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# MISJUDGING

Chris Guthrie\*

## INTRODUCTION

Judging is difficult. This is obviously so in cases where the law is unclear or the facts are uncertain. But even in those cases where the law is as clear as it can be, and where the relevant facts have been fully developed, judges might still have difficulty getting it right. Why do judges misjudge?

Judges, I will argue, possess three sets of “blindness”: informational blindness, cognitive blindness, and attitudinal blindness. These blindnesses make adjudication on the merits – by which I mean the accurate application of governing law to the facts of the case – difficult. This difficulty, in turn, has important implications for disputants and their lawyers for it bears directly on the choice of dispute-resolution forum.

In Part I of this paper, I will develop the positive argument that judges sometimes misjudge due to these three sets of blindnesses. To do so, I will rely largely on experimental research from psychology and empirical research from political science. Having developed the positive argument in Part I, I will turn to the prescriptive argument in Part II. There, I will explore the forum-selection implications of misjudging – namely, I will argue that the risk of misjudging suggests that various alternative dispute resolution processes, for different reasons and in different ways, might serve disputants better than adjudication.

## I. BLINDNESS

In 1931, Jerome Frank published an article in the *University of Pennsylvania Law Review* entitled *Are Judges Human?*<sup>1</sup> The answer to this question is self-evident; despite their fancy titles, their magisterial robes, and their elevated stature in the courtroom, judges are human. And like all humans, judges err.<sup>2</sup>

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<sup>1</sup> Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931).

<sup>2</sup> See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (providing experimental evidence demonstrating that judges are susceptible to cognitive illusions); W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 AM. LAW & ECON. REV. 26, 29 (1999) (finding that “judges exhibit a variety of biases”); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible*

That judges err is acknowledged by our legal system. If there were no risk of judicial error, there would be no need for appellate courts. In fact, however, the federal judiciary includes two levels of appellate courts,<sup>3</sup> and most states have adopted a similar structure.<sup>4</sup> Appellate courts at both the federal and state levels exist in large part to correct judicial error committed below.<sup>5</sup>

The legal system implicitly assumes that judicial error is infrequent, random, and often “harmless.” In fact, however, there is reason to believe that misjudging is more common, more systematic, and more harmful than the legal system has fully realized. Empirical evidence suggests that judges possess three sets of “blindness:” informational, cognitive, and attitudinal blinders.<sup>6</sup> These blinders, which can be understood as “obstacle(s) to clear judgment and perception,”<sup>7</sup> do not lead inexorably to judicial error, but they do increase the likelihood of inaccurate outcomes in court.<sup>8</sup>

### A. Informational Blindness

Judges need information to manage and adjudicate cases. The Federal Rules of Civil Procedure (and comparable provisions in the states) provide for the identification and disclosure of information through the disclosure and discovery processes.<sup>9</sup> The Federal Rules of Evidence (and comparable provisions in the states) distinguish information that is admissible at trial from that which should be excluded.<sup>10</sup> Throughout the litigation process, judges come into contact with this information at settlement conferences, motion hearings, discovery disputes, and trial itself.

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*Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005) (providing experimental evidence demonstrating that judges frequently have difficulty disregarding relevant, but inadmissible, evidence when making substantive decisions).

<sup>3</sup> See 28 U.S.C. § 41 (2000) (federal court structure).

<sup>4</sup> See, e.g., Roger A. Hanson & David B. Rottman, *United States: So Many States, So Many Reforms*, 20 JUST. SYS. J. 121, 122 (1999) (noting that forty of fifty states have both an intermediate appellate court and a court of last resort).

<sup>5</sup> See, e.g., Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 382 n.6 (1995) (citing sources). But see Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985) (challenging the conventional wisdom that the appellate process is designed to correct errors).

<sup>6</sup> As noted *infra*, there is significant overlap between those blinders I have labeled “information” and those I have labeled “cognitive.”

<sup>7</sup> OXFORD ENGLISH DICTIONARY 288 (2d ed. 1989).

<sup>8</sup> Another source of judicial error is what Geoffrey Miller calls “bad judging”:

Most examples of bad judging can be grouped in the following categories: (1) corrupt influence on judicial action; (2) questionable fiduciary appointments; (3) abuse of office for personal gain; (4) incompetence and neglect of duties; (5) overstepping of authority; (6) interpersonal abuse; (7) bias, prejudice, and insensitivity; (8) personal misconduct reflecting adversely on fitness for office; (9) conflict of interest; (10) inappropriate behavior in a judicial capacity; (11) lack of candor; and (12) electioneering and purchase of office.

