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# The Behavioral Psychology of Judicial Corruption: A Response to Judge Irwin and Daniel Real

W. Bradley Wendel\*

In their contribution to this Symposium, Nebraska Court of Appeals Judge John Irwin and his co-author Daniel Real provide a clear and insightful look at the psychology of judgment, and decision-making.<sup>1</sup> They focus on predictable errors in judgment that arise from the operation of so-called System 1 cognition. System 1 processes are characterized as fast, automatic, associative, relatively effortless, parallel operations, concrete, and nonconscious.<sup>2</sup> By contrast, System 2 processes are slow, deliberate, rule based, effortful, serial operations; they are sometimes abstract, and are available to conscious awareness.<sup>3</sup> Unlike rational-choice models, which assume compliance with formal rules of logic and probability, dual-process theories show that people sometimes engage in decision-making processes that violate these rules. Deliberators rely on tacit rules of thumb—“heuristics,” as they are known—to simplify the decision-making process.

Most of the time, these heuristics are more or less reliable, as well as being quick and not mentally taxing. Thus, reliance on heuristics improves the efficiency of decision-making without compromising its accuracy. It is now well established, however, that reliance on heuristics can lead to certain types of errors. One familiar illustration is the violation of the rules of probability due to the representativeness heuristic. If you asked someone whether it is more likely that there will be a terrorist attack in New York City or in the United States (which includes New York City as well as many other locations of a potential attack), a substantial majority of respondents would probably answer the former.<sup>4</sup> The reason is that it is easy to call to mind an example of a terrorist attack on New York City, and people tend to automatically assess the similarity between two events and use that assessment as a rough guide to the likelihood of an event.<sup>5</sup>

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1. Hon. John F. Irwin & Daniel L. Real, *Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity*, 42 MCGEORGE L. REV. 1 (2010).

2. See Thomas Gilovich & Dale W. Griffin, *Judgment and Decision Making*, in 1 HANDBOOK OF SOCIAL PSYCHOLOGY 542, 566 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey, eds., John Wiley & Sons, Inc. 2010); Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6-9 (2007); Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998 (2007). For an accessible summary of this literature, see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 17-39 (2008). The authors of the principal paper do not use the System 1 and System 2 terminology, but it is well established in the psychology literature.

3. Gilovich & Griffin, *supra* note 2; Guthrie et al., *supra* note 2; Haidt, *supra* note 2; THALER & SUNSTEIN, *supra* note 2.

4. This example is from Jeffrey J. Rachlinski et al., *Context Effects in Judicial Decision Making* 14-15 (Aug. 3, 2009) (unpublished manuscript) (on file with the *McGeorge Law Review*).

5. *Id.* Example is a variation on the “Linda problem” made famous by Daniel Kahneman and Amos

Judge Irwin and Daniel Real offer other examples, including a test of cognitive reflection, which illustrates the way in which reliance on gut-level, intuitive styles of processing may cause predictable mathematical errors.<sup>6</sup> The principal concern of the authors is with the interaction between the representativeness heuristic and unconscious bias.<sup>7</sup> Research has shown that people who would deny being affected by racial, ethnic, gender, or other stereotypes might nevertheless be subject to unconscious biases that affect System 1 decision-making processes.<sup>8</sup> Judges may therefore be influenced, sometimes in literally life-or-death judgments, by attitudes of which they are consciously unaware.<sup>9</sup> “[I]ntuition is . . . the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affects the legal system.”<sup>10</sup>

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Tversky. The problem is based on the following set of facts: “Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.” Upon hearing this description of the hypothetical “Linda,” subjects consistently reported to Kahneman and Tversky that it was more likely that “Linda is a bank teller and is active in the feminist movement” than that Linda is simply a bank teller. See Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 *PSYCHOL. REV.* 293, 297 (1983); Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 84, 92 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., Cambridge University Press 1982). During informal discussions of the “Linda problem” at the Symposium, several people objected that the question was ambiguous in some way. Nonetheless, the results of the problem have been robustly reaffirmed under many different conditions that control for a wide variety of ambiguities. See Gilovich & Griffin, *supra* note 2, at 551-52.

