



CSU
College of Law Library

Cleveland State Law Review

Volume 42 | Issue 1

Article

1994

Judicial Bias

Donald C. Nugent

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstlrev>

Part of the [Judges Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Donald C. Nugent, *Judicial Bias*, 42 Clev. St. L. Rev. 1 (1994)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol42/iss1/10>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

JUDICIAL BIAS¹

DONALD C. NUGENT²

I. INTRODUCTION	2
II. PERCEPTION AND THE DECISION-MAKING PROCESS	4
A. <i>An Illustration of the Problem of Perception</i>	8
B. <i>The Influence of Schemata on Perception and</i> <i>Decision-Making</i>	12
1. Attention	12
2. Adaptation	14
3. Organization	17
III. JUDICIAL DISQUALIFICATION AND RECUSAL STANDARDS	20
A. <i>Disqualification of a Federal Judge</i>	22
B. <i>Disqualification of a State Judge</i>	29
IV. THE IMPACT OF BIAS AND PREJUDICE ON THE DECISION- MAKING PROCESS	34
A. <i>Categories of Bias</i>	34
1. Gender Bias	34
a. <i>Gender Bias and Family Law</i>	35
i. Property Settlements and Alimony	36
ii. Child Support	37
iii. Child Custody	40
b. <i>Gender Bias and Victims of Crime</i>	41
c. <i>Gender Bias and Women Attorneys,</i> <i>Litigants and Witnesses</i>	43

¹This article is in partial fulfillment of the requirement for the Master of Judicial Studies Program at the University of Nevada, Reno, in cooperation with the National Judicial College.

²Judge, Ohio Court of Appeals, Eighth Appellate District; A.B., Xavier University and Loyola University of Rome, Italy, 1970; J.D., Cleveland State University, Cleveland-Marshall College of Law, 1974. Judge Nugent is a veteran of the United States Marine Corps, a member of the Vietnam Veterans of America, Inc., and a member of the Board of Trustees of the Greater Cleveland Veterans Memorial, Inc. Judge Nugent was an Assistant Prosecuting Attorney for Cuyahoga County, Ohio, in the Major Trial division from 1975 through 1984. Judge Nugent was elected as judge in the General Division of Cuyahoga County Common Pleas Court in 1984, was re-elected in 1990, and was elected to the Court of Appeals in 1992. Judge Nugent is co-founder and vice-chair, judicial, of the Litigation Section of the Cleveland Bar Association and a member of the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association.

2. Racial and Ethnic Bias	45
3. Other Areas of Bias	48
a. <i>Regional Bias</i>	48
b. <i>Economic or Wealth Bias</i>	48
B. <i>Impact of Judicial Bias and the Jury</i>	49
1. Juror Bias vs. Judicial Bias	49
a. <i>Prophylactic Procedures within the Jury System to Diminish Individual Biases of Jurors</i>	52
b. <i>Competency of the Jury</i>	55
2. Juror Attitude Toward Judges	56
V. THE JUDGE'S RESPONSIBILITY AND THE NEED FOR EDUCATION . . .	58
VI. CONCLUSION	59

The good judge takes equal pains with every case no matter how humble; he knows that important cases and unimportant cases do not exist for injustice is not one of those poisons which, though harmful when taken in large doses, yet when taken in small doses may produce a salutary effect. Injustice is a dangerous poison even in doses of homeopathic proportions.³

I. INTRODUCTION

The problems of bias⁴ and prejudice⁵ are pervasive throughout our society. In every facet of life, public and private, the human tendencies to fear, distrust

³PIERO CALAMENDREI, EULOGY OF JUDGES 9596 (J. Adams et. al. trans., 1942).

⁴BLACK'S LAW DICTIONARY 147 (5th ed. 1979) defines "bias" as: [A]n [i]nclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders a judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of judge, refers to mental attitude or disposition of the judge toward a party to the litigation, and not to any views that he may entertain regarding the subject matter involved.

The term "bias," as used in this effort, refers to an inclination, a predilection, that interferes with impartiality.

⁵WEBSTER'S NEW WORLD DICTIONARY 1122 (2d ed. 1984) defines "prejudice" as: [A] judgment or opinion formed before the facts are known; [a] preconceived idea, favorable or, more usually, unfavorable; . . . a judgment or opinion held in disregard of facts that contradict it; [or] . . . suspicion, intolerance, or irrational hatred of other races, creeds, religions, occupations, etc.

Prejudice implies a preconceived and unreasonable judgment or opinion, usually an unfavorable one, marked by suspicion, fear, intolerance, or hatred.

and judge others challenge society to overcome division and replace bias and prejudice with fairness. This challenge—the struggle for fairness—runs like a cord through this Country's history. It was the prize in the Revolution, the theme of our Constitution, and the fuel of recent riots. Today, the struggle is most visibly displayed in the arena of the American justice system. It is in our Nation's courtrooms that we place our hope and faith that this government of laws will dispense justice with fairness, unstained by the bias and prejudice of people. Indeed, too often we are content to believe that bias and prejudice do not operate in the sacred sphere of our courts. In the struggle for fairness, such contented disbelief is a very dangerous thing, particularly for judges whose very role it is to be unbiased and fair.

The United States Supreme Court has held that "[a] fair trial in a fair tribunal is a basic requirement of due process."⁶ Fundamental to the notion of a fair trial and tribunal is the principle that a judge shall apply the law impartially and free from the influence of any personal biases.⁷ And yet, judges disserve themselves and the system if they presume that bias and prejudice do not enter the decisionmaking process to some degree. As one judge observed, "to recognize the existence of such prejudices is the part of wisdom."⁸

As noted, the terms "bias" and "prejudice" are not synonymous. The two are neither mutually inclusive nor mutually exclusive. Prejudice may be more overt and forceful, while bias has a tendency to be less overt and more sublime.

This article examines how bias and prejudice may impact the decisionmaking process of our judiciary. It begins in Part II from the premise that all judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process. To the extent that we, as judges, recognize the potential for bias to enter into our deliberations, we combat the potential harm and unfairness that bias can produce if unchecked. Moreover, attorneys and other participants in the justice system should also be conscious of the operations of bias, both in the judges before whom they practice and in their own representation as counselors.

Bias implies a mental leaning in favor of or against someone or something. Few of us are without bias of any kind.

⁶*In re Murchison*, 349 U.S. 133, 136 (1955) (the Constitution requires that hearings take place before an impartial tribunal); *Tumey v. Ohio*, 273 U.S. 510, 512 (1926) ("A trial before a tribunal financially interested in the result of its decision constitutes a denial of due process of law.").

⁷*West Virginia Judicial Inquiry Comm'n v. Dostert*, 271 S.E.2d 427, 434 (W. Va. 1980) ("It is axiomatic that a judge serves as a neutral and detached magistrate. He is charged with the duty of impartiality in administering justice."); Charles Malarkey, *Judicial Disqualification: Is Sexual Orientation Cause in California?*, 41 HASTINGS L.J. 695, 695 (1990).

⁸JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 414 (1949).

Part III of the article discusses the recusal standards formulated by the legislature, the courts, and bar associations which judges and attorneys use to recognize the potential biases a judge may possess. It will be demonstrated that much attention has been given to the issues of recusal and disqualification by those interested in actual and perceived judicial fairness and impartiality. The existence of legislative, judicial and bar association recusal and disqualification standards and procedures is a recognition of judicial bias and prejudice.

Despite many informal and formal procedures enacted to identify potential areas of judicial bias and prejudice, generally litigants will have their case decided by the originally assigned judge. As such, this fact should encourage judges to work hard to prevent any bias or prejudice from entering into the decisionmaking process.

Part IV of the article outlines several areas where bias can and does operate in the justice system. By educating ourselves about the various areas where bias commonly occurs, we take great strides toward eliminating the harmful impact that bias may have on an otherwise fair and just system.

Finally, this article concludes with a discussion on the jury system. First, it highlights the inherent mechanisms within the jury selection process to reduce bias and prejudice from the jury panel. Second, it identifies the importance of a trial judge's appearance of impartiality when in front of a jury. As a result, it will be argued, despite what critics of the jury system contend, jurors can and often do accomplish a more fair and unbiased result than judges.

II. PERCEPTION AND THE DECISION-MAKING PROCESS

The primary decisionmakers in our justice system are the judges. A judge's opinions may shape and determine the outcome of every case. Surprisingly, however, few studies analyze the manner and method of the judiciary's decision-making process. Ideally, judges reach their decisions utilizing facts, evidence, and highly constrained legal criteria, while putting aside personal biases, attitudes, emotions, and other individuating factors.⁹ This ideal,

⁹Robert N. Wilentz, *Judicial Legitimacy—Finding the Law*, 8 SETON HALL LEGIS. J. 221, 221-22 (1985). Traditional jurisprudence teaches that there are five approaches to judicial decision-making: (1) the mechanical approach; (2) the logical or neutral principles theory; (3) the historical approach; (4) custom; and (5) public policy. RUGGERO J. ALDISERT, *THE JUDICIAL PROCESS* 777 (1976). The mechanical approach posits that judges simply apply predetermined rules to the facts of a case and decide the case accordingly. The logical or neutral principle theory strives to fill the gaps left open by the mechanical approach. Recognizing that specific rules sometimes do not apply to a situation, this theory posits that judges faced with this situation analyze the underlying legal principles and then "logically" extend them to fashion a new rule applicable to the case. The historical approach theory suggests that judges look for the applicable legal principle, attempt to determine through historical analysis the intent of those who framed the legal principle, and decide the case in keeping with that intent. The custom approach theory to deciding cases suggests that judges look to any practice that has existed since "time immemorial" and decide the case in accordance therewith. And finally, the public policy approach theory to deciding cases looks to the underlying

however, while appealing to most judges, does not coincide with the findings of behavioral scientists, whose research has shown that human beings rarely, if ever, conform to such idealistic principles.¹⁰

Judges are expected to be rigorous in excluding personal bias when making decisions; hence, there are few judges who would readily admit that they have biases which interfere with their impartiality. Indeed, judges are typically appalled if their impartiality is called into question.¹¹ After all, most judges believe themselves to be consistently objective, impartial and fair. Judges generally believe that they have taken great strides to be equitable and that they have granted full latitude to each side in a controversy, allowing both sides the opportunity to fully present their case. Unquestionably, judges believe that they have decided cases in a manner that is in harmony with the facts and pertinent legal issues involved.¹² Rarely do judges question whether they have conducted themselves with what Edmund Burke called the "cold neutrality of an impartial judge."¹³

But it is exactly through this blind faith in their impartiality that judges may gain a false sense of confidence in their decisions. They may fail to take into account the unavoidable influences we all experience as human beings and disregard the limits of human nature and the difficulty of bringing to the conscious level subjective motivations, beliefs and predilections.¹⁴

Lord MacMillan evinced a shrewd awareness of this weakness in human nature when he said:

The judicial oath of office imposes on the judge a lofty duty of impartiality. But impartiality is not easy of attainment. For a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by the possessor. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice might be a mechanical product, but amidst the incalculable complexities of

policies of statutes, regulations, contracts, constitutional provisions or the common law as the basis for decisions. *Id.*

¹⁰Amos Tversky & Daniel Kahneman, *Evidential Impact of Base Rates*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 153-60 (D. Kahneman et al. eds., 1982); Galen V. Bodenhausen, *Stereotypic Biases in Social Decision Making and Memory: Testing Process Models of Stereotype Use*, 55 J. PERSONALITY & SOC. PSYCH. 726, 726-37 (1988); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial By Heuristics*, 15 L. & SOC. REV. 123, 127 (1980).

¹¹Bernard L. Shientag, *The Personality of the Judge*, in HANDBOOK FOR JUDGES 67 (1961).

¹²*Id.*

¹³*Id.*

¹⁴*Id.*

human relationship the administration of justice can never be of this character. To quote the ancient and impressive formula, the judge in pronouncing his decision must be rightly advised, and have God and a good conscience before him . . . he must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments.¹⁵

The essential insight of Lord MacMillan's writing was that impartiality denotes a recognition of and a sensitivity to the contrasting positions of those involved in a controversy, but that judges, as human beings, naturally perceive these outlooks and positions and measure them against their own values, experiences, ideas, etc., which will influence how they decide their cases.

Certainly, it is a difficult, if not nearly an impossible, task for judges to separate themselves from all of the various influences which they bring with them to the decisionmaking process. Some influences are internal or personal, such as the age, generation, religion, values, upbringing, temperament, and the physical condition of the judge.¹⁶ Others are external, such as the culture and norms of the community in which the judge lives,¹⁷ legal and political tensions,¹⁸ the megatrends produced by the information society, the extent of the judge's power, the judge's time constraints and access to information, and the rules regulating the manner in which judges may fulfill their judicial duties.¹⁹

These subjective influences operate to select and interpret new information as it is filtered through the perceptual process. Since perception is subjective and influenced by so many of these factors, it is often difficult for judges to find the real and relevant facts when making a decision. For example, physiological, psychological, or emotional mechanisms may prevent assimilation of all the incoming information, forcing judges, consciously or unconsciously, to process only those pieces of information that conform to their preexisting cultural and social biases.²⁰

I am mindful that most judges strive diligently to avoid bias or sympathy in making their decisions and firmly believe their rulings are free from extraneous influences.²¹ But psychologists tell us it is easy for persons to rationalize their

¹⁵LORD MACMILLAN, *LAW AND OTHER THINGS* 217, 218 (1939). See also VISCOUNT ALVERSONE, *RECOLLECTION OF BAR AND BENCH* 240, 241 (1914).

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.*

¹⁹John M. Walker, Jr., *Decisionmaking in Government: A Personal Perspective*, 36 *FED. B. NEWS & J.* 333, 334 (1989).

²⁰Lorenzo Arredondo et al., *To Make A Good Decision ... Law and Experience Alone Are Not Enough*, *JUDGES' J.*, Fall 1988, at 23.

²¹Shientag, *supra* note 11, at 13.

behavior;²² individuals can almost always find excellent grounds for doing what they want to do. Therefore, the bases judges give for their decisions could be rationalizations or afterthoughts and not real determinants.

Unquestionably, judges who understand that everyone is susceptible to partiality and prone to be affected by bias are apt to make a prudent attempt at impartiality. On the other hand, judges who consider that their advancement to the bench automatically makes them dehumanized vehicles of faultless, logical truth will not be as impartial.²³

It is critical, therefore, that judges and the legal community be aware of how bias enters into the decision-making process. Once educated about how bias enters the decisionmaking equation, judges can identify various personal biases and attempt to minimize their effects.

Recent formulations in the behavioral sciences concerning perception can be employed, with considerable practical success, to an understanding of how personal bias enters into the decisionmaking process undertaken by any judge. Simply stated, these formulations posit that an individual's search for the truth is hampered by certain normal and natural processes that occur whenever humans attempt to extract, organize and use information from the world around them.²⁴ There is substantial experimental evidence to show that human perception is perforce selective and that the organization of perceptual experience depends, at least in part, upon what we expect and believe and what we take for granted.

The remainder of this section broadly examines various constraints on the decisionmaking process. One goal is to demonstrate to judges the many facets of perception that influence decisions—decisions that are too often presumed to be based solely on evidence presented in a case. A second goal is to alert litigants and their counsel to the many factors influencing judicial decisionmaking. As the decisions of trial judges are usually final, since very few decisions are ever reversed on appeal, it is important that both judges and litigators be sensitive to the various factors that impact their decisions.²⁵

²²*Id.* at 15.

²³*Id.*

²⁴RONALD H. FORGUS & LAWRENCE E. MELAMED, PERCEPTION: A COGNITIVE STAGE APPROACH 125-57 (1985); Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1134 (1987); George A. Miller, *The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information*, 63 THE PSYCHOL. REV. 81, 95-96 (1956).

²⁵See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1992 193 T.317 (112th ed. 1992).

A. An Illustration of the Problem of Perception

A POINT OF VIEW

A. Averchenko

"Men are comic," she said, smiling dreamily. Not knowing whether this indicated praise or blame, I answered noncommittally: "Quite true."

"Really, my husband's a regular Othello. Sometimes I'm sorry I married him." I looked helplessly at her. "Until you explain—" I began.

"Oh, I forgot that you haven't heard. About three weeks go, I was walking home with my husband through the square. I had a large black hat on, which suits me awfully well, and my cheeks were quite pink from walking. As we passed under a street light, a pale, darkhaired fellow standing near by glanced at me and suddenly took my husband by his sleeve."

"'Would you oblige me with a light,' he says. Alexander pulled his arm away, stooped down, and quicker than lightning, banged him on the head with a brick. He fell like a log. Awful!"

"Why, what on earth made your husband get jealous all of a sudden?" She shrugged her shoulders. "I told you men are very comic."

Bidding her farewell, I went out, and at the corner came across her husband.

"Hello, old chap," I said. "They tell me you've been breaking people's heads."

He burst out laughing. "So, you've been talking to my wife. It was jolly lucky that brick came so pat into my hand. Otherwise, just think: I had about fifteen hundred rubles in my pocket, and my wife was wearing her diamond earrings."

"Do you think he wanted to rob you?"

"A man accosts you in a deserted spot, asks for a light and gets hold of your arm. What more do you want?"

Perplexed, I left him and walked on.

"There's no catching you today," I heard a voice from behind.

I looked around and saw a friend I hadn't set eyes upon for three weeks.

"Lord!" I exclaimed. "What on earth has happened to you?"

He smiled faintly and asked in turn: "Do you know whether any lunatics have been at large lately? I was attacked by one three weeks ago. I left the hospital only today."

With sudden interest, I asked: "Three weeks ago? Were you sitting in the square?"

"Yes, I was. The most absurd thing. I was sitting in the square, dying for a smoke. No matches! After ten minutes or so, a gentleman passes with some old hag. He was smoking. I go up to him, touch him on the sleeve and ask in my most polite manner: 'Can you oblige me with a light?' And what do you think? The madman stoops down, picks up something, and the next moment I am lying on the ground with a broken head, unconscious. You probably read about it in the newspapers."

I looked at him and asked earnestly: "Do you really believe you met up with a lunatic?"

"I am sure of it."

Anyhow, afterwards I was eagerly digging in old back numbers of the local paper. At last I found what I was looking for: A short note in the accident column.

