause systemic and predictable biases in judges’ decision-making processes in a way that could be explained using known cognitive heuristics and biases.

Heuristics are cognitive shortcuts, or rules of thumb, by which people generate judgments and make decisions without having to consider all the relevant information, relying instead on a limited set of cues that aid their decision making. Such heuristics arise due to the fact that we have limited cognitive and motivational recourses and that we need to use them efficiently to reach everyday decisions. Although such heuristics are generally adaptive and contribute to our daily life, the reliance on a limited part of the relevant information sometimes results in systemic and predictable biases that lead to sub-optimal decisions. Amos Tversky and Daniel Kahneman (who later won an economics Nobel Prize for his joint work with the late Tversky) introduced the heuristics-and-biases approach by first identifying key heuristics and the biases they sometimes cause. For example, the availability heuristic is the one by which we judge the probability of an event based on how easy it is to recall instances of such an event. Try to think, for example, of words that start with the letter “r” compared to words that have “r” as the third letter. Although the latter is more frequent in English, people think there are more words that start with “r” simply because they are easier to recall.

The use of the availability heuristic, as with other cognitive and judgmental heuristics, is one of the System 1 processes of thinking. System 1 processes are those in which thinking, judgment, and choice are more intuitive, experiential, and adaptive. They are faster and consume fewer cognitive resources. This contrasts the System 2 processes, which are more analytic, relying on facts and normative rules and requiring many more cognitive resources—which are often not available in everyday situations. Although heuristics are highly adaptive and sometimes cause. For example, the availability heuristic is the one by which we judge the probability of an event based on how easy it is to recall instances of such an event. Try to think, for example, of words that start with the letter “r” compared to words that have “r” as the third letter. Although the latter is more frequent in English, people think there are more words that start with “r” simply because they are easier to recall.

The use of the availability heuristic, as with other cognitive

Footnotes

3. See, e.g., Thinking, supra note 2.
4. Id.
5. See id. for a recent review of heuristics and biases.
Hindsight Bias

When people evaluate events or outcomes after they have occurred, they sometimes exhibit a hindsight bias when they judge the event as being more predictable than it was before it actually happened. This “we knew it all along” phenomenon has been shown to occur in many areas such as history, medicine, finance, and the law, among others. In the basic experiment, participants are given a set of possible outcomes and are told which one of them is true. Then they are asked to assess the probability of each outcome. Although different participants are told that different outcomes are true, all assign higher probabilities to the outcome told to be true, no matter what it is.

The probability of events based on the detail in which these events are described. In particular, it has been found that more detailed descriptions of an event can give rise to higher judged probability of events than those described in less detail. According to classic probability theory, less detailed events actually contain various.

Confirmation bias can . . . affect judges when they hear and evaluate evidence. . . .

Confirmation bias makes people search, code, and interpret information in a manner consistent with their assumptions, leading them to biased judgments and decisions. For example, in a classic study at Stanford University, participants who were either for or against capital punishment read about studies that either supported or challenged capital punishment. It was shown that participants favored studies that followed their prior attitudes; those who were in favor of capital punishment agreed more with studies that confirmed their prior position and rated those studies as better and more convincing, while those who were against capital punishment favored the studies that argued against it.

Confirmation bias can also affect judges when they hear and evaluate evidence brought before them in court. Specifically, judges might be biased in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions. Indeed, several studies have pointed to the occurrence of this bias among judges, lawyers, or police officers. For example, Rassin and his colleagues presented these groups of experts with a murder case in which the victim was a female psychiatrist and the prime suspect was the wife of one of her patients. The wife was accused of killing the psychiatrist, allegedly out of jealousy. Participants were asked to review 20 pieces of information and to rate the degree these incriminated or exonerated the prime suspect. However, half of the participants were also told about the possibility of another suspect: a former male patient of the psychiatrist who had been harassing her for a long time. Surprisingly, all participants rated the pieces of evidence similarly and all thought the prime suspect was guilty in the same degree. Thus, it seems that the judges, lawyers, and police officers failed to consider the alternative scenario. Evidence was considered only if it helped them confirm their prior belief of the prime suspect’s guilt and was disregarded if it pointed to a different suspect.