6. The premise of this test is rather straightforward. Researchers begin by asking their research subjects to perform a simple mathematical equation. Once the subjects have answered, the researchers check those answers for accuracy. See Irwin & Real, *supra* note 1, at 6. Interestingly, researchers have found that a substantial majority of test subjects often respond with intuitively-appealing, but incorrect answers. Shane Frederick, *Cognitive Reflection and Decision Making*, 19 *J. ECON. PERSP.* 25, 26-27 (2005). For example, subjects who are presented with the “bat and ball” problem are asked the following question: “A bat and ball together cost \$1.10. The bat costs \$1.00 more than the ball. How much does the ball cost?” *Id.* The answer is of course five cents, as can easily be demonstrated by setting up the problem algebraically (“let  $x$  be the price of the ball; therefore the price of the bat is  $x + \$1.00$ ;  $x + (x + \$1.00) = \$1.10$ ; etc.). But because the “bat and ball” problem lends itself to System 1 processing, an answer of “ten cents” is much more intuitively appealing. *Id.* at 27. On the other hand, people make far fewer errors with the “banana and bagel” variation. *Id.* at 28. In that problem, “[a] banana and a bagel cost 37 cents. The banana costs 13 cents more than the bagel. How much does the bagel cost?” *Id.* The difference between this problem and the last is that with this problem, no intuitive answer pops up quickly. *Id.* As a result, people are required to slow down and set up the problem algebraically, thus relying on slow, conscious System 2 processes. *Id.* These results strongly support the dual-process model of decision-making.

7. See Gilovich & Griffin, *supra* note 2 (noting that “perceivers are thought to quickly (and often automatically) assign target individuals to a category, and then apply the attributes of the category to the person in question.”).

8. See, e.g., Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 *J. PERSONALITY & SOC. PSYCHOL.* 876 (2004); Mahzarin R. Banaji et al., *Implicit Stereotyping in Person Judgment*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 272 (1993); Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 *J. PERSONALITY & SOC. PSYCHOL.* 5 (1989).

9. See, e.g., Jennifer L. Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 *PSYCHOL. SCI.* 383 (2006).

10. Guthrie et al., *supra* note 2, at 31.

Implicit bias is an important phenomenon which deserves the attention of judges. As an occasional scholar of judicial ethics,<sup>11</sup> I am interested in a related question regarding the psychology of corruption and conflicts of interest. A number of high-profile cases in recent years have involved judges with personal or financial relationships with litigants. The public discussion of these cases has assumed the way a judge reacts to these connections is essentially within the judge's conscious control. Consider, for example, the short-lived but intense political furor in the spring of 2004, when it was reported that U.S. Supreme Court Justice Antonin Scalia had enjoyed an all-expenses-paid duck-hunting trip, complete with a free ride to Louisiana in a Gulfstream jet, with Vice President Dick Cheney. At the time of the hunt, Cheney was the nominal defendant in a lawsuit filed by the Sierra Club and Judicial Watch, seeking disclosure of information relating to an energy policy task force formed during the early months of the Bush administration, and a petition was pending in the Supreme Court for a writ of certiorari.<sup>12</sup> News reports of the trip triggered (in addition to a deluge of dreadful duck puns) a debate on judicial ethics in which both sides assumed that, whatever Justice Scalia did, it would be a conscious decision. Either he would favor his buddy Cheney or labor to put aside whatever gratitude he might feel for the duck-hunting trip and decide the case impartially. The debate assumed that the relevant harm (a biased decision) and the remedy (studied impartiality) were within Justice Scalia's capacity to control.<sup>13</sup> For practical purposes, the discussion concluded when Justice Scalia filed a lengthy memorandum denying the Sierra Club's motion that he recuse himself.<sup>14</sup> A similar controversy, involving eye-popping campaign expenditures and a frolic on the French Riviera, led to the U.S. Supreme Court's landmark decision in *Caperton v. A.T. Massey Coal Company*.<sup>15</sup>

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11. See, e.g., W. Bradley Wendel, *Impartiality in Judicial Ethics: A Jurisprudential Analysis*, 22 NOTRE DAME J. L., ETHICS & PUB. POL'Y 305 (2008).