UNDER THE INFLUENCE OF DRINK

"Yesterday morning, the keepers of the square found on a bench a young man whose papers show him to be of good family. He had evidently fallen to the ground while in a state of extreme intoxication, and had broken his head on a nearby brick. The distress of the prodigal's parents is indescribable."²⁶

Perception is our ability to notice, organize and integrate information, so-called stimuli, from and about the world around us.²⁷ As suggested by the illustration above, the perceptual process is much more complex than it might at first seem. Different individuals often collect and interpret facts about situations, events and others in contrasting ways, or integrate them in unique ways, with the result that they reach sharply different conclusions.²⁸ In recent years, behavioral scientists who have directed increasing attention to this issue—to the ways individuals collect and organize information and then make judgments on the basis of such information—attribute the differences in the way individuals perceive situations, events and others, to the different ways individuals cope with information overload.²⁹

When we think or engage in behavior which involves the mind, all of us necessarily carry on an internal conversation. We make indications of things to ourselves, sometimes even rehearsing alternative lines of action, solutions or results.

²⁶JOEL M. CHARON, *SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION* 1 (3d ed. 1989).

²⁷*Id.* at 3.

²⁸ROBERT A. BARON & DONN BYRNE, *SOCIAL PSYCHOLOGY: UNDERSTANDING HUMAN INTERACTION* 76 (5th ed. 1987).

²⁹*Id.*

This dialectic process involves two components of the self: the I, a spontaneous and impulsive aspect; and the ME, a set of internalized social definitions. In the interplay between these aspects of the self, individuals import into their behavior the same processes that take place during a dialogue.

Thus, human behavior, which is profoundly affected by the decision-making process, is both an elaborate process of interpreting, choosing and rejecting possible lines of action or alternative decision-making in response to both the external stimuli being perceived, as well as an expression of pre-established inclinations and meanings within an individual.³⁰

Stop for a moment and think about the last trial, hearing or settlement conference over which you presided. How many thousands of stimuli confronted you—all the sights and sensations, all the words spoken by everyone present, all the possible implications of everything that happened? It is simply impossible for us to notice, let alone analyze and use, all of the sensory information available in our surrounding environment. If we were capable of consciously perceiving all of the sensory information available, the vast amounts of information would cause an overload. Consequently, the brain uses simplifying strategies, so-called to help it reduce the quantity and complexity of information which must be integrated to yield a rational decision.³¹ Of particular interest to this effort is what behavioral scientists refer to as schemata, which are among the mind's main weapons for coping with information overload.³²

To simplify the complex flood of information from the world, we tend to categorize objects, people and occurrences into groups, types or categories—that is, into schemata—so that we can treat nonidentical stimuli as if they were equivalent.³³ We sort objects, people and occurrences according to similarities in their essential features, forming natural mental categories about "kinds" or "types" of guns, men, women, parties, etc.³⁴ Schemata allow us to structure and give coherence to our general knowledge about people and the social world, providing expectations about typical patterns of events and behavior and the range of likely differences between people and their characteristic attributes.³⁵

Our aim in using schemata is to reduce the quantity and complexity of incoming information by abstracting its main gist, but to avoid oversimplification which sacrifices too much of the information. Schemata guide this selective filtering of incoming information by providing a model of

³⁰CHARON, *supra* note 26, at 7.

³¹BARON & BYRNE, *supra* note 28, at 77.

³²*Id.* at 99.

³³ALBERT H. HASTORF & ALICE M. ISEN, *COGNITIVE SOCIAL PSYCHOLOGY* 34 (1982).

³⁴*Id.*

³⁵*Id.*

what to expect;³⁶ they tell the brain what information to pay attention to and what information to ignore. For example, when evaluating a drug offender case, invocation of a "drug offender" schema would probably contain information (suppositions) about the personality of the criminal, the kinds of crimes likely to be in the record, reasons why these crimes are committed, reasons why the individual got involved with drugs, prognosis for treatment, social history, and so forth. The brain then notices, selects and organizes incoming information within this general framework. Schemata, thus, enable judges to talk about "cases like these" and to appear to know more about a case than they could have read.

Behavioral scientists, who have given much attention lately to the problems of biased perception and introspection presumed to accompany a decisionmaker's reliance on schematic knowledge, debate the degree to which schematic knowledge may be efficient to use (by permitting decisionmakers to structure and use their general knowledge about people and the world), but easily abused (by often providing the decisionmakers with an inaccurate, biased view of reality).³⁷

Some suggest that schemata are especially useful in an overloaded legal system, plagued with constraints of time and resources, as they enable judges to readily differentiate relevant from irrelevant information and isolate key facts for attention. They contend that without schemata, each new case would require significantly more of a judge's time and attention.³⁸ Others are quick to point out, however, that the price we pay for such efficiency is bias in our perceptions and judgments. These scientists contend that our perceptions often become schemata driven, impervious to new information.³⁹ They raise the points that schemata make it easier for decisionmakers to make snap judgments, to color and distort facts, and to prejudge new ideas in terms of past practices rather than to be objective.

While I surely cannot provide a definitive answer to this complex debate, I can hope to stimulate attention on the part of the legal community as to how schematic knowledge impacts perception and produces bias in decision-making.

We turn now to a closer examination of schemata, their impact on perception, and their implications for judicial decision-making.

³⁶BARON & BYRNE, *supra* note 28, at 100.

³⁷Ronald A. Farrell & Malcolm D. Holmes, *The Social and Cognitive Structure of Legal DecisionMaking*, 32 SOC. Q. 529, 536-38 (1991); Lee Jussim, *Social Perception and Social Reality: A Reflection/Instruction Model*, 98 PSYCHOL. REV. 54, 56 (1991).

³⁸Farrell & Holmes, *supra* note 37, at 532.

³⁹RICHARD E. NISBETT & LEE ROSS, *HUMAN INFERENCES: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* 113-38 (1980); Gordon H. Bower et al., *Scripts in Memory*, 11 COGNITIVE PSYCHOL. 177, 178 (1979).

B. The Influence of Schemata on Perception and Decision-Making

Most of the research on the effect of schemata on perception and decision-making has focused on their impact on the three main stages of the perceptual process—attention, adaptation, and organization.⁴⁰ Attention refers to what sensory information we notice; adaptation refers to what sensory information we encode; and organization refers to how we interpret and make sense out of sensory information. The basic underlying premise is that because of information overload, we notice only a small part of the world that confronts us; we encode only a small part of what we notice; and we retrieve only a small part of what was previously stored in our memories. These processes are not random. Rather, the mind uses schemata to help it select from all the possible things that could be noticed, encoded, and recalled. Understanding how and why the mind selects certain pieces of information over others is the key to understanding how bias enters into the decisionmaking process.

Some of the major effects of schemata on attention, adaptation and organization are summarized below.

1. Attention

Attention span and arousal of attention are elemental to perception. Obviously, you cannot perceive something you never notice. Attention is also, however, the hardest part of the perceptual process for researchers to study since it is difficult to know whether a stimulus was never noticed or whether it was noticed but forgotten.⁴¹ For this reason, there is less information about attention than about adaptation and organization. Still, there is some evidence about how schemata influence attention.⁴² Schemata tell decisionmakers what to expect, and information that confirms these expectations naturally draws their attention. Considerable research has shown that the attention of individuals often moves in the direction of what they expect to observe.⁴³ This sort of tunneled attention, however, can, and often does, lead to what psychologists refer to as an expectancyconfirmation bias, which is the tendency of individuals to perceive reality in ways that confirm their expectations.⁴⁴ According to some psychologists, the old saying, "If I didn't see it, I wouldn't have believed it," is probably less true than another, "If I didn't believe it, I wouldn't have seen it."⁴⁵

⁴⁰Donald E. Vinson, *Juries: Perception and the DecisionMaking Process*, TRIAL, Mar. 1982, at 52.

⁴¹BARON & BYRNE, *supra* note 28, at 100.

⁴²*Id.*

⁴³HASTORF & ISEN, *supra* note 33, at 180.

⁴⁴John M. Darley & Paget H. Gross, *A HypothesisConfirming Bias in Labeling Effects*, 44 J. PERSONALITY & SOC. PSYCHOL. 20, 20-22 (1983).

⁴⁵Jussim, *supra* note 37, at 55. See also GORDON W. ALLPORT & LEE JOSEPH POSTMAN, THE PSYCHOLOGY OF RUMOR 25 (1965). This well-known study on rumor transmission

Some attorneys may trade on this defect of perception by trying to paint a personality picture of a party to the judge such as "chronic litigant" or "career criminal," etc., banking on the fact that individuals tend to rely on their stereotypes or implicit personality theories when forming judgments.

Paradoxically, other studies have found that information which violates expectations and threatens existing schemata often stands out and gets extra attention in the decisionmaking process. According to researchers, when information varies greatly from judges' expectations, the information is likely to be attended but at the same time, in an effort to maintain their existing beliefs, judges will often discount, redefine, or distort available information so that they can explain away or fit the inconsistent information into their preexisting expectations.⁴⁶

This dynamic is, perhaps, most often found in cases where the facts or law push judges toward a conclusion which they feel is unjust. In order to alleviate the psychological discomfort which they will undoubtedly experience, judges will need to realign the facts in some way, or do some creative interpreting of the law, in order to resolve their desire to reach a just decision. They may do this consciously or unconsciously, depending on how they perceive the role of a judge. If they are uncomfortable with the notion of a judge acting as a legislator, they will undoubtedly engage in an elaborate rationalization process to make it seem as though they are merely applying the principle of *stare decisis*.

Considerable research on selective attention also reveals that individuals pay more attention to attractive people than they do to those whose appearance is more average and that individuals' impressions of physically attractive people are much more positive than their impressions of unattractive people. For example, people who are physically attractive are perceived as more intelligent, more likeable, and less aggressive than those who are unattractive.⁴⁷

Given these findings, several researchers have attempted to determine whether judges perceive attractive parties differently than unattractive parties and, if so, whether this factor influences their decisions. While the results are not definitive, there is at least some evidence that judges can be swayed by physical appearance.

dramatically demonstrates the expectancyconfirmation bias. Study subjects were asked to look at a drawing of a scene in a New York subway and then to describe the scene to other subjects, who in turn described what they had heard to other subjects. The drawing included two standing men, one black, the other white, engaged in conversation. The black man held both hands open during the conversation; the white man held a straight razor in his left hand. When the subjects passed the information along to others, their descriptions often shifted the razor to the black man's hand. The subjects' preconceptions—their schemata about blacks and whites—influenced what they perceived and described. Many subjects did not describe reality; rather, they described what they expected. *Id.*

⁴⁶Farrell & Holmes, *supra* note 37, at 534.

⁴⁷John E. Stewart, II, *Defendants' Attractiveness as a Factor in the Outcome of Criminal Trials: An Observation and Study*, 10 J. APPLIED SOC. PSYCHOL. 348, 348-55 (1980).

In one study that rated the physical attractiveness of seventy-four male defendants in Pennsylvania courts, for example, it was reported that attractive convicted defendants tended to receive lighter sentences from judges than unattractive defendants and were considerably less likely to serve prison sentences than unattractive defendants. The limitation on the effects of physical attractiveness on decisions seems to be the severity of the allegations. Researchers report that as the severity of the offense increases, the less effect physical attractiveness will have on decisions.⁴⁸

2. Adaptation

Not everything that is noticed gets committed to memory. Instead, given the limitations on our ability to perceive all available sensory information, much of this information goes in one ear and out the other. The concept of adaptation refers to the process by which we adjust to this constant field of sensory stimulation.⁴⁹ We may adapt positively by encoding a stimulus and structuring it into meaningful information or we may adapt negatively by filtering the stimulus out.⁵⁰ Schemata have a powerful influence over how we adapt to incoming information.

It is a wellknown adage that individuals often see and hear what they wish. Such wishes have their roots in expectations (that is, schemata) and beliefs that we all carry within us. And, as was the case with selective attention, we often adapt positively to stimuli simply because they confirm our expectations and beliefs.⁵¹

Some theorists contend that positive adaptation to schema consistent information is especially likely in an overlyburdened legal system where the organizational imperative of bureaucratic efficiency is an overriding demand.⁵² They suggest that the less "real" information judges have to go on in evaluating a case and the less time they have to think about that information, the more likely they are to rely on their expectations in adapting to information.⁵³ Some critics of the American judicial system suggest that this imperative of organizational efficiency feeds the perpetuation of legal stereotypes.⁵⁴ This is seen, perhaps, most prevalently in the criminal arena when charged offenses are inconsistent with a defendant's social (i.e., noncriminal) status.

⁴⁸Dr. Jeffrey R. Boyll, *Factors in Jury Verdicts*, 15 L. & PSYCHOL. REV. 163, 181 (1991).

⁴⁹HASTORF & ISEN, *supra* note 33, at 18084.

⁵⁰Vinson, *supra* note 40, at 53.

⁵¹*Id.*

⁵²Farrell & Holmes, *supra* note 37.

⁵³*Id.*

⁵⁴*Id.*

Defendants charged with violent and property crimes, for example, are likely to be dealt with more routinely if their standing in society is consistent with lower class and minority group stereotypes popularly associated with such offenses.⁵⁵ The same crimes by the more affluent, however, may be more difficult for judges, since such offenses are not generally expected of them. These exceptional cases may invoke efforts at reconciling these exceptional facts with judges' preexisting schemata for these crimes.⁵⁶ One means of doing this is to search for possible mitigating factors, such as "running with the wrong crowd," to explain away the inconsistent information. This strategy will diminish the deviance of the defendant's actions thereby justifying less social control on the defendant.⁵⁷

Another strategy judges may use is to intensify scrutiny of the nature and motives of the defendant.⁵⁸ This usually involves extensive inquiry into the defendant's background, stressing family life, education and employment history, and general community standing. Such a process is likely to reveal information that puts the defendant on the same level with members of conventional society.⁵⁹ This outcome may also produce decisions that favor atypical defendants.⁶⁰

The overall effects of these cognitive strategies are to produce subjective adjustments to objective case profiles and to preserve and perpetuate crime stereotypes which will continue to serve as the backdrop against which all subsequent similar cases will be evaluated.

In addition to the evidence that individuals tend to adapt positively to information they expect and which is consistent with their schemata, there is also evidence that individuals will persevere in their expectations, even in the face of inconsistent information. One recent study indicated that even when expectancyinconsistent information is brought to an individual's attention, it may be regarded as flawed evidence and therefore given little weight in the judgment formation process.⁶¹

Another issue of particular concern in the judicial decisionmaking context has been the effect that positive adaptation to stereotypical traits has on a decision-maker's adaptation to subsequently encountered information. The answer, at least according to some research, is that positive adaptation to

⁵⁵*Id.* at 533.

⁵⁶Farrell & Holmes, *supra* note 37, at 533.

⁵⁷*Id.* at 534.

⁵⁸*Id.*

⁵⁹Stanton Wheeler et al., *Do the Haves Come Out Ahead? Winning or Losing in State Supreme Courts*, 21 L. & SOC. REV. 403, 438-39 (1987).

⁶⁰*Id.*

⁶¹Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Encountered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2098-2109 (1979).

stereotypic traits elicits a selective evidence processing strategy on the part of the decisionmaker. That is, evidence that corroborates the implications of the stereotype receives more attention and is more often incorporated into the decision-maker's mental representation of the case,⁶² whereas inconsistent information tends to be cognitively neglected or ignored and consequently plays a more peripheral role, if any, in the representation that is formed regarding the evidence.⁶³

In one study that examined the effects of stereotypes on mock jurors' judgments and memory about a criminal case, subjects received evidence about a crime and were asked to determine the defendant's guilt. The defendant either had an Hispanic surname or was ethnically nondescript. To determine the plausibility of the contention that positive adaptation to stereotypes leads to biased evidence processing strategies, the time at which the surname was made known to the subjects was manipulated. Specifically, the fact that the defendant was Hispanic was revealed either before or after the other case evidence had been processed.⁶⁴ The results were that stereotypes produced discrimination against the defendant only when they were presented before the case evidence was considered.⁶⁵ When the stereotype was presented after the evidence and therefore could not influence its original interpretation or the amount of attention, repetition or elaboration that it received, its effect on the subjects' judgment disappeared. Moreover, when the subjects were asked to recall the presented evidence, those who considered a stereotyped defendant recalled significantly more incriminating evidence and used the stereotype, or inferences based on it, as the central theme around which they organized evidence that was consistent with it. In contrast, evidence that was inconsistent with the stereotype was given less processing and was not as likely to be incorporated into the subjects' mental representations of the case.⁶⁶

Perhaps the most important finding of this study was its suggestion that stereotypes primarily affect judgments by virtue of their effects on the processing of other evidence rather than individual motivational factors, such as economic competition, displacement of aggression, egodefense and conformity to social norms, as is so often assumed.⁶⁷

Negative adaptation, the condition under which a stimulus ceases to be effective, also has important implications in the judicial decisionmaking context. Among other things, a judge's internal emotional sensors are vitally

⁶²Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCHOL. 871, 878-79 (1987); Bodenhausen, *supra* note 10.

⁶³*Id.*

⁶⁴Bodenhausen & Lichtenstein, *supra* note 62, at 871.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷Bodenhausen, *supra* note 10, at 732.

related to negative adaptation. Some thoughts or recollections associated with a particular piece of information can result in a selfinitiated dimension or a defensive response.⁶⁸

Sigmund Freud and others suggested that an individual's unconscious perceptual system can rapidly detect an anxiety producing situation and then somehow prevent the individual's conscious perceptual system from recognizing the situation.⁶⁹ One author tells of a judge who had latent homosexual feelings and was undergoing psychotherapeutic treatment. Every time he had to judge a case of obvious homosexuality, he fell into a state of enraged indignation, disabling him from being able to grant full latitude to all sides in a controversy.⁷⁰ This kind of perceptual defense strategy serves the function of protecting the individual from inner anxieties by selectively filtering out stimuli too uncomfortable or painful to confront.

Negative adaptation may also result from familiarity or lack of interest in information. Studies have shown that long exposure to the same argument or excessive repetitions of information will induce negative adaptation. When judges are exposed to information that is too similar, too familiar, or for too long of a time period, their attitudes may become increasingly pessimistic or disinterested.⁷¹

3. Organization

Organization is the means by which decisionmakers assign meaning and relevance to sensory information, for information in and of itself does not automatically prompt a particular decision; rather, the information must be interpreted and evaluated.⁷² A great deal of research on decisionmaking has focused on determining the various psychological and social forces that operate to interpret and give meaning to incoming information and what influence, if any, these forces have on decisions. As a result of these research efforts, experimenters have accumulated evidence of a wealth of factors that may influence judges' decisions.