Conjunction Fallacy

Another type of judgmental bias relates to how people judge the probability of events based on the detail in which these events are described. In particular, it has been found that more detailed descriptions of an event can give rise to higher judged probabilities. This bias has been termed the conjunction fallacy because it shows that people erroneously believe that events described in more detail are more probable than those that are described in less detail. According to classic probability theory, less detailed events actually contain various.

10. Baruch Fischhoff & Ruth Beyth, I Knew It Would Happen: Remem-

As one study showed, experienced judges were not different from inexperienced jurors in reacting to inadmissible evidence. instances of more detailed events and thus cannot be less probable than any of the contained events. For example, just as the probability of an object being a fruit cannot be smaller than the probability it is an apple, the probability of a suspect being convicted of a crime cannot be smaller than the probability that he will be convicted of a specific crime, such as burglary.

However, one study showed that expert attorneys actually committed this conjunction fallacy when asked to evaluate the chances of a specific case (Jones vs. Clinton) being disposed by a judicial verdict as opposed to an outcome other than a judicial verdict. When attorneys were asked to evaluate the probabilities of different types of outcomes that were not judicial verdicts (such as settlements, dismissals, withdrawals, etc.), they assigned much higher probabilities to each of these outcomes—sometimes totaling even higher than 1—than they did to the general probability of the case being disposed by an outcome that was “not a judicial verdict.” Although no studies have examined this conjunction fallacy among judges, research on other biases among judges (such as the research reviewed in this article) leads us to predict that judges might be prone to this bias as well.

BIASES IN THE RULING PROCESS
The biases described in the previous section related to the hearing process, but they also involved effects on the outcome of a trial and the judge's ruling process. In the next section we review more examples of different biases that affect judges’ ruling processes. These include the inability to ignore inadmissible evidence and biases in decisions of sequential ruling.

Inability to Ignore Inadmissible Evidence
Sometimes evidence that is presented in trial can be deemed as inadmissible because it was obtained illegally, is considered hearsay, is highly prejudicial, or is problematic for some other reason. When inadmissible evidence is wrongfully presented in jury trials, judges may instruct juries to disregard or ignore the evidence. However, many studies have shown that a jury's ability to not consider inadmissible evidence is questionable at best. For example, Doob and Kirshenbaum showed that mock jurors were more likely to rate a defendant as guilty when they were exposed to prior criminal-record information than when no record information was given, even when judicial instructions were that prior record information should be used only to determine credibility rather than as an indicator of guilt. Other studies showed similar findings, as jurors’ decisions seemed unaffected by instructions to disregard or ignore inadmissible evidence.

That jurors—who are inexperienced laymen—cannot ignore inadmissible evidence is not as surprising as is the fact that some judges could not do so either. As one study showed, experienced judges were not different from inexperienced jurors in reacting to inadmissible evidence. In this study, both groups read about a product-liability case including (or not including) biasing material and were either instructed (or not) to disregard this piece of inadmissible evidence. Both judges’ judgments depended heavily on whether the biasing material was included, but these decisions were not altered if that evidence was deemed as inadmissible. Thus, it seems that judges, as with jurors, cannot easily disregard inadmissible evidence, although they know they should.

Biased Decisions in Sequential Ruling
When judges make repeated sequential rulings, they tend to rule more in favor of the status quo over time, but they can overcome this tendency by taking a food break. In their study, Danziger and his colleagues examined 1,112 judicial rulings by 8 Israeli judges, made over 50 days in a 10-month period, all regarding parole requests. The study showed that about 65% of the rulings were in favor of the plaintiff at the beginning of each session (in the morning, after breakfast break, and after lunch break), and they gradually decreased to 0-10% at the end of each session. The authors concluded that the repeated rulings depleted the judges’ mental resources, causing judges to have a higher likelihood of granting parole in the first cases after a break. However, additional analyses showed that some overlooked factors—such as the non-random ordering of cases (cases with representation sometimes go first), and the fact that the parole board tries to complete cases from one prison before taking a meal break—could have accounted for some of the observed downward trend.