12. See *In re Cheney*, 334 F.3d 1096 (D.C. Cir. 2003).

13. Compare Monroe H. Freedman, *Duck-Blind Justice: Justice Scalia's Memorandum in the Cheney Case*, 18 GEO. J. LEGAL ETHICS 229 (2004); E.J. Dionne, Jr., *Why Scalia Should Duck Out*, WASH. POST, Mar. 23, 2004, at A19; Maureen Dowd, *Quid Pro Quack*, N.Y. TIMES, Mar. 21, 2004 (on file with the *McGeorge Law Review*); Editorial, *If It Walks Like a Duck . . .*, CHI. TRIB., Feb. 13, 2004 (on file with the *McGeorge Law Review*); Editorial, *Scalia's Quack Defense*, PALM BEACH POST, Jan. 31, 2004; Editorial, *Scalia, Use Good Judgment; Bow Out of Cheney Case*, ATLANTA J.-CONST., Jan. 29, 2004 ("[T]he American public has grown so accustomed to scandal that they tend to suspect that whatever waddles and quacks like a duck probably is."); Editorial, *One Case Scalia Should Skip*, L.A. TIMES, Jan. 22, 2004 (on file with the *McGeorge Law Review*); Editorial, *Duck-Blind Justice*, ST. PETERSBURG TIMES, Jan. 21, 2004 with Ronald D. Rotunda, *Election-Year Hunting: Should Scalia Recuse Himself from Cheney-Related Cases?*, NAT'L REV., Mar. 30, 2004, available at <http://old.nationalreview.com/comment/rotunda200403300900.asp> (on file with the *McGeorge Law Review*). See also Martha Neil, *Duck Hunter's Call Sets Off a Quackas — Er, Fracas, Scalia's Written Memorandum Can't Stop Debate Over Recusal*, 3 A.B.A. J. E-REPORT 12 (2004), available at 3 No. 12 ABAJEREP 1 (Westlaw) (on file with the *McGeorge Law Review*).

14. *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913 (2004) (mem. of Scalia, J.).

15. 129 S. Ct. 2252 (2009). During the pendency of an appeal from a \$50 million tort judgment against the Massey Coal Company, Massey president Don Blankenship lavishly supported the campaign of Brent Benjamin, a challenger for a seat on the West Virginia Supreme Court. *Id.* at 2257. Blankenship funded a 527

A kind of psychological default rule exists in the American law of judicial disqualification and recusal. Numerous cases say something like this: “[T]he presumption is that a judge will put personal beliefs aside and rule according to the laws as enacted, as required by his or her oath.”<sup>16</sup> Judicial ethics scholars similarly assume that judges can decide cases using only conscious decision-making processes. Charles Fried, for example, defines the essence of judicial virtue as “a complex posture of involvement and studied remoteness.”<sup>17</sup> The suggestion in both case law and commentary is that a judge can, through effort and willpower, satisfy her ethical obligation of impartiality despite the influence of campaign contributions, friendships, ideological commitments, and the like. If it is the case that a judge can decide to set aside connections and loyalties to friends and supporters, then in cases like *Caperton* and Scalia’s duck-hunting trip, we are apparently worried about these judges willfully failing to comply with their ethical obligations. This strikes me as somewhat implausible, because it seems to imply that a significant threat to the administration of justice comes from judges who consciously and explicitly refuse to decide cases impartially. Although of course some judges evidently are crooks,<sup>18</sup> more interesting and difficult cases are presented by well-motivated judges who, nevertheless, may have difficulty deciding cases impartially because of unconscious biases.<sup>19</sup>

Judge Irwin and Daniel Real’s paper suggests an alternative causal story underlying the law of judicial disqualification and recusal. Rather than assuming that judicial bias and corruption is primarily a matter of either deciding or refusing to set aside one’s gratitude toward campaign supporters, as well as personal commitments, beliefs, and loyalties, we should understand the root problem as one of unconscious psychological processes. In other words, instead of worrying about crooked judges, we should worry about decent judges who are