Great efforts have been made to determine and examine the effects of judges' attitudes on their decisions. Judges do not come to the bench "tabula rasa," that is, with a blank slate. Rather, their beliefs and attitudes, formed by their previous experiences, both on and off the bench, are well entrenched, and everything that is seen and heard by the judge will be filtered through these

⁶⁸Vinson, *supra* note 40, at 53.

⁶⁹*Id.*

⁷⁰PHILLIP PETTIT, *JUDGING JUSTICE: AN INTRODUCTION TO CONTEMPORARY POLITICAL PHILOSOPHY* 96 (1980).

⁷¹*Id.*

⁷²Keith Hawkins, *Discretion in Making Legal Decisions*, 43 WASH. & LEE L. REV. 1161, 1195 (1986).

ttitudes.⁷³ Studies that have found a relationship between judges' attitudes and their decisions report that the relationship is strongest for judges high in self-esteem and maturity. It is reported that attitudes, in conjunction with these other variables, typically can explain ten to forty percent of the variation in the decisions of trial judges.⁷⁴ Other researchers, however, have found that attitudes alone, without these variables, can explain only ten to fourteen percent of the variation in the decisions of trial judges.⁷⁵

In the legal⁷⁶ decisionmaking context, there is evidence that decisions are influenced, in large part, by an individual's personal value sense of what is right and what is wrong.⁷⁷ The strength of an individual's moral sense of what is right or wrong is largely determined by the individual's age, education, experiences, religion, cultural background, and emotions.⁷⁸ These subjective factors interact in complex ways, making it difficult for decisionmakers to see beyond their personal moral values when forming judgments. As observed by Judge Cardozo, "In the long run 'there is no guaranty of justice . . . except the personality of the judge.'"⁷⁹

In addition to these internal factors, experimenters have found that there are many external influences on the organization of incoming information and decisionmaking. Contemporary psychologists emphasize that decisions are influenced not only by past experiences and attitudes that were formed long ago, but also by what is happening in the present, such as the megatrends produced by the information society and the culture and norms of the community in which the decisionmaker lives.⁸⁰

Individuals are continually influenced by stories on the evening news, the communities in which they live, their conversations with others, and by group

⁷³Jeffrey A. Segal & Albert C. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 558 (1989); James L. Gibson, *Judges' Role Orientations, Attitudes and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 911-24 (1978).

⁷⁴Anne-Marie Henschel, *The Relationship Between Values and Behavior: A Developmental Hypothesis*, 42 CHILD DEV. 1997, 1997-2007 (1971); Segal & Cover, *supra* note 73, at 558-559 (citing Lars Sjöberg, *Beliefs and Values as Attitude Component*, Speech at the International Symposium on Social Psychophysics in Mannheim (1978)).

⁷⁵Gibson, *supra* note 73, at 921.

⁷⁶Hawkins, *supra* note 72, at 165 (The term "legal decisionmaking" is even broader than judicial decisionmaking. It is intended to include the decisions made by police, prosecutors, judges, probation and parole officers, and so forth.).

⁷⁷*Id.*

⁷⁸Arredondo et al., *supra* note 20.

⁷⁹BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 1617 (1921).

⁸⁰EDMUND BERGLER & JOOST MEERLOO, *JUSTICE AND INJUSTICE* 7677 (1963).

suggestions of which they are often not even aware.⁸¹ George H. Mead spoke of individuals "taking the role of the generalized other," suggesting that individuals approach the world from the standpoint of the culture and norms of their family, professional and social circles, whose outlooks they share, and then use these outlooks to define and interpret situations and others they encounter.⁸² Not surprising, then, is the fact that several studies have found the culture and norms of the community as a key variable in explaining differences in judicial decisions.⁸³

Other relevant factors affecting the organization of information include judges' legal and political orientations, such as bar and political party affiliations, and their role orientations. The concept of "judicial role" refers to judges' beliefs about how the judicial office should be performed (e.g., law interpreter vs. lawmaker).⁸⁴ Judges' legal training and their professional careers instill in them certain viewpoints regarding questions of public policy which may strongly influence their ultimate role concepts. During law school, for instance, judges presumably were exposed to traditional definitions of the role of the judge.⁸⁵ Their subsequent law practices may have further molded their views concerning the proper judicial function. Bar activities and party affiliations may also predispose judges toward a particular role orientation. Several studies have found a relationship between the way judges attribute meanings to legal authorities and how they view their judicial role. The relationship is especially pronounced in the arena of civil rights cases.⁸⁶

In sum, the general theoretical point suggested here, and which the literature more amply supports, is that judges' early lives, their experiences both on and off the bench, and their professional careers instill in them certain ideas, beliefs

⁸¹CHARON, *supra* note 26, at 2324; Arredondo et al., *supra* note 20, at 9; James L. Gibson, *Environmental Constraints on the Behavior of Judges: A Representational Model of Judicial Decision Making*, 14 L. & SOC. REV. 343, 362-67 (1980).

⁸²CHARON, *supra* note 26, at 2330.

⁸³*Id.*; Lettie McSpadden Wenner & Lee E. Dutter, *Contextual Influences in Court Outcomes*, 41 W. POL. Q. 115, 116 (1987); Gibson, *supra* note 81. One early study showed that southern district court judges who had been educated or worked outside the South tended to be more likely to support school integration following the *Brown v. Board of Educ.* decision than other judges who were more closely connected to their regional heritage. Kenneth N. Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337, 337-57 (1964). In another study, researchers found that judges in the ethnically homogeneous middleclass environment of Minneapolis tended to sentence convicted criminals more severely than do judges in the more ethnically mixed, workingclass city of Pittsburgh. Martin A. Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 116-17 (1975).

⁸⁴J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 916 (1977).

⁸⁵John T. Wold, *Political Orientations, Social Backgrounds and Role Perceptions of State Supreme Court Judges*, 27 W. POL. Q. 239, 242 (1974).

⁸⁶*Id.*; Howard, *supra* note 84.

and attitudes about issues and people (including oneself), all of which facilitate the organization of information by telling judges how to define situations and encouraging them to take action consistent with their ideas, beliefs or attitudes. And, while this dynamic often results in reasonable judgments, it also leads to many distorted and systematically biased decisions.

Lord Justice Scrutton demonstrated a shrewd awareness of this weakness in human nature when he said,

[I]mpartiality . . . is rather difficult to attain in any system [T]he habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish.⁸⁷

As I have indicated, a judge's job is decision-making. Although experience provides some guidance and the law makes some decisions uncomplicated, these factors may not be enough to make a good decision. Some claim that "the judge's eye need roam no further than the text of the Constitution, the statutes as enacted by Congress, the regulations promulgated by the bureaucracy, and the decisions interpreting them."⁸⁸

Theoretically, the above view is accurate; however, it overlooks the importance of how opinions play a role in the decisionmaking process. It is indisputable that different judges have different opinions. These different opinions are due to "differences in interpreting a statute, legal environment, legal knowledge, jurisdiction, expectation, habit or individual differences."⁸⁹

In making each decision, judges must eventually look to themselves. Practical decisionmaking requires judges to evaluate their own "values" and perceived "wisdom."⁹⁰

Hopefully, I have demonstrated, in this rudimentary behavioral science review, that it is a difficult, if not nearly an impossible, task for judges to separate themselves from all of the various limitations and influences on perception that produce bias in judicial decisions. For it is the responsibility of judges to be able to recognize and take steps to counter the influence of bias on their decisions. Thus, when judges determine that they are unable to meet this responsibility in a particular case, they should disqualify themselves from hearing the case.

III. JUDICIAL DISQUALIFICATION AND RECUSAL STANDARDS

One of the fundamental goals of the American legal system is equal justice to all under the law. One means of achieving this goal is to ensure that everyone

⁸⁷Lord Justice Scrutton, *The Work of the Commercial Courts*, 1 CAMBRIDGE L.J. 1, 8 (1921).

⁸⁸Walker, *supra* note 19, at 334.

⁸⁹*Id.*

⁹⁰Arredondo et al., *supra* note 20, at 24.

receives "a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case."⁹¹ Fundamental to the implementation of this standard is the recognition by judges of the personal biases or prejudices that permeate the decisionmaking process and infect impartiality. When a judge fails to recognize the appearance of bias or partiality, the burden is placed upon the litigants to raise the issue to the judge and request a different judge to hear the case.

There seems to be a belief among lawyers and litigants that judges will recuse themselves voluntarily when their impartiality can legitimately be questioned. Judicial recusal, however, is a subjective standard. Judges are generally more knowledgeable about themselves than others and are usually in the best position to determine whether to recuse themselves in a case or not. Thus, to enhance fairness and impartiality in judicial decisionmaking, it is essential for judges to be sensitive to their own real or potential bias or prejudice in a case. And, if bias and/or prejudice exist to the extent that decisionmaking may reasonably be compromised, the judge should not only recognize the issue but also do something about it.

Inherent in the judicial system are mechanisms for judges to recuse themselves from a case.⁹² If judges refuse to recuse themselves, litigants are able to petition the court to dismiss the judge from the case.⁹³ The disqualification procedure, however, is tedious and minimally effective, and few judges are disqualified through this procedure.⁹⁴ This is especially true when a judge's bias is internal and not specifically enumerated by statute. Therefore, it is even more critical for judges to recognize subjective biases and prejudices in their decisionmaking processes to ensure a fair and impartial trial.

⁹¹ Walker, *supra* note 19, at 334.

⁹² Judges may voluntarily disqualify themselves from a case. If a judge discloses what might be considered bias on the record to the parties, the parties may consent to allow the judge to still hear the case. 28 U.S.C. § 455(e) (1988).

⁹³ The majority of states have statutory provisions that enable litigants to disqualify judges for bias or prejudice by filing an affidavit with the state's supreme court. See ALASKA STAT. § 22.20.022 (1982); ARIZ. REV. STAT. ANN. § 12409 (1956) (civil); CAL. CIV. PROC. CODE § 170.6 (Deering Supp. 1987); HAW. REV. STAT. § 60107(b) (1976); IDAHO R. CIV. P. 40(d)(1); ILL. REV. STAT. ch. 38, para. 1145(a) (1973) (criminal); IND. R. TRIAL P. 76(1); IND. CODE ANN. § 353651 (Burns 1985) (criminal); KAN. STAT. ANN. § 20311(d) (1981); MINN. R. CIV. P. 63.03; MINN. STAT. ANN. § 542.16 (West Supp. 1987); MO. R. CIV. P. 51.05; MO. R. CRIM. P. 32.06.07; MONT. CODE ANN. § 31802 (1985); N.D. CENT. CODE § 291521 (1987); OHIO REV. CODE ANN. § 2501.13 (Anderson 1991); OHIO REV. CODE § 2701.03 (Anderson 1992) (appellate judicial recusal standards); OR. REV. STAT. § 14.25070 (1983); S.D. CODIFIED LAWS ANN. § 151222 (1984); WASH. REV. CODE § 4.12.04050 (1959); WIS. STAT. § 261.08 (1973); WYO. R. CIV. P. 40.1(b)(1). Typically, the Supreme Court or the Chief Justice of the state reviews the affidavit and determines whether judges must recuse themselves.

⁹⁴ See *infra* note 140.

This section delineates the standards and procedures by which judges are disqualified from a case for possessing a bias or prejudice toward one of the parties.

A. Disqualification of a Federal Judge

The procedures for disqualification of a federal judge⁹⁵ are outlined in 28 U.S.C. § 144,⁹⁶ and Canon 3 of the American Bar Association Model Code of Judicial Conduct.⁹⁷ Pursuant to these statutes and the Code, a judge must preside over a proceeding in an unbiased manner and with the appearance of impartiality.⁹⁸ If there is an appearance of bias or partiality, a judge may recuse himself from a particular case or be disqualified.⁹⁹

⁹⁵Federal judges are appointed to the bench by the President of the United States and have lifetime terms. Attorneys who practice in federal court will often appear before the same judge several times during their career. Therefore, attorneys may be hesitant to attempt to have a judge, whom they believe is biased, dismissed from a case for fear the judge may be offended or thereafter dislike the attorneys. It is important that disqualification statutes for federal judges do not hinder or regiment the procedure to disqualify judges when evidence exists of an appearance of actual bias or prejudice.

⁹⁶In federal court, 28 U.S.C. §§ 144, 455 (1988), delineates the procedures and standards for judicial recusal. Specifically, 28 U.S.C. § 144 (1988), provides that any Justice, judge or magistrate shall be disqualified if a party to any proceeding makes and files a timely and sufficient affidavit showing personal judicial bias or prejudice, and 28 U.S.C. § 455(a)(1988), requires Justices, judges, or magistrates to disqualify themselves in any proceeding if impartiality may reasonably be questioned. In determining whether judges should recuse themselves, the circuits apply different tests. See *United States v. Lopez*, 944 F.2d 33, 37 (1st Cir. 1991) ("[W]hether the charge of lack of impartiality is grounded on facts that would create a reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the [movant], but rather in the mind of the reasonable man."); *United States v. Wade*, 931 F.2d 300, 304 (5th Cir. 1991) ("[W]hether a reasonable person, knowing relevant facts, would expect that 'a justice, judge or magistrate knew of circumstances creating an appearance of partiality. . . .'", *cert. denied*, 112 Sup. Ct. 247 (1991); *Deluca v. Long Island*, 862 F.2d 427, 42829 (2d Cir. 1988) (whether an objective, disinterested observer, fully informed of the facts underlying the grounds on which recusal is sought, would entertain significant doubt that justice would be done absent recusal).

⁹⁷Although federal jurists are bound only to follow the disqualification statutes, most judges appear to accept the notion that they are also, absent compelling circumstances, bound to follow the ABA Code of Judicial Conduct. Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 631 (1987).

⁹⁸The Fifth Amendment due process right to a fair trial before an impartial trier of fact is codified in 28 U.S.C. §§ 144 and 455 and recognized in Canon 3. Authorities have determined that §§ 144 and 455 must be construed *in pari materia*. See *City of Cleveland v. Cleveland Elec. Illuminating Co.*, 503 F. Supp. 368, 37172 (N.D. Ohio 1980); *United States v. Zagari*, 419 F. Supp. 494, 50405 (N.D. Cal. 1976).

⁹⁹The term "recusal" has a technical definition different than "disqualification." "Disqualification" refers to the statutorily mandated removal of judges, while "recusal" refers to the voluntarily stepping down of judges on their own initiative. Randall J. Litteneker, Comment, *Disqualification of Federal Judges for Bias or Prejudice*, 46 U. CHI. L. REV. 236, 237 n.5 (1978). The distinction is of little importance today because "[u]nder

Two broad types of situations warrant compulsory judicial disqualification: 1) personal bias or prejudice, whether in fact or appearance,¹⁰⁰ and 2) personal involvement by the judge in the matter in controversy.¹⁰¹

Personal bias or prejudice is regulated pursuant to 28 U.S.C. § 144.¹⁰² Section 144 requires district judges¹⁰³ to remove themselves whenever a party "makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party. . . ."¹⁰⁴ The party¹⁰⁵ may file only one affidavit in a judicial disqualification case and must include in the affidavit a statement of the facts and reasons for believing there is bias.¹⁰⁶ Moreover, the statute requires counsel to certify that the affidavit is made in good faith.¹⁰⁷

current statutes, disqualification is mandated in virtually all cases where recusal is appropriate." *Id.*

¹⁰⁰28 U.S.C. §§ 144, 455(a), 455(b)(1) (1988).

¹⁰¹28 U.S.C. § 455(b) (1988).

¹⁰²The standards for recusal for bias in 28 U.S.C. § 144 are also adopted and applied in 28 U.S.C. § 455(a). Thus, interpretations of the bias provision in § 144 apply equally to the bias standard set forth in § 455(a).

¹⁰³By its terms, § 144 applies only to district court judges. Section 144 states it is providing a procedure for seeking removal of judges in "any proceeding in a district court." 28 U.S.C. § 144 (1988). *See also* *Millsagle v. Olson*, 128 F.2d 1015, 1016 (8th Cir. 1942)(holding § 144 inapplicable to circuit courts of appeal). In contrast, § 455 applies to all federal judges. *See Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1115 (5th Cir. 1980).

¹⁰⁴28 U.S.C. § 144 (1988), provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

¹⁰⁵*See generally* *Roberts v. Bailer*, 625 F.2d 125 (6th Cir. 1980) *on remand* 538 F. Supp. 424 (E.D. Tenn. 1980), *aff'd* 698 F.2d 1222 (6th Cir. 1982) (it was not error to deny motion where plaintiff's counsel, not plaintiff, signed and filed affidavit that accompanied motion); *Bumpus v. Uniroyal Tire Co.*, 385 F. Supp. 711 (E.D. Pa. 1974) (affidavit of defendant's attorney, accompanying a motion to disqualify trial judge for alleged personal bias in favor of plaintiffs, did not satisfy requirement that an affidavit be filed by a party to the proceeding).

¹⁰⁶The general language of § 144 has led to an enormous amount of litigation regarding the scope of inquiry into the facts stated in the affidavit and other aspects of its sufficiency, the nature of bias or prejudice sufficient to warrant disqualification, and the appropriate timing of review of the trial judge's determination. *See generally* *Berger v. United States*, 255 U.S. 22 (1921)(the district judge must determine only the sufficiency of the affidavit, not the truth of the allegations contained therein); *Ex parte American Steel Barrel Co.*, 230 U.S. 35 (1913)(the facts stated in the affidavit must demonstrate bias or prejudice, not simply adverse rulings in the course of the proceedings); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435 (1966).

Disqualification under § 144 places a high burden of proof on the party seeking to remove a judge. To disqualify a judge pursuant to § 144, a party must prove that the judge possesses actual personal bias or prejudice. The statute does not require disqualification of a judge based on general or judicial bias. Personal bias usually refers to bias in favor of or against a specific party, as opposed to judicial bias, which refers to prejudgment of the legal issues or the merits.¹⁰⁸ The Supreme Court has held, "[t]he alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."¹⁰⁹

The amount of evidence necessary to prove bias under § 144 is determined under a "bias-in-fact" standard. The standard requires that the allegations of bias against the judge "be sufficient to support a conclusion that bias actually exists."¹¹⁰ The Fifth Circuit Court of Appeals has held that to show bias, the moving party must show that "the facts [are] such, their truth being assumed, as would 'convince a reasonable [person] that bias exists.'"¹¹¹

The Third Circuit has incorporated this biasinfact standard into a three-part test for disqualifying a judge under § 144.¹¹² Under this test, the moving party must show:

1. The facts must be material and stated with particularity;
2. The facts must be such that, if true they would convince a reasonable [person] that a bias exists;
3. The facts must show the bias is personal, as opposed to judicial, in nature.¹¹³

Accordingly, when seeking to disqualify a judge under § 144, the moving party must allege specific facts showing bias, must prove those facts amount to personal bias, and must show the facts are sufficient to convince a reasonable person that bias actually exists. This standard is difficult to prove. A different and much broader approach to disqualification is taken under § 455.