See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-33 (2004). This is not the source of error on which this paper focuses.

<sup>9</sup> See, e.g., FED. R. CIV. P. 26-37, 45 (providing disclosure and discovery rules to guide the civil litigation process).

<sup>10</sup> See generally FED. R. EVID.; MIRJAN R. DAMASKA, *EVIDENCE LAW ADRIFT* 149 (1997) (observing the “striking emphasis on the screening of information to be submitted to triers of fact”).

Inevitably, some of this information, though highly relevant to the case at hand, will be inadmissible under the applicable evidentiary rules. Unfortunately, however, judges (as well as jurors)<sup>11</sup> possess informational blinders that can prevent them from disregarding this inadmissible information when making merits-based decisions, like assessing liability or awarding damages. In other words, judges have difficulty “unbit[ing] the apple of knowledge”<sup>12</sup> when making decisions.

To illustrate the operation and impact of informational blinders on judicial decision making, I report below the results of three experiments. The first implicates rules prohibiting the introduction of subsequent remedial measures,<sup>13</sup> the second focuses on the attorney-client privilege,<sup>14</sup> and the third considers the prejudicial impact of prior criminal convictions.<sup>15</sup> In each of these experiments – as well as in others not reported here<sup>16</sup> – researchers used a “between-subject” experimental design in which they randomly assigned judges to a control group or an experimental group.<sup>17</sup> Regardless of group, the researchers presented all of the judges with identical information about a case, except that they exposed the judges in the experimental group to inadmissible evidence. They then asked the judges in both groups to “rule” on liability or damages. Finally, they compared the responses of the judges in each of the groups, and if they detected statistically meaningful differences, they could attribute them to the inadmissible information because it was the only thing varied between the two randomly assigned groups.<sup>18</sup>

### 1. *Subsequent Remedial Measures*

The Federal Rules of Evidence (along with companion state provisions) prohibit the introduction of evidence of “subsequent remedial measures” for the purpose of establishing liability.<sup>19</sup> Suppose, for example, that a grocery shopper, who slips and falls in the produce aisle due to spilled fruit on the floor,

<sup>11</sup> For a summary of the work on jurors, see Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1270-76.

<sup>12</sup> DAMASKA, *supra* note 10, at 50.

<sup>13</sup> See Part I(A)(1), *infra*.

<sup>14</sup> See Part I(A)(2), *infra*.

<sup>15</sup> See Part I(A)(3), *infra*.

<sup>16</sup> See generally Wistrich, Guthrie & Rachlinski, *supra* note 2.

<sup>17</sup> See, e.g., C. JAMES GOODWIN, RESEARCH IN PSYCHOLOGY: METHODS AND DESIGN 171-72 (2d ed. 2002) (explaining between-subject designs).

<sup>18</sup> See, e.g., JOHN J. SHAUGHNESSY & EUGENE B. ZECHMEISTER, RESEARCH METHODS IN PSYCHOLOGY 182 (3d ed. 1994) (explaining that in such a design, “if the groups perform differently, it is presumed that the independent variable” – in this case, the inadmissible evidence – “is responsible”). For a fuller description of this methodology, see Wistrich, Guthrie, & Rachlinski, *supra* note 2, at 1282-84.

<sup>19</sup> Rule 407 of the Federal Rules of Evidence provides that:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product’s design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

FED. R. EVID. 407.

sues the grocery store. If the grocery store subsequently takes steps to prevent that kind of harm from occurring again – perhaps by instituting a practice of sweeping every thirty minutes during store hours – the shopper cannot introduce this new practice into evidence to establish the grocery store's liability. The evidentiary rule prohibiting the introduction of subsequent remedial measures is designed to give defendants like the grocery store incentive to take precautions against causing subsequent harm.<sup>20</sup>

Despite the inadmissibility of such evidence, it seems reasonable to speculate that a judge who becomes aware of measures taken by a defendant after an accident, even though inadmissible, might have difficulty disregarding this information when assessing liability. Stephan Landsman and Richard Rakos investigated this very issue in a study involving judges attending a session on "Specific Fact Finding" at the Ohio Judicial Conference in 1992.<sup>21</sup>

At the conference, Landsman and Rakos gave judges a case entitled "*Thompson v. Containex Corporation*."<sup>22</sup> All of the judges received the following common facts:

The plaintiff, Joseph Thompson, claims that on November 5, 1990, he was at home raking leaves. After gathering a considerable pile he attempted to burn them as was allowed by local ordinance. The leaves were somewhat wet and would not burn so he went to his garage and got out a gasoline container in which he kept fuel for his lawn mower. He poured some gasoline on the smoldering leaves and claims that a sheet of flame immediately ran up the pouring stream of gasoline into the gasoline container causing it to explode. Mr. Thompson was badly burned in the incident and says the container's manufacturer, Containex Corporation, produced a hazardously defective product because it had no flame arrester, a wire mesh screen over the mouth of the can, to prevent the sort of flashback effect that allegedly caused Mr. Thompson's injury.