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PAC with \$2.5 million and paid \$500,000 in direct expenditures for mailings and other campaign expenses (thus, the \$3 million was not, strictly speaking, a campaign “contribution,” as Professor Rotunda noted in his comments at the Symposium). *Id.* After Benjamin defeated the incumbent by a margin of 53.3% vs. 46.7%, he was seated on the West Virginia Supreme Court. *Id.* Soon thereafter, the Court, in a 3-2 decision, reversed the judgment against Massey Coal. *Id.* at 2256. But Benjamin wasn’t the only justice to have his motives questioned in that case. Another justice in the majority, Justice Maynard, was photographed with Blankenship on the French Riviera while the appeal was pending. See Adam Liptak, *Motion Ties W. Virginia Justice to Coal Executive*, N.Y. TIMES, Jan. 15, 2008. Justice Maynard did, however, remove himself from consideration of the *Caperton* case as a result. Steven Lubet, *It Takes a Court*, 60 SYR. L. REV. 221, 223 (2010) (This article also discusses the reactions of other judges on the West Virginia Supreme Court to their relationships with Blankenship.). *Id.* at 223-225.

16. *In re Aguinda*, 241 F.3d 194, 204 (2d Cir. 2000).

17. Charles Fried, *A Meditation on the First Principles of Judicial Ethics*, 32 HOFSTRA L. REV. 1227, 1228 (2004).

18. Consider, for example, the case of two judges in Luzerne County, Pennsylvania, who were charged with accepting \$2.8 million in kickbacks from the owner of a juvenile detention facility, in exchange for the judges’ agreement that they would increase the placement of juvenile defendants at the facility. Terrie Morgan-Besecker, *Conahan Likely Facing Prison*, TIMES LEADER (Wilkes-Barre, Pa.), Apr. 30, 2010.

19. Cf. Jason Dana & George Loewenstein, *A Social Science Perspective on Gifts to Physicians from Industry*, 290 J. AM. MED. ASS’N 252, 253 (2003) (reviewing empirical evidence on conflicts of interest and concluding that self-serving bias is unintentional).

susceptible to the same sorts of cognitive errors that affect the rest of us.<sup>20</sup> Reliance on fast, automatic processing is a pervasive feature of human decision-making. Errors sometimes result from the influence of these System 1 processes, and because they are mostly unconscious, judges may not be aware of the errors they are making. The result is still corruption and bias, but this explanation does not rely on some ethical failing on the part of the judge.

The practical implication of Judge Irwin and Daniel Real's account is that principles of judicial disqualification and recusal should closely resemble the law of disqualification of attorneys for conflicts of interest. Attorney conflicts rules regulate prophylactically. The party seeking disqualification need not show that its interests were actually harmed as a result of the conflict.<sup>21</sup> Disqualification is required upon a showing of some significant risk of an adverse effect, and the attorney failed to obtain the informed consent of the affected client.<sup>22</sup> Similarly, the law of judicial disqualification and recusal should focus on the risk of an adverse effect on the judge's ability to decide cases impartially, which is the most basic obligation in judicial ethics.

This prophylactic approach is necessary because of the unconscious nature of biased decision-making. The term "bias" refers not only to invidious racial and ethnic stereotypes, but also to any decision motivated by self-interest rather than those factors which ought to be taken into account when making the decision.<sup>23</sup> Accordingly, there is an important jurisprudential issue lurking in the background—namely, what factors a judge ought to take into account when making a decision. Despite the familiar rhetoric used at Senate confirmation hearings to refer to judges as "calling balls and strikes," it is generally accepted that judicial decision-making involves the exercise of discretion.<sup>24</sup> Two different

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20. See, e.g., Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (concluding that judges, like juries, are generally unable to disregard the influence of relevant, yet inadmissible, evidence).

21. See, e.g., *Fiandaca v. Cunningham*, 827 F.2d 825, 830 (1st Cir. 1987) ("The question, however, is not whether the state's second offer of judgment would have resulted in a settlement had plaintiffs' counsel not been encumbered by a conflict of interest. Rather, the inquiry we must make is whether plaintiffs' counsel was able to represent the plaintiff class unaffected by divided loyalties . . ."); *IBM Corp. v. Levin*, 579 F.2d 271, 280 (3d Cir. 1978) ("The fact that a deleterious result cannot be identified subsequently as having actually occurred does not refute the existence of a likelihood of its occurrence . . ."). See generally Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992).

22. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 cmt. c (2000).

23. See MODEL CODE OF JUDICIAL CONDUCT, Terminology (2007) (defining impartiality as an "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge").

24. See, e.g., Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1051 (2006) ("No serious person thinks that the rules that judges in our system apply, particularly appellate judges and most particularly the Justices of the U.S. Supreme Court, are given to them the way the rules of baseball are given to umpires."). Former Justice John Roberts called significant attention to this "balls-and-strikes" analogy during his Supreme Court confirmation hearing. Jack Shafer, *How the Court Imitates the World Series*, SLATE, Sept. 13, 2005, available at <http://www.slate.com/id/2126241> (on file with the *McGeorge Law Review*). Those critics with sufficient baseball knowledgeable immediately seized upon the comparison by

judges may decide a case differently, but it may be the case that neither was biased in the ethical sense because they both relied on considerations that are relevant to the justification of judicial decisions.<sup>25</sup> Disagreement is an unobjectionable feature of judging in a common-law system, but it necessarily complicates the evaluation of a judge's decision as biased. The experimental evidence cited by psychologists to illustrate judicial bias relies on the existence of a clear correct answer.<sup>26</sup> In many real cases facing judges, on the other hand, there may be many potentially right answers, along with some answers that are inadequately supported by the relevant considerations.

A comprehensive theory of judicial ethics, integrating both normative and empirical concerns, would have to grapple with the nature of the judicial role and its relationship with more general jurisprudential issues. For the purposes of this article, however, we can bracket the latter problems by assuming a judge may reach at least one well-supported conclusion and at least one inadequately supported conclusion. A troublesome case would thus be one in which prohibited considerations, such as gratitude for a campaign contribution or friendship with a party to the proceedings, would potentially cause the judge to reach an inadequately-supported conclusion. Going back to the two examples discussed previously, imagine that newly elected Judge Benjamin was trying to figure out the right way to decide the tort case against Massey Coal, or that Justice Scalia was deliberating about the right decision in the lawsuit seeking discovery of the members of Dick Cheney's energy task force. Presumably, it would be possible to obtain the legal opinion of numerous lawyers and judges, none of whom were involved in any way with these cases, and thereby determine a range of reasonable positions a judge could take. On the assumption that there are better or worse legal decisions the judges could make, these cases present a conflict between ethical decision-making and feelings of gratitude or loyalty toward one's friends and financial backers.

The problem in such a case is clearly stated by two psychologists who have studied conflicts of interest: "[W]hen professional responsibilities clash with self-interest, the two motives tend to be processed differently: Self-interest exerts a

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noting that strikes zones in baseball vary by umpire, so that Roberts's analogy conceded a great deal of subjectivity in judging. *See id.* (suggesting that much like no two judges see a case in exactly the same light, "no two umps see the same strike zone. They view the plate from different angles, react differently to pitches, and change their opinion of what a strike is from batter to batter. When umpires say they call balls and strikes the way they see them, they mean it literally. They are the strike zone."); *see also* Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007). Beyond the baseball point, critics have also accused conservative judges of not living up to their own rhetoric. In an op-ed piece for the *New York Times*, Geoffrey Stone of the University of Chicago pointed to cases like *Citizens United v. Federal Election Commission*, *District of Columbia v. Heller*, and *Parents Involved in Community Schools v. Seattle School District* as examples of activist judging that cannot be justified as merely calling balls and strikes. *See* Geoffrey R. Stone, Op-Ed, *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 14, 2010, at A27.

25. *See* Wendel, *supra* note 11.