Section 455 states the circumstances under which all federal judges must disqualify themselves.¹¹⁴ Section 455 was revised in 1974 and provides in part:

¹⁰⁷28 U.S.C. § 144 (1988).

¹⁰⁸Seth E. Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W. RES. L. REV. 662, 668 (1985).

¹⁰⁹United States v. Grinnell Corp., 384 U.S. 563, 583 (1966).

¹¹⁰Idaho v. Freeman, 507 F. Supp. 706, 723 (D. Idaho 1981).

¹¹¹Parrish v. Board of Comm'rs, 524 F.2d 98, 100 (5th Cir. 1975) (en banc)(quoting United States v. Thompson, 483 F.2d 527, 528 (3rd Cir. 1973)), cert. denied, 425 U.S. 944 (1976).

¹¹²Thompson, 483 F.2d at 528.

¹¹³Id.

¹¹⁴Prior to the 1974 Amendments, Section 455 simply provided:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel,

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall disqualify himself in the following circumstances:
 - (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
 - (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
 - (3) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
 - (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
 - (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
 - (i) Is a party to the proceeding, or an officer, director, or trustee of a party;

is or has been a material witness or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

28 U.S.C. § 455 (1970).

The statute was amended in 1974 to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C (1974). *See* S. REP. NO. 419, 93d Cong., 1st Sess. 1 (1973); H.R. REP. NO. 1453, 93d Cong., 2d Sess. 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352. The general language of subsection (a) was designed to promote public confidence in the integrity of the judicial process by replacing the subjective "in his opinion" standard with an objective test. *See* S. REP. NO. 419, 93d Cong., 1st Sess. 5 (1973); H.R. REP. NO. 1453, 93d Cong., 2d Sess. 5 (1974) *reprinted in* 1974 U.S.C.C.A.N. 6351, 6354-55; *see also* *United States v. Norton*, 700 F.2d 1072, 1075 (6th Cir.) ("The standard to be applied under § 455(a) is an objective one. . . ."), *cert. denied*, 461 U.S. 910 (1983). In addition, another purpose of the new § 455 was to make the statute conform to the Code of Judicial Conduct and thus eliminate the "dual standards, statutory and ethical [that] . . . had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril." H.R. REP. NO. 1453, 93d Cong., 2d Sess. 2 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352.

- (ii) Is acting as a lawyer in the proceeding;
- (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
- (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

In 1974, § 455 was broadened to cover situations 1) involving "personal bias" as regulated by § 144 and 2) when a judge's impartiality might be "reasonably questioned."¹¹⁵ In addition, § 455, as rewritten, is mandatory; if any of the specified circumstances are present, the judge must recuse from sitting.¹¹⁶ In contrast, § 144 is self-enforcing. Thus, pursuant to § 455, no motion or affidavit needs to be filed by a party; rather, the judge must recuse from the case *sua sponte* whenever any of the circumstances listed in § 455 are present.¹¹⁷ The legislative history of § 455 provides no guidance regarding the differences and overlap between §§ 455 and 144.¹¹⁸

The standard for determining whether a judge is required *sua sponte* to recuse from sitting on a case pursuant to § 455(a) is whether "a reasonable objective person, knowing all of the circumstances, would have questioned the judge's impartiality."¹¹⁹ Many courts have long applied this standard and mandated that a judge must recuse from sitting under the above described conditions.¹²⁰ The standard is objective and extends beyond judges' personal beliefs that their impartiality is not impaired.¹²¹ What is important in considering whether

¹¹⁵28 U.S.C. § 455 (1988).

¹¹⁶Under certain circumstances, the parties may agree to waive the judge's disqualification. 28 U.S.C. § 455(e) (1988).

¹¹⁷Motions for recusal under Sections 455(a) and (b) must be filed in a timely manner. 28 U.S.C. § 455(a)(b) (1988); *Molina v. Rison*, 886 F.2d 1124, 113132 (9th Cir. 1990) (section 455 motion untimely when defendant aware of asserted grounds for recusal during pretrial proceedings, yet failed to file motion); *United States v. Gipson*, 835 F.2d 1323, 132425 (10th Cir.) (section 455 appearance of impropriety motion untimely when filed after guilty plea entered but motion alleging actual bias not untimely), *cert. denied*, 486 U.S. 1044 (1988).

¹¹⁸See *Judicial Disqualification, Hearings on S. 1064 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 67, 1213, 76 (1973).

¹¹⁹*Hughes v. United States*, 899 F.2d 1495, 1501 (6th Cir.), *cert. denied*, 111 S. Ct. 508 (1990); *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990); *In re M. Ibrahim Khan*, 751 F.2d 162, 164 (6th Cir. 1984); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 (1988).

¹²⁰*Sammons*, 918 F.2d at 599; *Easley v. University of Mich. Bd. of Regents*, 906 F.2d 1143, 1146 (6th Cir. 1990); *Wheeler v. Southland Corp.*, 875 F.2d 1246, 1251 (6th Cir. 1989).

¹²¹See *Liteky v. United States*, 114 S. Ct. 1147, 1154 (1994); E. WAYNE THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 60 (1973); E. Wayne Thode, *The Code of Judicial Conduct—The First Five Years in the Courts*, UTAH L. REV. 395, 402 (1977).

judges should recuse themselves from sitting is "whether it reasonably appears to the public that the judge can preside impartially."¹²² The standard does not consider whether individual judges conclude that they are able to sit impartially. The main consideration courts stress is the importance of the objective standard because the public's respect for, and faith in, the fairness of the court system rests on a judge's scrupulous dedication to maintaining the appearance, as well as the fact, of impartiality.¹²³

While § 455(b)(1) states that a judge shall disqualify from sitting if "he has a personal bias or prejudice concerning a party . . .," this subsection has been uniformly held to be governed by the judicial definition of actual personal bias developed under § 144.¹²⁴ Accordingly, for a judge to be disqualified from a case, a party must prove, absent one of the relationships outlined in § 455(b), that the judge possessed actual personal bias or prejudice toward one of the parties. A party must also demonstrate that a reasonably objective person, knowing all the circumstances, would have questioned the judge's impartiality. This is a difficult burden to prove, especially when alleging the judge possesses subjective biases such as race or gender bias.

Moreover, the line of what constitutes bias and prejudice is not always clear. Judges, uncertain of whether they are required to step down from a case, may submit an inquiry to the American Bar Association Committee on Ethics and Professional Responsibility¹²⁵ to render an opinion as to whether they should recuse from sitting on a particular case.¹²⁶ This Committee consists of eight members, none of whom is a judge. The Committee renders an opinion to the judge, but rarely publishes formal opinions. In 1992, the Committee only pub-

¹²²*Duke v. Pfizer, Inc.*, 688 F. Supp. 1031, 1035 (E.D. Mich. 1987); H.R. REP. NO. 1453, *supra* note 114.

¹²³*Duke*, 688 F. Supp. at 103536.

¹²⁴13A CHARLES A. WRIGHT & KENNETH A. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 3542, at 55556 (1984). *See, e.g.*, *United States v. Sibla*, 624 F.2d 864, 868 (9th Cir. 1980); *United States v. IBM*, 475 F. Supp. 1372, 1389 (S.D.N.Y. 1979).

¹²⁵Hereinafter "Committee".

¹²⁶The Committee has issued opinions interpreting the Model Code of Judicial Conduct on certain occasions regarding judicial recusal. One example is whether judges must recuse themselves when represented by a party's counsel. In one opinion entitled *Requirement of Judicial Recusal When a Litigant is Represented by Judge's Lawyers*, the Committee held:

[w]e believe that the standards expressed in the Model Code require that a judge recuse himself or herself from adjudicating cases in which a litigant is represented by the judge's own attorney, at least while the lawyer-client relationship exists between the judge and the lawyer. Adequate procedures are available for substitution of judges or transfer of cases when a judge is unable to or cannot properly sit in a particular case.

ABA Committee on Ethics and Professional Responsibility, Informal Op. 1477 (1981).

lished eight opinions on a wide range of topics.¹²⁷ Thus, if a question is raised as to whether a judge should recuse from sitting, there are very few opinions published by the Committee which give guidance in resolving the issue.

Furthermore, if a judge refuses to recuse from sitting and the court concurs that the judge does not have to be disqualified from a case, a litigant who believes a judge is biased and cannot fairly decide a case may, as a last resort, file a complaint against the judge.¹²⁸ Pursuant to 28 U.S.C. § 372(c), a litigant may file a written complaint containing facts alleging that a judge or magistrate has "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts."¹²⁹ The complaint may be filed before, during, or after trial. The Chief Justice of the circuit initially reviews the complaint and may either dismiss the complaint¹³⁰ or appoint a special committee to investigate the complaint.¹³¹ Based upon the investigation, a

¹²⁷Telephone interview with Peter Guaraty, Ethics Research Attorney, Standing Committee on Ethics and Professional Responsibility, American Bar Association (Apr. 15, 1993).

¹²⁸28 U.S.C. § 372 (1988). This procedure, however, is separate from the disqualification procedures outlined in 28 U.S.C. §§ 144, 455 and is not a proper method to disqualify a judge from a case. This procedure is directed against serious judicial transgressions (i.e., conduct), not speech, and is only to be employed when the judge's conduct is prejudicial and impairs the effective and expeditious administration of the business of the courts.

¹²⁹The complaint must be filed with the clerk of the court of appeals for the circuit in which the circuit, district, or bankruptcy judge or magistrate presides. 28 U.S.C. § 372(c)(1) (1988).

¹³⁰The Chief Judge may dismiss the complaint if it is not in compliance with the filing provisions of section 372(c), is directly related to the merits of a judicial decision, or is frivolous. Chief Judges may also conclude the proceeding if corrective action has been taken or if action is no longer necessary because of intervening events. Dismissal of a complaint against a Circuit Judge alleging judicial misconduct is warranted where the basis of the complaint is legal disagreement with the judge's decision on the merits of a decision or procedural ruling. *In re Charge of Judicial Misconduct*, 691 F.2d 923, 925-26 (9th Cir. 1982).

In 1991, 359 complaints were filed pursuant to 28 U.S.C. § 372(c). *Report of Complaints and Action Taken Under Title 28 U.S.C. § 372(c)*, 1991 U.S. JUD. BUS. DIR. ANN. REP. 115-16. This was a 12.9% increase from 1990. *Id.* Two hundred and ten of the complaints (69%) were concluded by the Chief Judges. *Id.* Of the 210 complaints, the Chief Judge dismissed 195, ruling that 162 were directly related to the merits of a judicial proceeding, eighteen were not in conformance with the statute, and fifteen were frivolous. *Id.* Appropriate action had already been taken in ten complaints, and five complaints were withdrawn. *Id.* The remaining ninety-six complaints were acted upon by the Judicial Councils of the Circuits. *Id.* All complaints came to the Circuit Councils by way of a petition for review by the complainant or judicial officer; none was forwarded by special investigating committees. *Id.* The Judicial Councils dismissed all ninety-six complaints. *Id.*

¹³¹28 U.S.C. § 372(c)(4) (1988). Judges under inquiry have a right to confront all evidence against themselves at whatever stage it is presented. *Hastings v. Judicial Conf. of United States*, 593 F. Supp. 1371, 1383-84 (D.D.C. 1984).

judicial council is thereafter granted authority to take appropriate action on the complaint.¹³² This procedure, however, is futile to remedy bias or prejudice of a judge, as no action is likely to be taken to investigate the prejudicial conduct of the judge for months or years after the case has ended. Hopefully, this procedure will, in the long run, alert judges to allegedly prejudicial conduct in which they engage and prevent the conduct from recurring.

Given the procedures and standards for recusal described above, it is clear that an attorney attempting to disqualify a federal judge for personal bias or prejudice has many obstacles to overcome. Although an objective standard is established in 28 U.S.C. § 455 to determine if a judge is biased or impartial, when alleging "bias" or "prejudice," the courts will also apply the more narrow definition of "actual bias" interpreted in § 144. Therefore, a party must meet the subjective standard of § 144 and the objective standard of § 455. Furthermore, there are few resources available to determine fact specific scenarios involving subjective bias of a judge for a litigant to use when determining if a judge is biased and should be disqualified.

B. Disqualification of a State Judge

Grounds for disqualification of state judges are mandated pursuant to state statute or court rules.¹³³ Fortyfive states and the District of Columbia have adopted the American Bar Association Model Code of Judicial Conduct¹³⁴ either in its original language or in substantially the same format to govern judicial disqualification.¹³⁵ The remaining five states have promulgated rules based upon standards similar to the Code, and several are currently considering adoption of the Code.¹³⁶

The ABA Model Code of Judicial Conduct (1990), Canon 3(E)(1) is similar to the federal judicial disqualification statutes. Canon 3(E)(1) provides "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The Code further outlines circumstances when judges must disqualify themselves. These include 1) when a judge has a personal bias or prejudice concerning a party or a party's lawyer; 2) when a judge has personal knowledge of disputed evidentiary facts

¹³²28 U.S.C. § 372(c)(6) (1988). The judicial council has broad authority to take whatever action the council deems appropriate, including reprimanding or censuring judges, but cannot under any circumstances order the removal from office of judges appointed to serve during good behavior under Article III of the Constitution. 28 U.S.C. § 372(c)(6)(B) (1988).

¹³³*See infra* note 134.

¹³⁴Hereinafter "the Code". The Code was established in 1972 and revised in 1990 to maintain and enforce a uniform set of ethical standards for judges and thus preserve the integrity of the judiciary. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 1 (2d ed. 1992).

¹³⁵*Id.* at 1.

¹³⁶*Id.*

concerning the proceeding; 3) when a judge or the judge's spouse, parent or child, wherever residing, or any member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimus* interest that could be substantially affected by the proceeding; 4) when the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (i) is a party to the proceeding, or an officer, director or trustee of a party; (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have a more than *de minimus* interest that could be substantially affected by the proceeding; or (iv) is to the judge's knowledge likely to be a material witness in the proceeding.¹³⁷

The Code attempts to set forth an objective standard mandating when judges should recuse themselves. Absent these circumstances, it is less likely that courts would require judges to recuse themselves. For example, a recent area of controversy is whether judges who presided over a prior criminal proceeding and, as a result, acquired knowledge of the facts of the case must recuse themselves in a subsequent proceeding involving one of the parties.¹³⁸ The Supreme Court of Ohio held that just because the judge presided over the prior proceeding does not automatically mandate that the judge recuse himself.¹³⁹ In order to require recusal on the basis of the prior proceeding, the judge must form an opinion as to the facts at issue in the subsequent proceeding.¹⁴⁰

In most states, judges may disqualify themselves from hearing a case on their own motion or following the filing of a motion to recuse by one or more of the parties.¹⁴¹ If a party files a motion for recusal with the court,¹⁴² the motion must

¹³⁷MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1980).

¹³⁸*State v. D'Ambrosio*, 616 N.E.2d 909, 913-14 (Ohio 1993).

¹³⁹*See infra* note 150; *United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976) ("What a judge learns in his judicial capacity—whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both—is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification."); *State v. Smith*, 242 N.W.2d 320, 324 (Iowa 1976) (since "evidence presented in the trial of a prior cause . . . do[es] not stem from an extrajudicial source," it creates no personal bias requiring recusal); Ann C. Haberle, Annotation, *Disqualification from Criminal Proceeding of Trial Judge Who Earlier Presided Over Disposition of Case of Co-participant*, 72 A.L.R.4th 651, 658, 66163 (1989); *see also* *United States v. Thirion*, 813 F.2d 146, 154-55 (8th Cir. 1987).

¹⁴⁰Several state courts have adopted a stricter standard, requiring recusal if the record indicates that, as a result of a prior proceeding, the judge formed an opinion as to facts at issue in a subsequent proceeding. *See, e.g., In re George G.*, 494 A.2d 247, 249-50 (Md. App. 1985); *People v. Gibson*, 282 N.W.2d 483, 486 (Mich. App. 1979); *People v. Robinson*, 310 N.E.2d 652, 655 (Ill. App. 1974).

¹⁴¹ABRAMSON, *supra* note 134.

¹⁴²In Ohio, the motion is filed with the clerk of the Supreme Court. It is the duty of the clerk to thereafter give notice to the clerk of common pleas. The clerk of common pleas enters the fact of filing on the trial docket in the cause. OHIO REV. CODE ANN.

be supported by an affidavit which states facts and reasons for the belief that a disqualifying conflict of interest exists.¹⁴³ Thereafter, the challenged judge¹⁴⁴ must decide the sufficiency of the allegations.¹⁴⁵ If, on the basis of the allegations, the judge's "impartiality might reasonably be questioned," the judge may¹⁴⁶ refer the recusal motion to another judge for hearing.¹⁴⁷ At the recusal hearing, a judge, often the Chief Judge of the highest court, will determine whether the judge's impartiality may reasonably be questioned and whether the judge must step down from the case.¹⁴⁸

In Ohio, the Chief Justice of the Supreme Court or any judge of the Supreme Court designated by the Chief Justice decides whether the challenged judge should be disqualified from the case.¹⁴⁹ If the Chief Justice, or any judge of the Supreme Court designated by the Chief Justice, finds the judge is disqualified, that judge shall assign the case to another judge.¹⁵⁰ Over the past three years,

§ 2701.03 (Anderson 1991). *See* *Wendel v. Hughes*, 28 N.E.2d 686, 687 (Ohio 1940)(it is the duty of the clerk to give notice to the court of common pleas, and a praecipe directing the clerk to do so is not necessary); *State ex rel. Glass v. Chapman*, 65 N.E. 154, 155 (Ohio 1902).

¹⁴³*Municipal Publications, Inc. v. Snyder*, 469 A.2d 1084, 1093 (Pa. Super. 1983)(an affidavit solely based on hearsay is insufficient). Frivolous or repeated affidavits of prejudice may result in sanctions. *In re Disqualification of Courts*, 546 N.E.2d 928, 929 (Ohio 1989); *In re Disqualification of Light*, 522 N.E.2d 458, 459 (Ohio 1988).