16. Id.
18. See Joel D. Lieberman & Jamie Arndt, Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 PSYCHOL., PUB. POLY. & L. 677 (2000), for a review of studies about jurors’ decisions in relation to evidence instructions.
21. Id.
23. Id.
BIASES IN THE SENTENCING PROCESS

The next and final group of biases we review here relate to the process of sentencing, or assigning punishment to the convicted party. First, we review a comprehensive study that modeled sentencing decision making by comparing normative to heuristic models. Second, we discuss a prevalent bias in sentencing that stems from the anchoring-and-adjustment heuristic.

Modeling Sentencing Decisions

In the beginning of the article, we asked whether judges are rational decision makers who contemplate every relevant aspect in the optimal manner or whether they are sometimes satisfied with using simpler heuristics. One study that tried to answer this question regarding sentencing decisions examined several possible normative and heuristic cognitive models in trying to evaluate which model better described judicial decisions and the magnitude of sentences in trials on theft, forgery, and fraud in a German court.24 The results showed that with respect to relatively minor offenses, prosecutors and judges considered only a limited number of factors while neglecting other legally relevant and highly important ones. The discrepancies between the number of factors that should have been considered and the number of those actually considered, according to the decision analysis, were higher when the offense characteristics were less serious; for more serious offenses, the discrepancies found were smaller. Examining both judges and prosecutors in the context of sentencing is important due to the high frequency of plea bargaining, at least in U.S. courts.25 For example, although judges and prosecutors indicate that they base their sentencing and sentencing requests on the relevant and important factors of the presence of a confession or a prior record, the analysis revealed that these factors were neglected. Other relevant and legally important factors indeed affected the sentencing, while possible factors that should not affect sentencing (e.g., race, sex, nationality) were found not to have affected it. Von Helversen and Rieskamp indicated that the neglected factors could be explained by cognitive constraints but also by time limitations under which sentencing decisions were made.26

Anchoring-and-Adjustment

Anchoring-and-adjustment refers to the process of assimilation of a numeric estimate toward a previously considered standard. In their classic anchoring study, Tversky and Kahneman asked participants comparative and absolute consecutive questions about the percentage of African nations in the United Nations.27 In the comparative question, participants indicated whether the percentage of African nations in the U.N. was higher or lower than an arbitrary number (the anchor): either 65 or 10 (the alleged result of spinning a roulette wheel). Then, participants were asked an absolute question regarding their best estimate of the actual percentage. Absolute judgments were assimilated to the provided anchor value, so the mean estimate of African nations in the U.N. among participants who received the high anchor was 45%, compared to 25% for participants receiving the low anchor.

Since Tversky and Kahneman’s classic study, the effect of anchoring-and-adjustment has been demonstrated in various domains of judgment and decision making and was proven to be a strong, robust, reliable, and persistent psychological effect.28 Several theoretical explanations have been offered for the mechanism through which the anchor affects the numerical estimation or prediction. Some scholars believe that people integrate the anchor to the answer and adjust from it insufficiently,29 adjusting estimates until an acceptable value is found; however, the adjustment is usually insufficient because it arrives at the nearest upper or lower boundary of a large range of acceptable values.30 There is also the selective-accessibility model, in which comparing a target to an anchor leads to a biased search strategy consistent with positive-hypothesis testing: when presented with a low anchor, people will retrieve information consistent with the hypothesis that the estimate is small, and vice versa.31