26. *See supra* text accompanying notes 5-6 (the "Linda" and "bat and ball" problems have only one right answer, which is apparent upon reflection).

more automatic influence than do professional responsibilities, which are more likely to be invoked through controlled processing.<sup>27</sup> In other words, we tend to think about ethical decision-making as a matter of consciously applying rules and principles (i.e. System 2), but a significant threat to ethical decision-making comes in the form of unconscious influences that skew our intuitive, automatic (i.e. System 1) processes. Moreover, when people are busy or are under stress, it is more difficult for their controlled, System 2 processes to override automatic, System 1 processes.<sup>28</sup> Thus, a judge with the best of intentions may believe herself to be making her best efforts to put aside feelings of partiality or loyalty, but may be unable to override the influence of unconscious biases.

The word “feelings” is important, because many unconscious influences tend to be *affective*. How one is feeling turns out to have a significant impact on one’s decision-making. Studies show strong correlations between stock market returns and factors such as the weather and the performance of a country’s soccer team in the World Cup.<sup>29</sup> Being in a good mood is positively correlated with helping and cooperativeness.<sup>30</sup> Perceptions of risk may be influenced by anger or fear, and people may make very different subjective assessments of probability based on whether the outcome is associated with a strong emotion such as dread or excitement.<sup>31</sup> Because emotions have an effect on unconscious, System 1 decision-making processes, their influence may not be apparent, even to a decision-maker trying scrupulously to be impartial.

The effect of factors like unconscious bias and affective influence is further compounded by the dynamic nature of decision-making.<sup>32</sup> A decision may not be a one-off matter that is simply made with the decider going on to do something else. Rather, a person may have a hunch or a tentative hypothesis and work to confirm it. She may be aware of the possibility of making an erroneous decision and attempt to compensate for this possibility. She may also make decisions in a group setting, where the opinions of others play an important role. Thus, we must also be attentive toward those influences that affect the confirmation of decisions. One factor is the very human tendency toward overconfidence, which includes the unwarranted belief that we are able to minimize the impact of the very influences considered here.<sup>33</sup> One’s overconfidence may be exacerbated by

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27. Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189, 190 (2004).

28. *Id.* at 193.

29. Gilovich & Griffin, *supra* note 2, at 560.

30. See JOHN M. DORIS, LACK OF CHARACTER 30 (2002) (citing numerous studies).

31. Gilovich & Griffin, *supra* note 2, at 561-63; MAX H. BAZERMAN & DON MOORE, JUDGMENT IN MANAGERIAL DECISION MAKING 96-99 (7th ed. 1986).

32. See Haidt, *supra* note 2, at 998 (noting that moral reasoning essentially involves two processes: one process is automatic, while the other is conscious).

33. See David M. Messick & Max H. Bazerman, *Ethical Leadership and the Psychology of Decision Making*, SLOAN MGMT. REV., Winter 1996, at 9, 19-20.

confirmation bias—that is, the tendency to look for evidence to confirm one's initial hypothesis, rather than seeking out evidence to contradict it.<sup>34</sup>

Decision-making processes are also strongly influenced by framing effects, which arise from the way a person construes a situation.<sup>35</sup> Language can play a role in the way decisions are construed, where the term used calls to mind positive or negative features of the situation. For example, consumers judge seventy-five percent lean beef more favorably than beef that is described as twenty-five percent fat.<sup>36</sup> Business lingo is full of euphemisms—like “right-sizing” instead of firing, or “earnings management” instead of cooking the books—that seek to minimize the ethical consequences of a decision.<sup>37</sup> In a particularly nice experimental demonstration of the effect of language, the rate of subjects' cooperation in a Prisoner's Dilemma game varied according to whether they were told they were playing the “Wall Street Game” or the “Community Game.”<sup>38</sup> In a seven-round trial, subjects playing the Wall Street Game cooperated approximately thirty to forty percent of the time, while subjects playing the Community game had cooperation rates of approximately sixty-five to seventy percent.<sup>39</sup> Apparently the subjects believed that the norms of the game favored either cooperation or defection, and were prompted to adopt one set of norms by the label used to describe their situation.<sup>40</sup> Finally, people may also take guidance from previous decisions made in similar situations.<sup>41</sup> Because people need to make sense of past actions, they often strive to see themselves in a good light.<sup>42</sup> The result may be, however, that marginally unethical decisions made in

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34. See *id.* at 19; BAZERMAN & MOORE, *supra* note 31, at 28-30; Gilovich & Griffin, *supra* note 2, at 546-48; Haidt, *supra* note 2, at 998 (“[P]eople generally begin reasoning by setting out to confirm their initial hypothesis. They rarely seek disconfirming evidence, and are quite good at finding support for whatever they want to believe.”).