¹⁴⁴*Cuyahoga County Bd. of Mental Retardation v. Association of Cuyahoga County Teachers of Trainable Retarded*, 351 N.E.2d 777, 779 (Ohio 1975)(when an affidavit of disqualification has been properly filed with the clerk of courts, a trial judge is without authority to proceed with the case or to enter judgment therein, thereby affecting the substantive rights of the parties, until the Chief Justice of the Ohio Supreme Court has passed upon the issue of disqualification); *see also* *Wolf v. Marshall*, 165 N.E. 848, 849 (Ohio 1929). A judge whose impartiality has been challenged may nevertheless perform administrative or ministerial acts. *See* *Cuyahoga County Bd. of Mental Retardation*, 351 N.E.2d at 784 n.3 (citing *Ashland Bank & Savings Co. v. Houseman*, 5 Ohio App. 165 (1915)); *Tumbleson v. Noble*, 164 N.E.2d 808, 809 (Ohio 1959).

¹⁴⁵The allegations in the motion are to be considered as true.

¹⁴⁶*In re Buford*, 577 S.W.2d 809, 824-25 (Mo. 1979)(whether or not judges remain disqualified in proceedings which are had subsequent to disposition of main case in which they have disqualified themselves is not sufficiently definite so as to premise imposition of discipline against judges for failure to disqualify themselves on their own motion in the subsequent proceedings).

¹⁴⁷*See* *Municipal Publications, Inc.*, 469 A.2d at 1099 (if on the basis of the allegations, taken as true, the judge's impartiality might reasonably be questioned, the judge must refer the recusal motion to another judge for hearing).

¹⁴⁸*See infra* note 159.

¹⁴⁹OHIO REV. CODE ANN. § 2701.03 (Anderson 1991). Section 2501.13 governs the disqualification procedure for appellate judges.

¹⁵⁰*See generally* *In re Disqualification of Pepple*, 546 N.E.2d 1298 (Ohio 1989)(in the absence of extraordinary circumstances, an affidavit of disqualification should not be used to disqualify a judge after lengthy proceedings have taken place); *In re Disqualification of Kilpatrick*, 546 N.E.2d 929 (Ohio 1989)(filing of disciplinary

however, the Ohio Supreme Court has disqualified only three percent of the judges against whom an affidavit of prejudice was filed.¹⁵¹

complaint against judge by affiant not grounds for disqualification); *In re* Disqualification of Nadel, 546 N.E.2d 926 (Ohio 1989)(when a judge's wife is the victim of the crime, it is grounds for disqualifying all the judges in the county from the case); *In re* Disqualification of Badger, 546 N.E.2d 929 (Ohio 1989)(representation of judge in unrelated matter by counsel for one of the parties warrants disqualification even though judge did not personally select counsel); *In re* Disqualification of Buck, 536 N.E.2d 1153 (Ohio 1989)(judge who presided over adoption proceedings is not automatically disqualified from hearing subsequent motion to vacate order of adoption); *In re* Disqualification of Kilbane, 536 N.E.2d 1153 (Ohio 1989)(judge who presided at trial is not automatically disqualified from hearing the motion to vacate sentence); *In re* Disqualification of Martin, 538 N.E.2d 1024 (Ohio 1989)(a judge's prior preparation of a will tangentially involved in litigation does not warrant disqualification); *In re* Disqualification of Badger, 538 N.E.2d 1023 (Ohio 1989)(judge who earlier ruled on summary judgment motion is not disqualified from hearing subsequent motion for relief from judgment); *In re* Disqualification of Corrigan, 546 N.E.2d 925 (Ohio 1989)(the possibility that presiding judge will be called as witness, coupled with allegation that judge played "central role" in prosecution of case, may be grounds for disqualification. Since the majority of the judges of the Cuyahoga County Court of Common Pleas have been, and will be, referred to in connection with the prosecution of the defendants, all other judges in Cuyahoga County may not participate in the proceedings.); *In re* Disqualification of Kimbler, 540 N.E.2d 756 (Ohio App. 1988)(a ruling by a common pleas judge denying disqualification of a municipal judge pursuant to R.C. 2937.20 is not a final appealable order); *In re* Disqualification of Light, 522 N.E.2d 458 (Ohio 1988)(alleged errors of law or procedure not grounds for disqualification/R.C. § 2701.03 is inapplicable to court referee); *In re* Disqualification of Basinger, 522 N.E.2d 459 (Ohio 1988) (vague and unsubstantiated allegations are insufficient for a finding of bias or prejudice); *In re* Disqualification of Murphy, 522 N.E.2d 459 (Ohio 1988) (alleged errors of law or procedure not grounds for disqualification); *In re* Disqualification of Walker, 522 N.E.2d 460 (Ohio 1988) (allegation of "dislike" of party by judge is not grounds for disqualification); *In re* Disqualification of Grigsby, 522 N.E.2d 461 (Ohio 1988)(allegation of legal error in imposition of sentence may not be raised by affidavit); *In re* Disqualification of Hunter, 522 N.E.2d 461 (Ohio 1988)(disagreement with judge's opinions of law is not sufficient/automatic disqualification is not granted when judge is adverse party in another case/frivolous, unsubstantiated, or repeated affidavits may result in sanctions); *In re* Disqualification of Courts, 546 N.E.2d 928 (Ohio 1988)(judge's rulings of law, even if erroneous, not evidence of bias or prejudice/affiant's filing of lawsuits against judge's colleagues not grounds for disqualification); *In re* Disqualification of Nugent, 546 N.E.2d 927 (Ohio 1987)(when a victim of crime is related to several court personnel, including judges, grounds exist to disqualify all judges in the county from the case); *In re* Disqualification of Sweeney, 522 N.E.2d 456 (Ohio 1987)(repeated filing of affidavits to delay trial is not permissible); *In re* Disqualification of Kimmel, 522 N.E.2d 456 (Ohio 1987)(judge may preside at retrial even if that judge's rulings were reversed on appeal); *In re* Disqualification of Spahr, 522 N.E.2d 457 (Ohio 1987)(refusal to grant continuance is not by itself evidence of bias or prejudice); *In re* Disqualification of Martin, 522 N.E.2d 457 (Ohio 1987)(alleged error in sentencing not amenable to affidavit of disqualification).

¹⁵¹In Ohio in 1990, 186 affidavits of prejudice were filed with the Supreme Court. Interview with Keith T. Bartlett, Assistant Administrative Director of the Supreme Court of Ohio, (Apr. 6, 1993). Of the 186 affidavits, thirty (16%) of the judges voluntarily stepped down from the case. *Id.* The Supreme Court disqualified seven (4%) judges from the 186 affidavits filed. *Id.* In 1991, 209 affidavits of prejudice were filed with the

Furthermore, in all states, the motion to recuse must be timely filed.¹⁵² Typically, this means the motion must be filed at the first opportunity after the affiant learns of the grounds of disqualification and sufficiently in advance of trial as to allow another judge to preside at trial.¹⁵³

If an attorney is unable to disqualify a judge for bias or prejudice and believes the judge's biased participation in a case equates to misconduct, an attorney can report the judge to a state grievance commission which will investigate the matter. Since 1981, all 50 states and the District of Columbia have established judicial conduct organizations vested with authority to investigate, prosecute, and adjudicate cases of judicial misbehavior and impose sanctions.¹⁵⁴ In every state system, judges are members of the judicial conduct commissions.¹⁵⁵ Furthermore, the decisions of the commissions are typically appealable to a court.¹⁵⁶ The court then has final determination as to what constitutes judicial misconduct. The mere fact that an attorney files a misconduct complaint against a judge, however, does not automatically disqualify the judge.¹⁵⁷

Supreme Court. *Id.* Of the 209 affidavits filed, the challenged judge voluntarily stepped down from twenty-six (12%) of the cases. *Id.* The Supreme Court disqualified six (3%) of the 209 judges. *Id.* In 1992, 192 affidavits of prejudice were filed with the Supreme Court. *Id.* Of the 192 affidavits filed, the challenged judge voluntarily stepped down from twenty (14%) of the cases. *Id.* The Supreme Court disqualified six (3%) of the judges from the case. *Id.*

¹⁵²The time limitation to disqualify a judge is established in each state by statute or rules of court. Many statutes and rules either expressly provide or have been interpreted to provide that a motion to disqualify a judge must be presented before the challenged judge has made certain rulings in the case, such as those requiring an exercise of discretion. *State v. D' Ambrosio*, 616 N.E.2d 909, 911 (Ohio 1993) ("Absent extraordinary circumstances, an allegation of judicial bias must be raised at the earliest available opportunity."); *Doty v. Doty*, 125 Cal. Rptr. 153, 156 (1975) (parties waived right to file a motion to disqualify a judge after judge had appointed referees in an action for partition of real property); *Jordon v. Hodges*, 291 S.E.2d 778, 779 (Ga. 1982) (a motion to rescue must be filed 1) promptly and without delay, at the first opportunity after learning of the grounds for disqualification and 2) sufficiently in advance of trial to allow time for the designation of another judge to preside); *Jones v. Stivers*, 477 S.W.2d 869, 870 (Ky. 1969) (party waived right to file a motion to disqualify after judge made rulings against the party). See *In re Disqualification of Pepple*, 546 N.E.2d 1298, 1298 (Ohio 1989); *Tari v. State*, 159 N.E. 594 (Ohio 1927) (paragraph two of the syllabus).

¹⁵³ABRAMSON, *supra* note 134, at 11; *Hunnicut v. Hunnicutt*, 283 S.E.2d 891, 893 (Ga. 1981); *Data Lease Fin. Corp. v. Blackhawk Heating & Plumbing Co.*, 325 So.2d 475, 478 (Fla. App. 1976) (although aware of the asserted ground for disqualification, the party waited to file a motion to disqualify until after having suffered an adverse ruling).

¹⁵⁴ABRAHAMSON, *supra* note 134, at 5-6. In Ohio, Rule V of the Supreme Court Rules for the Government of the Bar of Ohio creates a Board of Commissioners on Grievances and Discipline to hear complaints of alleged judicial misconduct. OHIO S. CT. R. V.

¹⁵⁵See IRENE A. TESITOR & DWIGHT B. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 2839 (2d ed. 1980).

¹⁵⁶*Id.* at 1218; ABRAMSON, *supra* note 134, at 5-7.

¹⁵⁷*In re Disqualification of Kilpatrick*, 546 N.E.2d 929, 930 (Ohio 1989).

Once a case is assigned to a judge, the litigants and the public have a right to expect the judge to fairly and honestly evaluate whether there are any reasons to prevent the judge from presiding over the case. This subjective analysis by the judge is usually done personally and without any involvement by the parties or attorneys. Thus, a judge may be aware of some potential reasons for recusal while the parties have no idea that the issue exists. It is, therefore, critical for the judge to have a full awareness of potential biases, prejudices, and sympathies.

In the event that the parties or attorneys believe the judge's impartiality may reasonably be questioned, all participants are placed in a difficult situation. If a lawyer raises the issue with the judge, how will the judge react? Will the judge be offended? What about the other parties? And, if the ultimate step of filing an affidavit of prejudice is required, the likelihood of success is minimal, which results in a very uncomfortable and potentially prejudicial situation for the clients involved. All of these difficulties emphasize the need for judges to be even more aware of subjective biases and how schemata may influence a decision. The integrity of our system of justice requires no less.

IV. THE IMPACT OF BIAS AND PREJUDICE ON THE DECISION-MAKING PROCESS

The ability of judges to combat the subjective biases and prejudices inherent in the human perceptual and decisionmaking processes is dependant upon identification and heightened sensitivity to the various categories of potential bias and their manifestations. This section of the article will discuss some of the more widely recognized forms of bias and their manifestations within and among the judiciary. The categories discussed herein by no means purport to be an inclusive list. Indeed, biases and prejudices are largely subjective and can be extremely individualized. The categories listed below, however, are areas that have been widely identified as common manifestations of bias in the judicial system.

A. Categories of Bias

1. Gender Bias

Over the past several decades, the judicial system has been scrutinized for gender-discriminatory practices and policies.¹⁵⁸ Most recently, this scrutiny has been undertaken by the judiciary itself in the form of a task force movement. Many state supreme courts have formed commissions to study the extent and impact of gender bias on the judicial system.¹⁵⁹

¹⁵⁸See Norma J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202, 202 (1980).

¹⁵⁹See Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181, 183-86 (1990). At the time of Schafran's writing, nine states had already issued reports on the existence of gender bias within their state's judicial systems. These included, in order of publication: Florida, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island and Washington state. *Id.* at 186 n.20. Schafran writes:

The efforts of task force commissions and the research conducted by those independent of the state courts have resulted in volumes of research demonstrating alarming evidence of gender bias among the judiciary.¹⁶⁰ Several states have issued reports "document[ing] irrefutably that gender based biases are distorting the justice system. . . ."¹⁶¹ Many judges themselves agree that gender bias in the judicial system is a prevalent problem causing serious injury, as illustrated by the following:

Stereotyped thinking about the nature and roles of the sexes, devaluation of women and what is perceived as women's work, and myths and misconceptions about the social and economic realities of women's and men's lives are as prevalent in the justice system as in the other institutions of society. In the courts these three aspects of gender bias distort decision making and create a courtroom environment that undermines women's credibility.¹⁶²

Clearly, all segments of the justice system need to be sensitized to the issue of gender bias, but judges in particular must become more aware of the existence and impact of gender bias, both in their own decisionmaking and in the actions and attitudes of the attorneys and court personnel working around them. This section of the article will identify and discuss several common areas where gender bias most frequently enters the decisionmaking equation. The goal is to aid judges and attorneys in recognizing gender bias in its various forms and forums.

The courtroom manifestations of gender bias are witnessed most frequently in areas of family law, criminal law with respect to the treatment of the victims of crimes such as domestic violence and rape, the disparate treatment of male and female attorneys, and the disparate treatment of male and female litigants, particularly with respect to damage awards and sentencing.¹⁶³

a. Gender Bias and Family Law

Gender bias is perhaps most visible in its many forms in the arena of family law. Gender based stereotypes and biases negatively impact the treatment of

"[t]he catalyst for the gender bias task force movement was an effort, conceived in 1969 and formally inaugurated in 1980, to introduce information into state and national judicial education programs about the way gender bias affects decisionmaking and court interaction." *Id.* at 183.

¹⁶⁰See, e.g., John D. Johnston & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 747 (1971).

¹⁶¹Schafran, *supra* note 159, at 181.

¹⁶²NATIONAL CONFERENCE OF STATE TRIAL JUDGES, AMERICAN BAR ASSOCIATION, THE JUDGES' BOOK 66 (1989) [hereinafter THE JUDGES' BOOK].

¹⁶³Lynn H. Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280, 283 (1987) (citing NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, FIRST YEAR REPORT (1984) [hereinafter NEW JERSEY TASK FORCE]).

both men and women in areas of postdivorce property settlements, alimony, child support, and child custody.¹⁶⁴

i. Property Settlements and Alimony

Despite legislative efforts and judicial policies that profess an attempt to achieve gender equity in distributing marital property and apportioning the economic burdens of divorce, research reveals that women tend to receive a smaller share of the marital assets.¹⁶⁵ The Florida Supreme Court Gender Bias Study Commission reported that "equitable distribution generally grants men sixty-five to seventy-five percent of the marital assets and grants women only twenty-five to thirty-five percent."¹⁶⁶ Moreover, support awards for women tend to be inadequate and inequitable, particularly when viewed in relation to the improved economic status of men after divorce.¹⁶⁷ The task forces consistently reported that trial judges rarely award permanent or even indefinite alimony.¹⁶⁸ Where alimony is awarded, even if temporary, the amount is frequently inadequate.¹⁶⁹ Finally, the default rate on support payments is extremely high, due largely to weak enforcement of awards.¹⁷⁰ The Washington State Task Force on Gender and Justice in the Courts documented this disparate distribution:

A disturbing picture has emerged concerning the economic status of women and children following dissolutions in Washington. Indications are that maintenance awards, if ordered, are of limited duration and generally only available to women of very long-term marriages. Women traditionally have been disadvantaged in property

¹⁶⁴See Wikler, *supra* note 158, at 206.

¹⁶⁵*Id.* at 207; Schafran, *supra* note 163, at 284. As Schafran reports, New Jersey's Task Force on Gender Bias in the Courts found that women received no more than 35-40% of the marital assets upon divorce. See NEW JERSEY TASK FORCE, *supra* note 163.

¹⁶⁶Schafran, *supra* note 159, at 189 (citing THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 59 (1990)).

¹⁶⁷NEW JERSEY TASK FORCE, *supra* note 163, at 8082; see also Schafran, *supra* note 163, at 285; THE JUDGES' BOOK, *supra* note 162, at 70. A University of Michigan study found husband incomes to be 1731% above the need level seven years after divorce compared to wife incomes at 7% below need level. THE JUDGES' BOOK, *supra* note 162, at 70. The disparity was linked to three factors: (1) the wives generally had primary custody of the children; (2) the wives were receiving inadequate or no alimony and child support from the husbands; and (3) the earning capacity of the wives was significantly lower than commonly anticipated. *Id.*

¹⁶⁸Schafran, *supra* note 159, at 188.

¹⁶⁹*Id.* at 188.

¹⁷⁰NEW JERSEY TASK FORCE, *supra* note 163, at 80.

awards when the courts and attorneys fail to address the disparate earning capacities of the spouses in making such divisions.¹⁷¹

The result is that "many, and perhaps most, women suffer disproportionate hardship as a consequence of separation and divorce,"¹⁷² placing them among the forty percent of all female-headed families living in poverty.¹⁷³ United States Department of Commerce statistics reveal that in 1989, forty-seven percent of the children living in households headed by a single mother had income levels below \$7,500.¹⁷⁴ Only twenty percent of children living with single fathers had incomes below this figure and an even smaller four percent of children living with both parents fell into this bracket.¹⁷⁵

Researchers, commentators, and practitioners attribute this disparity in part to a tendency on the part of judges to "overestimate the earning power of women who have been out of the job market for many years"¹⁷⁶ and to underestimate the value of a woman's work within the household in calculating marital earnings and assets.¹⁷⁷ The recommendations of New Jersey's task force support this theory:

Judges should keep current with the actual costs of shelter, food, clothing and child care. Additionally, they should keep informed concerning job opportunities and salary levels for women of all ages in their own communities. Judges should not depend solely upon lawyers to bring this information to their attention, as some lawyers are not adequately informed about the economic consequences of divorce.¹⁷⁸

ii. Child Support

In 1985, one-third of all children eligible for child support lived in poverty.¹⁷⁹ The extent to which the child support system is responsible for the growing

¹⁷¹Schafran, *supra* note 159, at 188 (quoting WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, GENDER AND JUSTICE IN THE COURTS (1986)).