As can be expected, judges have also been found to be affected by anchors in their judicial decisions. As criminal-sentencing decisions pertain to numeric quantities, they are also affected by numeric anchors, whether they are minimal sentences that the law presents or sentences demanded or recommended by prosecutors,32 attorneys, or probation officers.33 For example, anchoring affected both novice and experienced judges when they were presented with two different demands for sentence by an alleged prosecutor on a hypothetical rape case—12 months or 34 months.34 Anchoring affected the ruling sentence even when the judges declared that the anchor was not relevant to their decision. Enough and Mussweiler suggested that the anchor affected the ruling of the judges because of selective increase in the accessibility of anchor-consistent knowledge: given an anchor of a relatively severe punishment

25. Id.
26. Id.
27. Tversky and Kahneman, supra note 1.
29. Tversky & Kahneman, supra note 1.
34. Enough & Mussweiler, supra note 32.
(34 months in the above study), the judges retrieved more information that was consistent with this sentence—that is, evidence and details that were consistent with more severe punishment. In contrast, given the more lenient punishment (12 months in the study), the judges retrieved more information that was consistent with this sentence—that is, evidence and details that were consistent with less severe punishment. As a result, the rulings of the judges were affected by the given anchor, whether it was more relevant and informative or less so.

In a follow-up study, Englich and others showed a similar anchoring effect even when the anchor was set not by the prosecutor (a potentially relevant source), but rather by a journalist (who is an irrelevant source, as the media should not affect judicial decisions). The study compared the effect of anchoring on judges who were experts in criminal law versus others who were not, to find similar effects for the two groups. These findings are consistent with those of Northcraft and Neale, as well as Mussweiler and others, who found that the judgments of experts are also susceptible to the effect of anchoring.

**CONCLUSION**

In this article, we summarized research that demonstrated how heuristic thinking is involved in judicial decision making. Although heuristic thinking is typically efficient, it may cause biases at times. Heuristic thinking was demonstrated in various contexts of the hearing process, the ruling process, and the sentencing process. The hearing process may be affected by hindsight bias, confirmation bias, or the conjunction fallacy. Heuristic thinking also characterizes some of the ruling process that might be biased, since judges are unable to ignore inadmissible evidence and since they make biased decisions in sequential rulings. Heuristic thinking might also affect the sentencing process, due to a tendency to rely on a limited number of factors and because of the dominant effect of anchoring. Thus, research suggests that judges, prosecutors, and other professionals in the legal field use heuristic thinking in judicial processes and decisions, although not all of them may be aware of such use.

A question that arises is, “What can be done to counteract judicial bias?” To answer this question, one must first determine the origin of the bias. The method of overcoming bias depends on whether the cause of bias lies in the task, the judge, or a combination of the two. If we assume a judge is the culprit, we may employ techniques that aim at improving the judge's ability to circumvent the bias. Fischhoff identified several such techniques, including warning people in advance about the existence of bias, describing the likely direction of a bias, illustrating biases to the judges, and providing extended training, feedback, coaching, and other interventions. He concluded that the first three strategies yielded limited success and that even intensive, personalized feedback and training produced only moderate improvements in decision making. Although some experiments have shown that some biases, such as the hindsight bias, could be counteracted, research is still needed to explore whether it is possible to counteract other biases among judges, such as the ones described in this article, and to what degree. Obviously, awareness to the heuristic thinking and the resulting possible biases affecting judicial decisions is a prerequisite for any future attempt to limit these biases. We hope that this article will be a small step towards that goal.

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35. Id.


37. Id.


39. *Thinking*, supra note 2; Kahneman, Slovic, & Tversky, supra note 2; Tversky & Kahneman, supra note 1.