35. BAZERMAN & MOORE, *supra* note 31, at 62-67; Gilovich & Griffin, *supra* note 2, at 570-73.

36. Irwin P. Levin & Gary J. Gaeth, *How Consumers are Affected by the Framing of Attribute Information Before and After Consuming the Product*, 15 J. CONSUMER RES. 374, 374 (1988).

37. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223, 226-27 (2004).

38. Varda Lieberman, Steven M. Samuels & Lees Ross, *The Name of the Game: Predictive Powers of Reputation Versus Situational Labels in Determining Prisoner's Dilemma Game Moves*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1175 (2004). The experiment was run with similar results on both American undergraduate students and Israeli Air Force pilots and flight instructors. *Id.* at 1177-79.

39. *Id.* at 1177.

40. See Tenbrunsel & Messick, *supra* note 37, at 232 (arguing that external cues serve as a “signal that impacts the construal of the situation” and that “[t]he cognitive processing that follows is then unique to each frame”).

41. See John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 BROOK. L. REV. 1177, 1190-91 (2005).

42. Moore & Loewenstein, *supra* note 27, at 196-97. Moore and Loewenstein cite the famous “foot in the door” experiments, in which experimenters asked a group of homeowners either to sign a petition or to place a small sign in the window of their houses; those who accepted the small sign were significantly more willing on a later occasion to display a large, unattractive billboard in their yard. *Id.*; see also Jonathan L. Freedman & Scott C. Fraser, *Compliance Without Pressure: The Foot-in-the-Door Technique*, 4 J. PERSONALITY & SOC. PSYCHOL. 195 (1966). As the experimenters put it, one infers from past actions that one is “the kind of person

ambiguous situations will set a precedent for more serious wrongdoing in the future.<sup>43</sup> Together, these psychological effects may combine to “fade” ethical considerations from the decision-making process.<sup>44</sup>

Like doctors who are influenced by gifts from pharmaceutical companies to prescribe new and unnecessarily costly drugs,<sup>45</sup> judges may be unaware of the extent to which their decisions are influenced by unconscious factors. In his memorandum denying the Sierra Club’s motion for recusal, Justice Scalia took umbrage at the suggestion that a mere hunting trip could change his vote: “If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the nation is in deeper trouble than I had imagined.”<sup>46</sup> It may very well be unreasonable to believe that Justice Scalia would be *consciously* motivated to throw the case out of gratitude for the vacation. On the other hand, it is considerably more plausible to worry that the hunting trip, and the broader context of Scalia’s friendship with Cheney, exerted a subtle influence on Scalia’s unconscious decision-making process. Thinking about spending vacation time with one’s friends can be expected to trigger a positive emotional state. This positive affective condition may, in turn, have profound effects on the decision-making process that follows.

A bad mood may signify a troublesome situation, serving as something of a “trouble ahead, slow down” sign and leading to a processing style that is careful, systematic, and deliberate. A happy mood, in contrast, may signify a benign situation and serve as something of a “smooth sailing” sign, leading people to process information more heuristically and reflexively. A great deal of research supports this view, with people in positive moods being shown to engage more than those in negative moods in top-down rather than bottom-up analysis, heuristic rather than systematic processing, and global or abstract thought rather than specific or concrete thought.<sup>47</sup>

Thus, a plausible causal story would go something like this: Scalia’s good mood, which is the product of the pleasant memories from the hunting trip, implicitly triggers System 1 processes that lead him to unconsciously apply heuristics to reach certain tentative conclusions about how the case ought to come out. Those conclusions are then reinforced by confirmation biases when he seeks to subject them to testing.<sup>48</sup> This is not so much a story of corruption as it is

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who does this sort of thing.” *Id.* at 201.