¹⁷²NEW JERSEY TASK FORCE, *supra* note 163, at 80. The Task Force based this conclusion on national data compiled by the Bureau of the Census, U.S. Department of Commerce.

¹⁷³*Id.* at 66 (citing BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS: HOUSEHOLD AND FAMILY CHARACTERISTICS 31, Table A-1 (Mar. 1981)).

¹⁷⁴BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STUDIES IN MARRIAGE AND THE FAMILY 23 (June 1989).

¹⁷⁵*Id.*

¹⁷⁶Schafran, *supra* note 163, at 284; see NEW JERSEY TASK FORCE, *supra* note 163, at 80, 82.

¹⁷⁷*Id.*

¹⁷⁸NEW JERSEY TASK FORCE, *supra* note 163, at 82.

problem of children living in poverty is not known. Clearly, however, the child support system plays a major role in the dilemma.

First, too few children who are eligible for child support are awarded payments.¹⁸⁰ The 1981 figures indicate that forty-one percent of the 8.4 million house-holds with children eligible for child support were never awarded the much needed payments.¹⁸¹ More alarmingly, sixty percent of the eligible children living in poverty failed to be awarded support.¹⁸²

A second area in which the child support system contributes greatly to the poverty of children is in its weak enforcement of child support payment orders.¹⁸³ The 1985 figures on child support enforcement show that only about one-half of the 4.4 million women owed child support received the full amount.¹⁸⁴ Of the remaining women owed child support, twenty-five percent received less than the full amount owed, and an alarming twenty-six percent received no payment at all.¹⁸⁵ Ironically, women with court-ordered awards had an even harder time getting payment than women with voluntary payment arrangements. Twenty-eight percent of this group received only partial payment, while thirtythree percent received no payment at all.¹⁸⁶ The Massachusetts Supreme Judicial Court Gender Bias Study Committee made the following observation:

The lack of a well-functioning child support enforcement system is a problem that can be properly analyzed as gender bias because it disadvantages women so much more than men. About 90% of custodial parents are women. All of the problems that impede support collection thus affect women in a disproportionate manner.¹⁸⁷

Finally, the amount of the child support awards is generally inadequate to support a minimal standard of living for the eligible children.¹⁸⁸ The Minnesota task force reported that the standard of living of the custodial parent (usually

¹⁷⁹Norma J. Wikler, *The Economics of Divorce: The Impact of Child Support on Children & Taxpayers*, JUDGE'S J., Summer 1986, at 8, 9 (citing BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P23, No. 141, CHILD SUPPORT AND ALIMONY: 1983 2 (July 1985) [hereinafter CURRENT POPULATION REPORTS]).

¹⁸⁰CURRENT POPULATION REPORTS, *supra* note 179, at 30.

¹⁸¹*Id.*

¹⁸²*Id.*

¹⁸³*Id.* at 29.

¹⁸⁴ARLENE F. SALUTER, U.S. DEPT OF COMMERCE, CHANGES IN AMERICAN FAMILY LIFE 26 (1989).

¹⁸⁵*Id.*

¹⁸⁶*Id.*

¹⁸⁷Schafran, *supra* note 159, at 190 (quoting REPORT OF THE GENDER BIAS STUDY OF THE MASSACHUSETTS SUPREME JUDICIAL COURT 44 (1989)).

¹⁸⁸Wikler, *supra* note 179, at 1011.

the mother) and the children "decreases substantially after divorce, while that of the noncustodial parent often improves."¹⁸⁹ Minnesota's study is not the first to reach this conclusion. Empirical data collected in numerous state and national studies reveal these same disparities.¹⁹⁰

The research cited above offers objective, empirical evidence that the child support system contributes to the impoverished state of many of this nation's children. In an effort to develop solutions to the system's problems, a significant body of research is being generated that identifies gender bias on the part of the judiciary as a significant factor contributing to the dilemma. Research conducted by both New Jersey's and New York's state task forces suggested that judges had "unrealistic ideas of the costs of running a family and raising children."¹⁹¹ One task force concluded that the awards appeared to be based more on what the father could afford to pay without impacting on his standard of living, rather than on the needs and living standards of the children.¹⁹² Mothers, on the other hand, usually the custodial parents, possess less earning power than is often supposed,¹⁹³ resulting in a stark disparity between the post-divorce economic status of men and women.¹⁹⁴

Some judges were found to "undervalue or deprecate the homemaker's contributions and ignore the permanent economic loss women incur when they forego developing their own income-generating potential and retirement funds to become homemakers."¹⁹⁵ Thus, distribution of the marital property and allocation of the child support expenses is inequitable.¹⁹⁶ The bulk of the financial burden is placed on the women, leaving the children at risk of living in poverty while the husbands' standard of living steadily rises after divorce.¹⁹⁷

As is the case with all forms of bias and prejudice, judicial education is the recommended course toward controlling the operation of bias in the decision-making process. Some judges recommend as follows:

To avoid gender bias in decisions respecting equitable distribution, spousal and child support and enforcement, judges need to reconsider their attitudes toward unpaid work in the home and to familiarize themselves with the paid work force potential for individual women,

¹⁸⁹Schafran, *supra* note 159, at 191.

¹⁹⁰*Id.*

¹⁹¹Schafran, *supra* note 163, at 285.

¹⁹²*Id.*

¹⁹³Wikler, *supra* note 179, at 40; Schafran, *supra* note 163, at 285.

¹⁹⁴Wikler, *supra* note 179, at 48-49; Schafran, *supra* note 163, at 285.

¹⁹⁵Schafran, *supra* note 163, at 285.

¹⁹⁶*Id.*

¹⁹⁷Wikler, *supra* note 179, at 48.

given their age, education, and employment background, as well as the real costs of child raising.¹⁹⁸

iii. Child Custody

Custody is an area where the biases and stereotypes concerning both sexes influence decision-making.¹⁹⁹ Bias against fathers is witnessed in the persisting application of the "maternal preference" doctrine.²⁰⁰ Although this doctrine has been eliminated from the books, it still operates in practice, perpetuating the assumption that mothers, characterized as self-sacrificing, nurturing and at home full-time, are better caregivers.²⁰¹ Fathers tend to be perceived as less capable caretakers and must prove their ability to parent, whereas mothers are presumed to be capable.²⁰²

Bias against mothers results from situations where the mother works outside the home on a full-time basis. Stereotypical presumptions about the role of women have operated to deny the mother custody in favor of the father on the theory that a career woman is a less competent parent.²⁰³ Under these circumstances, fathers have been awarded custody "on little more than a showing of interest in postdivorce parenting."²⁰⁴

The personal relationships of women tend to be scrutinized more closely than those of men in post-divorce custody decisions. For example, numerous cases document situations in which women with live-in boyfriends have lost custody, while men with live-in girlfriends retain custody.²⁰⁵ As one commentator put it: "[t]he divorced man with a girlfriend is a stable fellow starting a new life, but the divorced woman with a boyfriend is a promiscuous and unfit custodial mother. . . ."²⁰⁶ A Massachusetts task force reported that "[w]hen fathers contest custody, mothers are held to a different and higher

¹⁹⁸THE JUDGE'S BOOK, *supra* note 162, at 73.

¹⁹⁹*Id.*

²⁰⁰Schafran, *supra* note 159, at 191 ("The task forces have confirmed widespread bias against fathers on the part of some judges who do not perceive men as being capable or appropriate primary caretakers.").

²⁰¹THE JUDGES BOOK, *supra* note 162, at 73.

²⁰²Schafran, *supra* note 159, at 191.

²⁰³This bias in favor of women with careers as homemakers is ironic considering the corresponding inequities in support awards. Divorced mothers are forced to enter the workplace to provide financial support for their children on the one hand, while risking challenges to their custody rights based on their absence from the home. THE JUDGES' BOOK, *supra* note 162, at 73.

²⁰⁴*Id.*

²⁰⁵*Id.*

²⁰⁶Schafran, *supra* note 159, at 194.

standard of parenting and personal behavior than fathers."²⁰⁷ The result is that "fathers are far more successful in winning child custody than generally is perceived."²⁰⁸

b. Gender Bias and Victims of Crime

Gender bias against women is prevalent in the judicial system's treatment of victims of crime, particularly with respect to rape and domestic violence. The literature on the topic is replete with accounts of cases in which judges blame the victim for inviting the violence while forgiving the offender.²⁰⁹

Rape victims are frequently characterized as "seductive deceitful temptress[es]."²¹⁰ The rape laws have historically demonstrated a "presumed causal connection between a woman's (but not a man's) sexual behavior and her credibility, and a tendency to discourage prosecution by making it extremely difficult and unpleasant for the victim."²¹¹ Although the laws have changed, the presumptions prevail to a great extent.

The judicial system, in cooperation with other disciplines, has made considerable headway in the effort to change the treatment of rape victims. A significant amount of research has been conducted on the nature of the crime of rape, the psychology of offenders, the psychological and emotional impact on the victim (both short and long term), the prevalence and seriousness of acquaintance rape,²¹² and rape trauma syndrome.²¹³ Judges need to seek out this data in order to better identify the stereotypes that impact their own decision-making and that affect the behavior of attorneys in a rape prosecution.²¹⁴

Victims of domestic violence are subject to similar biases that reflect the long cultural and legal treatment of wives and women as property.²¹⁵ Despite domestic violence statutes intended to protect victims, "judicial enforcement of those protections is often influenced by a common law heritage and cultural

²⁰⁷*Id.* at 192.

²⁰⁸*Id.*

²⁰⁹Wikler, *supra* note 158, at 206.

²¹⁰THE JUDGE'S BOOK, *supra* note 162, at 68.

²¹¹*Id.* at 69.

²¹²There is a tendency to underestimate the injury suffered by a victim of acquaintance rape. The erroneous presumption is that victims who either knew their offender or did not suffer any visible physical injuries were not, in fact, injured in any legal sense. *See* THE JUDGE'S BOOK, *supra* note 162, at 70.

²¹³*Id.* at 70. Rape trauma syndrome defines the variety of behavioral reactions exhibited by rape victims. *Id.*

²¹⁴Schafran, *supra* note 163, at 284.

²¹⁵Wikler, *supra* note 158, at 206; THE JUDGE'S BOOK, *supra* note 162, at 67.

stereotypes which treat wives as the property of their husbands, sanction wife abuse and assume that women provoke the attacks and enjoy the pain."²¹⁶

The problem of domestic violence is severe enough without judicial bias contributing to the victim's injuries. Federal Bureau of Investigation figures report that in the United States a woman is beaten every 18 seconds.²¹⁷ Moreover, between 2,000 and 4,000 women die each year because of abuse.²¹⁸ Sadly, despite reform efforts, "recent statistics suggest that . . . the incidence of battering may be increasing, not decreasing."²¹⁹

One major problem women suffer when seeking relief from their batterers in the courts is the frustration of being passed from family court to the police department while court personnel and judges decide whether the battering is a crime or just a private, domestic squabble.²²⁰ A second problem commonly experienced by battered women when seeking court protection is that they frequently emerge with a mutual order of protection.²²¹ These mutual orders are often issued despite the absence of a cross-petition by the respondent or allegations of violence by the petitioner.²²² Finally, court enforcement of domestic violence legislation reportedly has been very poor.²²³

There is now a movement among the states to address the unjust treatment of victims of crime. State constitutional amendments designed to give crime victims the right to be informed, the right to be present, and the right to be heard at all stages of criminal justice proceedings have already been approved in at least twelve states.²²⁴ Nine other states, including Ohio, have introduced or will soon introduce legislation to put similar amendments on upcoming ballots.²²⁵ The hoped-for result of these amendments is that innocent victims will "be treated with compassion and afforded protections similar to those of alleged offenders."²²⁶ Moreover, by improving the treatment and respect

²¹⁶Schafran, *supra* note 163, at 283.

²¹⁷Sylvia A. Law, *Every 18 Seconds a Woman is Beaten: What Judges Can Do in the Face of This Carnage*, JUDGES J., Winter 1991, at 12, 14.

²¹⁸*Id.*

²¹⁹*Id.* at 14.

²²⁰Schafran, *supra* note 163, at 284.

²²¹*Id.*

²²²*Id.*

²²³*Id.* at 281.

²²⁴These states include Arizona, Colorado, Florida, Kansas, Illinois, Michigan, Missouri, New Jersey, New Mexico, Rhode Island, Texas and Washington. Victims Rights Amendments (1991) (unpublished manuscript, on file with author).

²²⁵Schafran, *supra* note 163, at 281.

²²⁶*Id.* (quoting Linda Lowrance, chair of the Victims' Constitutional Amendment Network). The proposed Ohio amendment, recently introduced as House Joint Resolution 3, would set the following constitutional amendment on a statewide ballot:

afforded victims in general, there is hope that the biased treatment of female victims will cease and that the stereotypes described above will be prevented from operating to the disadvantage of women.

c. Gender Bias and Women Attorneys, Litigants and Witnesses

The task forces on gender bias report that there is substantial evidence of gender-biased treatment of women litigators, litigants, and witnesses, both expert and otherwise, by judges personally and by male attorneys whose demeaning treatment of women colleagues goes unchecked by the male judiciary.²²⁷ This gender bias is displayed in a wide range of far too common courtroom behavior: inappropriate and overly familiar forms of address; comments on personal appearances and dress; belittling and condescending comments (i.e., addressing a female litigator as "little girl"); unsolicited verbal and physical advances; and sexist trial tactics that attempt to portray the female attorney as incompetent or lacking credibility.²²⁸ Female attorneys report frequently being asked by judges whether they are attorneys when the same question is not asked of men.²²⁹ The research also describes a related tendency on the part of judges to require a woman to prove her competency as an attorney while presuming competency on the part of male colleagues.²³⁰

The impact of the gender-biased behavior described above cannot be underestimated. Demeaning treatment of women results not only in personal humiliation for the woman, but undermines her credibility and professionalism in the courtroom.²³¹ In cases where the victim of gender bias is a female attorney, the biased behavior compromises her ability to provide her client with the best possible advocacy by creating and reinforcing in the

Article I, Section 10 a. Effective enforcement of the criminal law depends on cooperation between victims of criminal offenses and persons charged with enforcing the law. To ensure the involvement of a victim in the proceeding in which a person is held to answer for the offense, a victim shall have the right to receive due notice, information, assistance, and protection during the proceedings and to be present at the proceedings, as provided by law.

See H.R. J. Res. 3, 120th Ass., 1st Sess. (1993).

²²⁷Schafran, *supra* note 163, at 287.

²²⁸*Id.* at 287; see also Lynn H. Schafran, *How Stereotypes About Women Influence Judges*, JUDGES' J., Winter 1985, at 14, 15.

²²⁹Schafran, *supra* note 163, at 287. Schafran cites a survey conducted by New York's Task Force on Gender which two-thirds of the women under the age 35 and more than half of the women between 35 and 50 who responded to the survey reported that they had been questioned when men had not. *Id.* (citing NEW YORK TASK FORCE ON WOMEN IN THE COURTS, REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS (1986)).

²³⁰Martha W. Barnett, *Women Practicing Law: Changes in Attitudes, Changes in Platitudes*, 42 FLA. L. REV. 209, 217 (1990).

²³¹Schafran, *supra* note 163, at 287; see also Schafran, *supra* note 228, at 15.

minds of jurors and judges unfounded doubts about her credibility and competency.²³² One commentator writes:

[w]hat must be understood about these incidents is that they result in more than personal embarrassment, humiliation, and anger for the women involved, and that whether the offending remarks are unintentionally sexist or deliberately made, their consequences are the same. In the courtroom, in chambers, and in other professional settings, terms of endearment, comments on looks and clothing, and remarks that otherwise call attention to the individual as a woman rather than as a lawyer undercut her credibility and her professionalism.²³³

One step that is being taken to implement the recommendations of the state task forces is the adoption of new disciplinary rules and ethical considerations.²³⁴ Ohio is currently considering a proposed amendment to the Ohio Code of Professional Responsibility. The new disciplinary rule, if adopted, will prohibit discriminatory conduct by attorneys in their professional capacity.²³⁵ The proposed disciplinary rule is accompanied by an ethical consideration which recommends that attorneys "should not engage, in a professional capacity, in illegal discrimination or inappropriate and demeaning language or conduct based upon race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability."²³⁶

Another step that we, as members of the judicial system, must take is to educate ourselves. At least some members of the Ohio legislature seem to agree. A proposal is currently being considered which would require all judges to complete a threehour course each calendar year in racial and gender sensitivity and cultural diversity.²³⁷ Particularly with respect to gender bias, there is a widespread presumption that the problem is not as serious as is claimed. Worst

²³²*Id.*

²³³Lynn H. Schafran, *Abilities vs. Assumptions: Women as Litigators*, TRIAL, Aug. 1993, at 38.

²³⁴Schafran, *supra* note 163, at 198.

²³⁵MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1993) (proposed amendment to the Ohio Code by the Joint Task Force on Gender Fairness). The proposed DR 1-102 reads:

1-102(B) A lawyer shall not engage, in a professional capacity, in conduct involving discrimination because of race, color, religion, age, gender, sexual orientation, national origin, marital or disability, where the conduct is intended or likely to cause harm. This prohibition does not preclude legitimate advocacy where race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability is relevant to the proceeding where the advocacy is made.

Id. (on file with *Cleveland State Law Review*).

²³⁶*Id.*

²³⁷*See supra* note 235.

still is the presumption that those complaining about gender bias are militant feminist women making smoke where no fire exists.²³⁸ Task force members investigating gender bias in the judicial system have reported their own surprise that the extent and severity of the problem far exceeds their original expectations and presumptions.²³⁹

2. Racial and Ethnic Bias

Racial bias is a second major category of judicial bias that has received a significant amount of research and commentary. Considerable scrutiny was focused on the court systems' treatment of racial and ethnic minorities in the beginning of the 1960s and continuing throughout the 1970s. The scrutiny appears to have subsided somewhat, although the problem of racial and ethnic bias persists. The operation of these biases may be less overt, which partly explains why the topic is not discussed with the frequency and fervor it entertained in previous decades, but recent research clearly indicates that racial and ethnic bias in more subtle, covert forms exist.²⁴⁰

The criminal justice system has been most criticized for racial discrimination and biases. From arraignment to filed charges, from prison sentences to parole or to death row, there is a disproportionate number of minorities at each stage of the criminal justice process.²⁴¹ A 1990 study published by the Sentencing Project,²⁴² a nonprofit Washington-based firm that lobbies for alternatives to incarceration, presents alarming statistics:

One in four black men between 20 and 29 are in prison . . . or otherwise under the control of the criminal courts through parole or probation. By contrast, about 6% of white males in their 20s are under the control

²³⁸Schafran, *supra* note 163, at 204.