41. Id.

42. See, e.g., Lawrence J. Sanna & Norbert Schwarz, *J. EXPERIMENTAL SOC. PSYCHOL.*
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NEW ETHICS OPINIONS

Judge’s Use of Electronic Social Networking Media

ABA Formal Opinion 462
http://goo.gl/qip8

Can a judge be a Facebook friend with an attorney who appears before the judge? That question has resulted in conflicting ethics opinions. The Florida Judicial Ethics Committee concluded that a lawyer should not be a Facebook friend of a judge because the public identification of a lawyer as a “friend” of the judge “conveys the impression that the lawyer is in a position to influence the judge.” Florida Advisory Op. 2009-20 (http://goo.gl/22Zkd). Similarly, a California ethics committee concluded that a judge may not have a social-networking relationship with an attorney while that attorney has a case pending before the judge. Calif. Judges Ass’n Judicial Ethics Comm. Op. 66 (2010) (http://goo.gl/ytuh). But other state ethics opinions have not been so restrictive:

- A New York advisory committee noted that a judge “generally may socialize in person with attorneys who appear in the judge’s court,” so using technology to do so shouldn’t create an ethics violation for the judge. Even so, the committee cautioned that the public nature of these online friendships might create the appearance of a particularly strong bond and thus require recusal. N.Y. Advisory Op. 08-176 (2009) (http://goo.gl/RPBkE).
- A Kentucky advisory committee urged judges to be “extremely cautious” and noted that several judges who had initially joined social-networking sites had since limited or ended their participation. But the committee concluded that a judge could ethically be a Facebook friend with persons who appeared in court, including attorneys, social workers, and law-enforcement personnel. Ky. Advisory Op. JE-119 (2010) (http://goo.gl/wGC49).

- A South Carolina advisory committee concluded that a judge could be a Facebook friend with law-enforcement officers so long as they didn’t discuss anything related to the judge’s position in the online communications. S.C. Advisory Op. 17-2009 (2009) (http://goo.gl/KjMF3).

The American Bar Association has now waded into this thicket with a formal ethics opinion on the judicial use of social-networking media, including Facebook. The ABA’s conclusion—judges may participate in the social-networking world, just as they can have in-person relationships, but ethics rules still must be considered. The ABA opinion provides a roadmap to the judicial-ethics rules (as found in the ABA Model Code of Judicial Conduct) that should guide a judge in the social-networking world:

- Rule 1.2 provides that a judge “shall avoid . . . the appearance of impropriety” and “shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.” Based on this rule, the ABA opinion cautions “that the judge be sensitive to the appearance of relationships with others,” including online relationships. As the opinion notes, electronic messages, images, and information—once created—may be electronically transmitted without the judge’s permission to unintended recipients.
- Rule 2.4(C) provides that “[a] judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.” The ABA opinion cautions judges not to “form relationships” online that may convey such an impression.
- Rule 2.9 prohibits ex parte communications about pending or impending matters except as otherwise authorized by law. Rule 2.10 prohibits a judge from making “any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court.” And Rule 3.10 provides that a judge “shall not practice law” and may not give legal advice except to members of the judge’s immediate family. The ABA opinion concludes that “[a] judge should avoid comment about a pending or impending matter in any court,” should “avoid using any [electronic social-media] site to obtain information regarding a matter before the judge,” and should “take care not to offer legal advice” while on social-media sites.
- Rule 2.11 provides that a judge “shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned,” including where the judge “has a personal bias or prejudice concerning . . . a party’s lawyer.” The rule also provides that a judge subject to disqualification “other than for bias or prejudice” against a party or lawyer “may disclose on the record the basis of the judge’s disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive the disqualification.” The ABA opinion concludes that “whenever matters before the court involve persons the judge knows or has a connection with professionally or personally,” the judge “should disclose on the record information the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification even if the judge believes there is no basis for disqualification.” As an example, the opinion suggests that “a judge may decide to disclose that the judge and a party, a party’s lawyer or a witness have an [electronic social-media] connection, but that the judge believes the connection has not resulted in a relationship requiring disqualification.”

For judges in states in which no ethics opinions have yet been rendered on judicial use of electronic social media, the ABA opinion provides an excellent starting point for analysis. A cautious judge might also want to review the Florida and California opinions.