43. Tenbrunsel & Messick, *supra* note 37, at 228; Darley, *supra* note 41, at 1185-86.

44. Tenbrunsel & Messick, *supra* note 37, at 224. The authors summarize their research by observing that “self-deception leads to coding, or framing, of decisions that either eliminate negative ethical characterizations or distort them into positive ones.” *Id.* at 231-32.

45. Dana & Loewenstein, *supra* note 19.

46. Cheney v. U. S. Dist. Court for D.C., 541 U.S. 913, 929 (2004) (mem. of Scalia, J.).

47. Gilovich & Griffin, *supra* note 2, at 560-61.

48. The heuristic involved may be availability—that is, the ease with which one can generate examples is an unconscious cue as to the likelihood of the relevant category. *Id.* at 549. Because of Scalia’s friendship

an explanation in terms of the perfectly ordinary and predictable operation of cognitive processes.

Thus, rather than seeing the Blankenship-Benjamin and Cheney-Scalia relationships as wicked and productive of corruption, it may be better to take a broader perspective and consider the ways in which judicial decision-making can be improved through attention to the cognitive processes involved. Three leading scholars of judicial psychology recommend several complementary approaches aimed at inducing System 2 deliberative processes and using them as a check against errors that may arise as a result of intuitive System 1 processes.<sup>49</sup> Their concern is not corruption, but predictable glitches in human decision-making that may cause judges to decide cases in ways they otherwise would not have, but for the influence of unconscious processes. The law of judicial recusal, disqualification, and conflicts of interest, which is the subject of this article, focuses on a subset of these cognitive glitches, relating to the influence of loyalty, affection, gratitude, and similar emotions. Some of the remedies recommended by Guthrie, Rachlinski, and Wistrich may be effective in this context. For example, requiring judges to give written reasons for their decisions induces deliberation, which can override the effects of System 1 processing.<sup>50</sup> In light of the findings of behavioral psychology, however, we have reason to be skeptical of many of the strategies that are often suggested for dealing with conflicts of interest. Simply reminding judges of their duty of impartiality is unlikely to be effective because education improves only conscious decision-making and has no effect on unconscious biases. Without some kind of selective intuition-override, it is futile to concentrate solely on improving System 2 processes.<sup>51</sup>

The further implication of this research may be that changes are necessary in the law of recusal and disqualification. At the present time, for example, there is no rule prescribing that social friendships with a party to a pending proceeding automatically constitute a basis upon which to infer a lack of impartiality, even if the judge and the party are relatively close friends.<sup>52</sup> The problem with amending the rules is that the sweep of recusal duties could be very broad indeed if the goal was to eliminate all possible effects of unconscious decision-making processes. We remain confident in the capacity of judges to hold attachments, loyalties, and

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with Cheney, he may be more inclined to associate positive qualities with the energy task force and, therefore, be less inclined to require disclosure of the membership. *Id.*

49. See Guthrie et al., *supra* note 2, at 33-42.

50. *Id.* at 37-38.

51. This statement is qualified by talking about "selective" intuition-override because not all effects of System 1 processing can or should be eliminated. For example, if positive moods tend to induce intuitive processes of judgment, and these processes are prone to certain predictable errors, the remedy for these errors surely cannot be for decision-makers to avoid getting into a happy frame of mind.

52. See RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 8.12.1 (1996). In his memorandum denying recusal, Justice Scalia provides a long and colorful history of judges having friendly social relationships with executive branch officials. See *Cheney*, 541 U.S. at 916-17 (2004) (mem. of Scalia, J.).

commitments aside and decide cases impartially: “A judge’s political beliefs, his or her policy preferences, should not cause concern unless they hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood.”<sup>53</sup> While a great deal of recent research shows this confidence to be unwarranted, the effect of unconscious biases is so pervasive that it is difficult to contemplate a different regime of disqualification and recusal rules that would adequately respond to the problem. I mention this not to end on a note of futility, but merely to emphasize that Judge Irwin and Daniel Real are on to something extremely important here that deserves a great deal of thoughtful consideration.

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53. Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination, and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1999 (1997).

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