²³⁹*Id.* at 207.

²⁴⁰Harold Hood, *What Progress Have We Made, and What Can Be Done?*, NATIONAL JUDICIAL COLLEGE ALUMNI MAG., Fall/Winter 1992, at 11-13. Judge Hood, chairman of a Michigan Supreme Court Race/Ethnic Bias Task Force, stated:

It is my belief that instances of overt and blatant gender, racial and ethnic bias, although they obviously exist, are not the primary problem in our system of justice. Such manifestations, to the limited extent that they do exist and can be identified, are almost universally held unacceptable, and can be dealt with. What is widespread, and endemic in the system, however, is unconscious insensitivity to racial, gender and ethnic concerns, as well as conscious or unconscious stereotyping of entire groups or classes of persons.

Id. at 12.

²⁴¹NATIONAL CONFERENCE ON SENTENCING ADVOCACY 1991, RACE, SENTENCING, AND CRIMINAL JUSTICE 1 (PLI Litig. & Admin. Practice Course Handbook Series No. C4-4197, Apr. 19-20, 1991), available in WESTLAW, Law Review Library, TP-ALL File.

²⁴²MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 8 (1990) [hereinafter SENTENCING PROJECT REPORT].

of a criminal court. While far fewer women than men in this age group are under court control, a far higher percentage of black women than whites are in prison or jail.²⁴³

The Sentencing Project's study reports that in 1989, there were 247,930 whites in state prisons, jails and federal prisons, compared to 212,252 blacks.²⁴⁴ These numbers are disturbingly close, considering that blacks comprise only twelve percent of the entire United States population.²⁴⁵ Moreover, there are more than two times the number of whites on probation or parole (806,578) as there are blacks (397,438).²⁴⁶

There are many factors contributing to the disparities, such as increased pressure on the justice system to be "tough on crime," family dysfunction, reduced access to education and job opportunities, poverty, and the invasion of drugs into urban areas populated most densely by blacks and other minorities.²⁴⁷ It is easy to recognize that these powerful socioeconomic conditions contribute significantly to the racial disparities within the criminal justice system.²⁴⁸ Indeed, research has demonstrated that "socioeconomic conditions associated with crime are more prevalent among blacks than among whites."²⁴⁹ But to the extent that judicial bias may have an impact on the racial disparities, the issue must be treated as significant and in need of evaluation by judges. Indeed, there are numerous studies that implicate racial discrimination as a significant factor in the disproportionate treatment of blacks and other minorities in the criminal justice system.²⁵⁰

The empirical evidence demonstrates that race may be a factor in the treatment of minorities by the American justice system. There are many other

²⁴³David G. Savage, *One in Four Young Black Men in Jail or in Court Control, Study Says*, L.A. TIMES, Feb. 27, 1990, at A1 (citing SENTENCING PROJECT REPORT). These statistics, however, are incomplete in two respects. First, they imply a direct and unconditional linkage between a defendant's race and judges' sentencing decisions; that is, they fail to consider the interaction of different variables, such as crime severity, repeat offender status, state sentencing statutes, etc., and the complex way in which they may relate to such decisions. The second deficiency is that they fail to identify the number of blacks and whites charged or convicted of offenses. It may well be the case that more crimes are committed by blacks than whites, which would account for the higher number of blacks in prison or otherwise under the control of the criminal courts.

²⁴⁴Savage, *supra* note 243.

²⁴⁵*Id.* at 7.

²⁴⁶*Id.*

²⁴⁷*Blacks in Prison*, BIRMINGHAM NEWS, Feb. 28, 1990, at A10.

²⁴⁸Clyde E. Murphy, *Racial Discrimination in the Criminal Justice System*, 17 N.C. CENT. L.J. 171, 171-74 (1988).

²⁴⁹*Id.* at 176 (quoting JOAN PETERSILLA & SUSAN TURNER, *GUIDELINE BASED JUSTICE, THE IMPLICATIONS FOR RACIAL MINORITIES* xi (1985)).

²⁵⁰*Id.* at 177; see also Rose M. Ochi, *Racial Discrimination in Criminal Sentencing*, JUDGES J., Winter 1985, at 7.

factors which contribute to the disproportionate number of minorities who are processed through the system. Thus, all who are interested in fair treatment of all persons must consider multiple factors in determining whether race has contributed to any alleged disparate treatment of anyone by the justice system. At least twelve states have organized task forces to study racial bias.²⁵¹ The American Bar Association has also taken up the initiative to fight racial and ethnic bias in the justice system. In 1992, the ABA's Task Force on Minorities and the Justice System published the results of its research on racial and ethnic bias.²⁵² The report concluded: "[o]ur justice system treats minorities inequitably and . . . past efforts to eliminate bias and promote diversity, although well-intentioned, have fallen considerably short of their goals. Much needs to be done . . ." ²⁵³

Racial bias is particularly evident with respect to the sentencing of criminal defendants. Studies consistently report that racial minorities receive harsher and longer prison sentences.²⁵⁴ This is true even where federal mandatory sentencing guidelines are used. Florida reported that "whether the mandatory sentencing minimum is applicable appears to be related to the race of the defendant [and that] whites are more likely than non-whites to be sentenced below the applicable mandatory minimum."²⁵⁵ One commentator stated: "[t]here is no getting around the evidence: Racial minorities receive disproportionately stiffer sentences for comparable crimes, in spite of our system of justice that provides more safeguards for accused persons than in any other country."²⁵⁶ Racial prejudice has also been documented in many other areas of the criminal justice system. State task forces reported consistently that ethnic and racial biases impact the charging decisions of prosecutors, particularly when the victim is caucasian and the defendant is a minority.²⁵⁷ In Michigan, for example, the State's Task Force on Racial/Ethnic Issues in the Courts reported that racial and ethnic minorities are routinely overcharged and are often charged with felonies "in cases . . . where majority persons are brought to court on misdemeanor charges."²⁵⁸ Other state reports cite similar findings

²⁵¹Joanne Pitulla, *Fighting Invidious Discrimination in the Legal Profession: Is Justice a White Men's Club?*, PROF. L., Nov. 1992, at 11.

²⁵²AMERICAN BAR ASSOCIATION TASK FORCE ON MINORITIES AND THE JUSTICE SYSTEM, *ACHIEVING JUSTICE IN A DIVERSE AMERICA* 8-28 (1992) [hereinafter ABA REPORT].

²⁵³*Id.* at 1-2.

²⁵⁴*Id.* at 17 app. a.

²⁵⁵ABA REPORT, at 22 app. (quoting 2 FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION, *WHERE THE INJURED FLY FOR JUSTICE* 36 (1991)).

²⁵⁶*See* ABA REPORT, *supra* note 252, at 13.

²⁵⁷*Id.* at 13 app. a.

²⁵⁸*Id.* at 13-14 (citing MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHICAL ISSUES IN THE COURTS, *FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON RACIAL/ETHICAL ISSUES IN THE COURTS* 51 (1989)).

with respect to bias in charging and report also that racial and ethnic bias may operate as a factor in disproportionate treatment of minorities during plea bargaining,²⁵⁹ jury selection through use of peremptory challenges,²⁶⁰ the adequacy of defense representation,²⁶¹ and in setting of bail.²⁶²

All of these statistics are mentioned to alert judges of the absolute necessity for judges to recognize the possibility that gender, race, or ethnicity may influence their judicial decision-making. Judges should be aware and be sensitive to the impact and potential bias our decisions have, not only on lawyers and litigants who appear before us, but also how our conduct affects the real and perceived fairness of judicial decision-making.

3. Other Areas of Bias

a. Regional Bias

Closely linked to ethnic bias is the category of regional bias. Very little research or commentary exists on this topic. However, the possibility of regional bias operating in the decision-making process of a judge cannot be dismissed.

A Vermont case demonstrates regional bias in operation. A New Jersey citizen, injured while skiing on Vermont's slopes, brought a personal injury action in a Vermont district court.²⁶³ The attorney representing the defendant, a condominium association, engaged in regional bias trial tactics by repeatedly emphasizing to the jury that the injured plaintiff was an outsider and that the citizens of Vermont, including the judge, jury, defendants, and defense attorney, were all a unified collective.²⁶⁴ The trial tactic was successful in the trial court, but proved ultimately fatal for the defendants on appeal. In reversing the verdict, the Second Circuit Court of Appeals held that "[n]o verdict may stand when it is found in any degree to have been reached as a result of appeals to regional or other prejudice."²⁶⁵

b. Economic or Wealth Bias

Poverty may be another area where bias impacts decision-making. Some researchers claim that wealth bias has a negative impact on criminal defendants

²⁵⁹*Id.* at 14.

²⁶⁰*Id.* at 15.

²⁶¹ABA REPORT, *supra* note 252, at 16.

²⁶²*Id.* at 17.

²⁶³Pitulla, *supra* note 251, at 14.

²⁶⁴*Id.*

²⁶⁵*Id.* at 14-15 (quoting *Pappas v. Middle Earth Condominium Ass'n*, 963 F.2d 534 (2d Cir. 1992)).

and civil litigants.²⁶⁶ It is also suggested that there is a strong link between the operation of poverty bias and racial bias and that poverty bias is really just an indirect form of racial bias.²⁶⁷ One commentator writes:

[w]ealth discrimination [results] from poor defendants' inability to obtain a private attorney or pretrial release. As the effect of wealth discrimination on [minority] defendants is likely to be greater than on white defendants, since [minorities] are more likely to be poor, it amounts to indirect racial discrimination. Still others have suggested that this disparity is due to the effect of legal factors, such as the seriousness of the charge or prior criminal record. Since [minorities] are more likely to have a serious charge or prior criminal record, they are also likely to receive a more severe sentence.²⁶⁸

There is little research on the issue of poverty bias, and the line between poverty and racial bias is very blurred. Judges should be aware that poverty bias may be operating in their own decision-making or may be affecting the behavior of other players in the justice system, causing an unfair and unjust result for poor defendants and litigants.

B. Impact of Judicial Bias and the Jury

1. Juror Bias vs. Judicial Bias

Judicial bias does exist; where it exists unidentified and untempered by the judge or by an attorney via recusal mechanisms, the bias of a judge can negatively impact the outcome of a trial or other judicial proceedings. And yet, many judges are slow to accept the possibility of bias in their own decision-making, viewing the existence of partiality as improbable instead of as an inherent aspect of the human perceptual process. Indeed, there is surprisingly little discussion about the existence of judicial bias relative to the central role the judiciary plays in the justice system. There is, however, a tremendous amount of literature providing commentary and empirical evidence on the issue of jury bias—much of it criticizing the jury system. In light of the existence and frequent manifestations of bias on the part of judges, this criticism is misguided. As the judicial system employs mechanisms to expose jurors' biases and permits parties opportunities to avoid a particular juror's biases, a jury may be the best means of protecting against the operation of the individual biases of judges.

²⁶⁶Ochi, *supra* note 250.

²⁶⁷Ochi, *supra* note 250, at 8. This link is largely due to demographics and the fact that a high percentage of those persons living in poverty are minorities.

²⁶⁸*Id.* at 8 (quoting Cassia Spohn et al., *The Effect of Race on Sentencing: A Re-Examination of an Unsettled Question*, 16 LAW & SOC. REV. 71, 72 (1981-82)).

Throughout the history of American jurisprudence, the jury system has played a central role in providing a fair and impartial trial.²⁶⁹ The American colonists valued the right to trial by jury as a bulwark against governmental oppression.²⁷⁰ The early Americans believed that a jury of one's peers would prevent the arbitrary exercise of governmental authority and that juries were "a valuable safeguard to liberty."²⁷¹ This belief stemmed from the fact that several procedural safeguards exist in the selection and decision-making process of a group of individuals on a jury that aids in diminishing individual biases and prejudices.²⁷² In contrast, a judge is one individual, whose decisions are not a compromise of the majority, but rather are the decisions of an autonomy. There are no inherent mechanisms to force a judge to acknowledge and set aside personal prejudices when deciding a case.

Our country's founders acknowledged the importance of a jury of one's peers in granting the right to a jury trial in criminal and civil cases in Article III

²⁶⁹For example, the United States Constitution guarantees the right to trial by jury in suits at common law where the value exceeds twenty dollars. U.S. CONST. amend. VII.

²⁷⁰*See also* THE FEDERALIST NO. 83 499 (Alexander Hamilton) (New American Library ed. 1961)(noting that although friends and adversaries of convention's plan agreed on little else, they did agree on value of trial by jury).

²⁷¹*Id.*

²⁷²The federal government and the majority of states have acknowledged that a judge may possess subconscious bias and prejudices that are diminished in juries through enactment of a rule prohibiting waiver of a jury by criminal defendants absent court and governmental approval. For instance, federal rules provide that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." FED. R. CRIM. PRO. 23(a). The Supreme Court in *Singer v. United States*, 380 U.S. 23 (1964), upheld the constitutionality of this rule and acknowledged a jury "has been surrounded with safeguards to make it as fair as possible—for example, venue can be changed when there is a well-grounded fear of jury prejudice . . . and prospective jurors are subject to voir dire examination, to challenge for cause, and to peremptory challenge. . . ." *Id.* at 35. Thus, the Court held a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury pursuant to the Sixth Amendment of the Constitution. *Id.* at 36. The Court, in essence, noted a jury provides impartial due process to the defendant. The Court found it "difficult to understand" how forcing defendants to undergo a jury trial against their will was contrary to their right to a fair trial or to due process. *Id.*

The only obvious reason defendants would want to be able to waive their right to a jury and be tried by a judge is if they believed the judge would be biased or prejudicial toward them. By requiring the judge and the prosecutor to approve a waiver of the jury, the legislators are acknowledging the defendant's prey on a judge's bias and a method to prevent abuse of this process. In fact, the *only* states that do not require the approval of the judge and prosecutor for a waiver of a jury in a criminal case are: CAL. PENAL CODE § 1167 (West 1985); FLA. STAT. ANN. § 40.01, 92.141 (West 1988); ILL. ANN. STAT. ch. 725, para. 103-6 (Smith-Hurd 1992); IND. CODE ANN. §§ 35-37-1-2, 35-41-4-31 (West 1986); KY. R. CRIM. P. 12.83, § 9.26; MINN. STAT. ANN. § 26.01(a) (West Supp. 1994); N.Y. R. CRIM. P. § 340.40; OHIO REV. CODE ANN. § 2945.05 (Anderson 1993); PA. CONS. STAT. ANN. § 5104 (1981).

of the United States Constitution²⁷³ and in the Sixth and Seventh Amendments to the Constitution.²⁷⁴ This recognition is derived from the awareness of the inherent procedural safeguards from bias and prejudice in a jury and the acknowledgement that a trial by judge does not possess the equivalent safeguards. The Supreme Court acknowledged that the jury affords protection in the interposition of the commonsense judgment of a group of impartial laypeople between the defendant and the potentially biased prosecutor and judge.²⁷⁵ Therefore, in light of these facts, and when comparing juror versus judicial bias, one example of legislative recognition of the difference between juror and judicial bias that comes to mind is jury waiver. In all but a few states,²⁷⁶ by court rule, statute or constitutional provision, defendants in a criminal case cannot unilaterally waive their right to a jury trial without the consent of the judge and all parties involved.²⁷⁷

Rule 23(a) of the Federal Rules of Criminal Procedure,²⁷⁸ Rule 38(d) of the Federal Rules of Civil Procedure,²⁷⁹ and forty-two of the fifty states' rules of court or statutes²⁸⁰ reflect the fact that if defendants are permitted to unilaterally waive their right to a jury and be tried by a judge, it is because the defendants feel the judge will be more favorable or biased in their favor than a jury that has undergone the procedural mechanisms that are designed to

²⁷³U.S. CONST. art. III, § 2, cl. 3, provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"

²⁷⁴The Sixth Amendment to the U. S. Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. CONST. amend. VI. The Seventh Amendment to the U. S. Constitution provides that in civil cases "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.

²⁷⁵*See Williams v. Florida*, 399 U.S. 78, 100 (1970).

²⁷⁶The few states that permit defendants in criminal trials to unilaterally waive their right to a jury trial without the approval of the judge or the prosecutor are: Colorado, Connecticut, Illinois, Iowa, Michigan, Minnesota, Ohio, and Texas. *Id.*

²⁷⁷*Id.*

²⁷⁸Rule 23(a) of the Federal Rules of Criminal Procedure provides that: "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." FED. R. CRIM. P. 23(a).

Moreover, the Supreme Court has held that there is no Constitutional impediment to conditioning a waiver of a right to a jury trial on consent of the prosecutory attorney and judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury. *Singer v. United States*, 380 U.S. 24, 36 (1965). The government is not required to articulate its reasons for demanding a jury trial and refusing to consent to a defendant's proffered waiver. *Id.*

²⁷⁹Rule 38(d) of the Federal Rules of Civil Procedure provides that "[d]emand for trial by jury made as herein provided may not be withdrawn without the consent of the parties." FED. R. CIV. P. 38(d).

²⁸⁰*See supra* note 276.

remove or raise the awareness of potential biases a juror may possess toward the defendant. Thus, the defendant in a criminal case would seek to exploit the justice system by utilizing potential biases a judge may unconsciously possess to the defendant's advantage.

A few states remain, however, that could be construed as more lenient toward the accused in criminal trials because they allow the accused to waive a jury trial and be tried by the judge without allowing the government the right to insure fairness by an impartial jury.²⁸¹ These states argue that by allowing the defendant to unilaterally waive the right to a jury trial, it expedites the time to conduct the trial and saves money. However, at issue is ensuring that justice is accomplished. Therefore, to ensure that justice is accomplished, especially in states that allow the accused to waive a jury trial without court approval, judges must educate themselves and be conscious of their potential bias in order to minimize the effects of their bias on the parties in the action. If this is accomplished, the accused in criminal cases will not be able to exploit the justice system as easily and take advantage of a judge's personal bias. The public has a right to expect no less from its judges.

While both judges and jurors, as human beings, will always possess a degree of bias when given a choice between who shall listen to the evidence and render a verdict, several prophylactic procedures are inherent within the jury selection process to minimize the personal biases a juror brings into the jury room. These procedures separate juror bias from judicial bias.

a. Prophylactic Procedures within the Jury System to Diminish Individual Biases of Jurors

It is true that each juror brings to the jury room a myriad of personal biases and prejudices, some of which may impact the deliberations of the case at hand. But a jury is a collective of many counteractive biases and prejudices and is ideally composed of a cross-section of the community. The collective nature of juries has the effect of leveling individual jurors biases and prejudices, resulting in a potentially more fair and impartial decision-making body than an individual judge may provide.

The United States Supreme Court has recognized the right to an unbiased jury²⁸² and has endeavored to develop mechanisms to foster impartiality of juries. These mechanisms include: 1) the requirement that a jury be representative of a cross-section of the community; 2) voir dire, the ability to question potential jurors about prejudices; 4) peremptory challenges; and 5)

²⁸¹See *supra* note 270. The government attorney is not acting as an advocate when consenting to the jury trial waiver. "The United States Attorney is the representative . . . of a sovereignty whose obligation . . . in criminal prosecution is not that it shall win a case, but that justice shall be done." See *Singer v. United States*, 380 U.S. 24, 37 (1964); *Berger v. United States*, 295 U.S. 78, 88 (1935).

²⁸²An impartial jury has been construed as meaning one composed of jurors with a "mental attitude of appropriate indifference" who can decide the case solely on the evidence before them. *United States v. Woods*, 299 U.S. 123, 145-46 (1936).

the ability of parties to have jurors excused for cause. All of these mechanisms reduce the presence of biases on juries.

The Supreme Court has enunciated the rule that a jury must come from a fair cross-section of the community to ensure impartiality.²⁸³ To implement this rule, the Court held the state cannot exclude jurors on the basis of race and gender so as to undermine the goal of a fair cross-section of the community.²⁸⁴ Consequently, a prosecutor would violate the Equal Protection Clause of the Fourteenth Amendment if he used a peremptory challenge solely on account of race or on account of the assumption that black jurors do not have the impartiality to consider the state's case against a black defendant.²⁸⁵ Thus, purposely excluding a potential juror on the basis of race or gender by peremptory challenge violates the principle of obtaining a jury from a fair cross-section of the community in both criminal and civil trials.²⁸⁶

Voir dire²⁸⁷ is another method to "weed out" the biases and prejudices of prospective jurors which may undermine the decision-making process. During voir dire, attorneys have the opportunity to get to know prospective jurors by engaging in two-way conversations with them.²⁸⁸ Using the knowledge of the individual panel member²⁸⁹ and any indications of bias or prejudice he or she

²⁸³Holland v. Illinois, 493 U.S. 474, 480-81 (1990).

²⁸⁴*Id.*

²⁸⁵Batson v. Kentucky, 476 U.S. 79, 88-89 (1986).

²⁸⁶*See generally* Georgia v. McCollum, 112 S. Ct. 2348 (1992)(using peremptory challenges by a criminal defendant/defense attorney to excuse jurors solely on the basis of race violates the public's right to Equal Protection under the Fourteenth Amendment to the United States Constitution.); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991)(using peremptory challenges to excuse jurors solely on the basis of race violates a civil litigant's Equal Protection under the Fourteenth Amendment to the United States Constitution).

²⁸⁷"Voir dire" is a French expression that means "to speak the truth." Voir dire is defined as the preliminary examination which the court may make of those presented as witnesses or jurors where their competency, interests, etc. may be objected to. BLACK'S LAW DICTIONARY 147 (5th ed. 1979).

²⁸⁸*See generally* Willis B. Perkins, *Some Needed Reforms in the Methods of Selecting Juries*, 13 MICH. L. REV. 391, 395 (1915)(noting that during voir dire, jurors were often asked questions relating to their past lives, their business, and even their domestic social relationships).

²⁸⁹Some attorneys use old wives' tales in the form of stereotypes to decide which prospective jurors to excuse peremptorily. These attorneys typically "picked" the jury following Clarence Darrow's formula. "Never take a German; they are bullheaded. Rarely take a Swede; they are stubborn. Always take an Irishman or a Jew; they are the easiest to move to emotional sympathy. Old men are generally more charitable and kindly disposed than young men; they have seen more of the world and understand it." THE OXFORD BOOK OF LEGAL ANECDOTES 101 (1986). Darrow practiced law at the turn of the century when many immigrants came to America. Today, especially with many of the nationalities diluted over time, stereotypes cannot categorize a juror's reaction or decision process.

may reveal, the attorneys are able to exercise their peremptory challenges to avoid a particularly biased jury member from deciding the case.

Since all potential jurors possess a spectrum of conscious and unconscious biases, the court empowers both parties in trial to utilize a limited number of peremptory challenges²⁹⁰ to eliminate prospective jurors who appear hostile to that party's position. When a party exercises a peremptory challenge, the attorney is not generally required to explain or justify the reasons for the challenge. Moreover, as a general rule, no judicial determination is made as to the validity of the attorney's challenge. "The result is intended to be a jury composed of impartial community members capable of rendering a just and equitable verdict."²⁹¹

Although peremptory challenges are not constitutionally mandated,²⁹² the Supreme Court has recognized them as essential to the American justice system.²⁹³ The theoretical justification for arbitrary elimination of randomly-selected jurors is to obtain a jury devoid of any predispositions toward a particular party or issue in a case.²⁹⁴ Thus, the goal of peremptory challenges is to obtain jurors that fall somewhere near the middle of the spectrum of biases, who will objectively consider evidence presented at trial and render a just verdict.²⁹⁵

If a potential juror's bias or prejudice becomes obvious during voir dire and the juror states or implies an inability to keep an open mind or to set aside preexisting prejudices, he or she will be stricken for cause. A challenge for cause, unlike a peremptory challenge, requires the attorney to give a specific reason, within statutory or court rule guidelines, for excluding a prospective juror. The judge then must approve the reasons for the challenge before the potential juror is excused. Reasons that would disqualify a potential juror for cause include bias, relationship to a party, etc.²⁹⁶ Although challenges for cause may be difficult to obtain if a juror's bias is not readily apparent, they can have a potentially large impact because the number of challenges are unlimited. Therefore, to the extent that either party can persuade the court to strike

²⁹⁰In most state courts, each party is entitled to three peremptory challenges. Perkins, *supra* note 288, at 396.

²⁹¹Phyllis N. Silverman, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. PITT. L. REV. 673, 673 (1983).

²⁹²*See generally* Stilson v. United States, 250 U.S. 583 (1919) (the Sixth Amendment requires trial by an impartial jury but does not mention peremptory challenges or jury selection procedures).

²⁹³Pointer v. United States, 151 U.S. 396, 408 (1894); Lewis v. United States, 146 U.S. 370, 376 (1892).

²⁹⁴Commonwealth v. Soares, 387 N.E.2d 499, 513-14 (Mass. 1979).

²⁹⁵Silverman, *supra* note 291, at 676.

²⁹⁶*See* WAYNE R. LAFAYE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.3, at 84051 (1985) (showing how trial attorneys use voir dire, peremptory challenges, and challenges for cause to appoint a favorable jury).

potential jurors who are biased or prejudiced, parties are able to obtain more neutral jurors devoid of extreme biases or prejudices. This advantage does not exist in a bench trial, as the judge may possess many biases or prejudices against one party that are readily apparent, but over which that party has little or no control to eliminate.

Finally, obtaining a jury from a fair cross-section of the community facilitates the impartiality of the jury during the jury's decision-making process. Each juror brings to the jury room subjective biases. In fact, some argue that individuals never shed their biases completely.²⁹⁷ However, the collaborative decision-making process within the jury room will act as a check on those biases.²⁹⁸ Thus, while jury decisions may inevitably be discretionary and based on a collective hunch, the representative character of the jury will check any power abuses.²⁹⁹ Hence, collective decision-making helps foster the requisite impartiality of juries. Accordingly, the inherent mechanisms within the jury selection and decision-making process aid in diminishing the jury's collective biases and prejudices. The effect is a fairer trial, devoid of many biases or prejudices a judge may possess and unconsciously use.

b. Competency of the Jury

The judicial system does demand impartiality of the jury. The system also demands competency of decision-making by the jury. Competency and impartiality are related. A jury which renders an incorrect decision based on the facts and evidence presented may have decided the case based on its bias. Thus, an impartial jury must possess competency. Trial procedure, however, may inhibit the jury from rendering a competent decision.³⁰⁰ For example, if a deposition is read into testimony, a jury will respond more favorably to a reader who presents the deposition in a positive manner.³⁰¹ Thus, the jury will perceive the positive reader as more trustworthy than a negative reader and

²⁹⁷See Martha Minnow, *Stripped Down Like a Runner Or Enriched By Experience: Bias and Impartiality of Jurors*, 33 WM. & MARY L. REV. 1201, 1203-09 (1991). Minnow identifies three types of jury bias. First, bias may occur when the juror knows the party involved. Second, bias may arise from the goal of fair representation of the community within the jury since some of the jurors may be intimately familiar with the lifestyle, community, background, etc., of the parties. Third, bias may arise from an immutable characteristic of the juror, such as race or gender, which compels the juror to feel sympathetic to a party. *Id.*

²⁹⁸*Id.*

²⁹⁹Patrick Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1051-52 (1991).

³⁰⁰See Saul Kassin, *The American Jury Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687, 709-11 (1990).

³⁰¹*Id.* at 690.

ignore the actual evidence and facts presented.³⁰² Hence, trial procedure and competent, impartial jury decisions may conflict.

Solutions, however, do exist to facilitate competent decisions. For example, one method consists of allowing the jury to acquire a more active role.³⁰³ For example, an active jury would take notes and ask questions during the trial.³⁰⁴ This "activity" would increase the accuracy of decision-making and, therefore, the competency of the decision-making. Another approach consists of not permitting the jury to hear cases which present extremely complex issues. For example, the U.S. Court of Appeals for the Seventh Circuit held the Seventh Amendment does not guarantee a right to jury trial when the lawsuit is so complex that the jury will not be able to perform the task of rational decision-making with areas of understanding of the evidence and legal rules.³⁰⁵ In *Japanese Products*, the court determined the jury could not adequately review the complex issues of fact and law produced by over 100,000 pages of discovery.³⁰⁶ Thus, proposals do exist to address the problem of jury competency.

It seems to me, from my experience of personal involvement as a trial lawyer and trial judge, that the competency of a jury and the competency of its final decisions are directly related to the competency of the lawyers presenting the case and the trial judge presiding. Thus, the jury's decision-making has the potential of being far more accurate and far more competent in the long run than the individual decision of a particular judge.

In conclusion, the two foremost issues surrounding the use of juries are impartiality and the related concept of competency. Despite jury critics' complaints, in their anticipation to be in a courtroom, often for the first time, and render a proper verdict, jurors, in my experience, are inclined to be more conscious of the evidence presented and the credibility of the witnesses. The result is a more competent and impartial jury.

2. Juror Attitude Toward Judges

Judges have a duty to be fair and impartial both in fact and in appearance.³⁰⁷ Since the premise of this article is that every judge, as part of human nature, holds certain biases and that often these biases are subtle and unconscious, it is particularly important for judges to be sensitive to their "appearance."

³⁰²*Id.*

³⁰³See Steven Friedland, *The Competency and Responsibility of Juries in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990).

³⁰⁴*Id.*; see generally *State v. Williams*, 610 N.E.2d 545, 547 (Ohio 1992) (trial court has discretion to permit jurors to take notes if warranted under circumstances).

³⁰⁵*In re Japanese Prods. Antitrust Litig.*, 631 F.2d 1069, 1086 (7th Cir. 1980).

³⁰⁶*Id.* at 1073.

³⁰⁷Peter D. Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 89 (1985).

Bias may manifest itself in both verbal and nonverbal forms.³⁰⁸ The verbal manifestations are rather easily identified, and where they are extreme enough, recusal may be a means of combatting the biases.³⁰⁹ Subtle paralinguistic and nonverbal communication, on the other hand, occurs on a level beyond the conscious control of the communicator involved and is certainly less identifiable by the receiver.³¹⁰ This is problematic with regard to a judge non-verbally communicating bias to the participants in a trial or other judicial proceeding. Studies indicate that sixty to sixty-five percent of a person's total communicative output consists of nonverbal behaviors.³¹¹ Judicial predilections can be communicated by posture, gaze, facial expression, or tone of voice, indicating to those in the courtroom a wide array of attitudes: "concern, attentiveness, liking and disliking, fairness, annoyance, superiority, patience, timidity, boredom, attraction, impartiality," and especially bias.³¹² When there is a jury present, indications of bias or other beliefs on the part of a judge can be extremely prejudicial.

Studies on the decision-making process of juries indicate that jurors are very sensitive to judges' opinions.³¹³ Several federal and state appellate courts take the position that sometimes the slightest indication of partiality by the trial judge toward one party has an impact on the decisions of the jury.³¹⁴ Researchers have also found a link between judges' expectations for trial outcome and the actual trial outcome.³¹⁵ The expectations of a judge may affect the judge's behavior in such a manner as to influence the jury to confirm the

³⁰⁸Peter D. Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 777 (1991) ("The courts, legal scholars, practitioners, and social scientists recognize that trial judges' verbal and nonverbal behavior may have important effects on trial processes and outcomes.").

³⁰⁹See *supra* part III.

³¹⁰Blanck, *supra* note 307, at 127.

³¹¹*Id.*

³¹²David B. Givens, *The Way Others See Us; It's Not What We Say in Court But How Our Bodies Speak That Telegraphs Our Message*, 19 JUDGES J. 21, 21 (1980).

³¹³*Id.* at 23 ("Judges are watched closely, sometimes more closely than actors on stage. This is due in part to the court's physical layout. Judges stand out because they sit costumed, above viewers, center stage, in eye-catching benches, framed by flags, official seals, wood paneling, and engraved legal truths.").

³¹⁴Blanck, *supra* note 307, at 95 (citing *United States v. Bland*, 697 F.2d 262 (8th Cir. 1983)); see also Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1267 (1975).

³¹⁵Blanck, *supra* note 307, at 106; see also Note, *supra* note 314, at 1267 (citing HARRY KALVEN & HANS ZEISEL, *THE AMERICAN JURY* (1966)), whose findings reveal a possible corollary between the judges' desired outcome and actual jury results. "Judge/jury concurrence may result, at least in part, because the judge subtly and unintentionally conveys to the jury his feelings about the parties and participants in the case and because the jury is influenced by his cues.").

judge's expectations.³¹⁶ One study of trial judges' behavior during jury trials suggests that "trial judges may inadvertently 'leak' or reveal their underlying feelings, beliefs, or expectations about defendants to juries through nonverbal channels."³¹⁷ The extent to which such nonverbal communication influences jurors is difficult to measure, but the possibility exists that the appearance of judicial bias may greatly impact the litigants' abilities to have a fair trial.

The ultimate question, therefore, is who provides a fairer trial—a bench trial where the ultimate decision-maker is the judge, or a jury trial where the decision-makers are a cross-section of one's peers. The answer is *both* provide a fair trial. The gravamen of this paper is that human biases exist in everyone. The jury selection and decision-making process, however, has built-in mechanisms to reduce the human biases and prejudices that exist in individual jurors. No such mechanisms exist, however, to force judges to be conscious of their biases or to force judges to step down from a case when they may possess subconscious biases toward one party that they do not recognize. Therefore, judges must take the initiative to become aware of their biases so to prevent the application of their biases in their decision-making process. This can be accomplished through education.

V. THE JUDGE'S RESPONSIBILITY AND THE NEED FOR EDUCATION

Judges need to be ever cognizant of the effect their own personal biases have on their decision-making process and on the justice system as a whole. Without consciousness of their human biases, they cannot be overcome. The most pragmatic method of becoming aware of one's biases and prejudices is through education. Several judicial colleges offer courses and seminars in this area. In addition, bar associations are developing new sections devoted to women and minorities to bring their concerns and problems to the spotlight and to educate everyone in the legal system of the myths inherent in many biases in an attempt to thwart those biases.³¹⁸

In addition to actively seeking education, judges should also perform a self-inventory of potential bias. At a minimum, judges should mentally list potential biases that may permeate their decision-making process. They should review and add to the list daily and, with every decision, ask themselves, "Could any of my biases affect this decision?" If a bias could potentially infect their decision-making process, they should make a conscious effort to set that

³¹⁶*Id.*

³¹⁷Peter D. Blanck, *Off the Record: Nonverbal Communication in the Courtroom*, STAN. LAW., Spring 1987, at 18.

³¹⁸The Ohio Bar Association has established a new section on Women In The Profession to address the special concerns and interests of Ohio's women lawyers. The President of the Ohio State Bar Association, H. Ritchey Hollenbaugh, stated that "[b]y creating this new Section, the Association is taking a positive step to acknowledge the concerns of our female colleagues and to provide a forum for continuing examination of gender issues that affect the practice of law and the administration of justice." *State Bar Forms "Women In The Profession" Section*, DAILY LEGAL NEWS, May 26, 1993, at A1.

bias aside. By identifying and neutralizing, to the extent possible, the effects of bias on their decisions, judges will be able to render fairer, impartial decisions.

VI. CONCLUSION

This article examines one sphere where societal challenges must take place—the judicial system. For it is to the judiciary that the people have given the responsibility of fairly and impartially enforcing the laws of our nation. If the members of the judiciary fail to acknowledge their biases and prejudices, then the entire justice system will evolve into a subjective, r method of law enforcement. Indeed, proactive efforts to end the operation of bias and prejudice within the judicial system are likely to have the most effective and influential impact on the rest of society. One commentator, writing on the need to eliminate sex discrimination in American society, had this observation:

[b]eginning with the legal profession specifically is appropriate because it is uniquely linked to all the segments constituting the public sphere—the judiciary, the legislatures, and the business sector. The majority of judges are lawyers, as are many legislators, and employers inevitably interact with lawyers at some point in time. Thus, lawyers are capable of influencing all segments of the public. This fact demonstrates why, on a practical level, the legal profession should initiate the battle against discrimination. Ethical considerations also support this proposal: the profession that represents justice should not be guilty of treating individuals in an unfair and unlawful manner.³¹⁹

³¹⁹Suzannah B. Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817, 81718 (1982).