Containex Corporation claims that the incident was not its fault and that the container did not explode. Containex asserts that the plaintiff, Mr. Thompson, poured a great deal of gasoline on the leaves and was burned when the fuel ignited all at once. Containex claims that experiments it has conducted demonstrate that explosions of the sort described by Mr. Thompson virtually never happen and that wire mesh flame arrester screens are useless in small containers where there is insufficient room for the oxygen necessary to form explosive mixtures.<sup>23</sup>

Landsman and Rakos randomly assigned the judges to a control group or an experimental group. The control group judges received the facts above; the experimental group judges received the facts above as well as the following information about a subsequent remedial measure undertaken by the defendant:

At a pretrial hearing Containex Corporation moved to prohibit the introduction at trial of a 1992 warning and recall letter sent out by Containex to the purchasers of its fuel containers at the direction of the Federal Consumer Product Safety Board. Under protest, Containex sent all purchasers a notice informing them of the possibility of flashbacks in its gasoline storage containers. Containex seeks the exclusion of

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<sup>20</sup> See, e.g., the notes to FED. R. EVID. 407.

<sup>21</sup> Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry Into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113, 120 (1994).

<sup>22</sup> *Id.* at 121.

<sup>23</sup> *Id.*

this evidence because it is a “subsequent remedial measure” and as such should be barred from the trial as required by Rule 407 of the Ohio Rules of Evidence. The Court, in accordance with sound precedent has [granted/denied] the company’s motion.<sup>24</sup> Because of illness, the original judge has asked to have another judge try the case and you have been assigned to hear the matter.<sup>25</sup>

Despite the fact that the evidence was inadmissible and had been ruled as such, the researchers speculated that the judges would be influenced by it. This is what they found. All of the judges in the control group ruled in favor of the defendant, finding no liability. In the experimental group, by contrast, only 75% ruled in favor of the defendant; 25% of the judges ruled that the defendant should be held liable.<sup>26</sup> In short, “judges who were not exposed to the motion to exclude evidence found the company liable significantly less often than judges who were exposed to the motion to exclude evidence.”<sup>27</sup>

## 2. *Privilege*

In conjunction with the common law, the Federal Rules of Evidence (along with companion state provisions) privilege certain communications,<sup>28</sup> including those between husbands and wives, psychotherapists and patients, and attorneys and clients.<sup>29</sup> The attorney-client privilege rests on the assumption that clients will disclose critical information to their attorneys only if they know that such disclosure will not harm them. If such disclosures were to see

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<sup>24</sup> The researchers divided the judges into a control group and two experimental groups, one of which learned that the prior judge had granted the motion to suppress and the other of which learned that s/he had not. *Id.* The researchers also compared judge groups to juror groups. *Id.* at 121-22. The comparison of interest in this paper is the control group judges to the experimental group judges that granted the motion to suppress, so that is all I report here.

<sup>25</sup> *Id.* at 121.

<sup>26</sup> *Id.* at 124 tbl.3. The difference in responses between the two groups is statistically significant. *Id.*

<sup>27</sup> *Id.* at 122. Landsman and Rakos also tested jurors drawn from the Cuyahoga County, Ohio Court of Common Pleas. *Id.* at 120. Among jurors assigned to a control group, which did not learn of the subsequent remedial measure, 91.2% ruled in favor of the defendant, finding no liability. *Id.* at 124. In the experimental group, by contrast, only 72.7% ruled in favor of the defendant; 27.3% of the jurors ruled that the defendant should be liable. *Id.* Regarding their overall results, Landsman and Rakos concluded as follows:

The data presented above suggest that judges and jurors in civil cases react similarly when exposed to material that is subsequently ruled inadmissible – their perceptions of central trial issues are altered. Most critically, both judges’ and jurors’ determinations of defendant liability were less frequent when the material potentially damaging to the defendant was not introduced into the process.

*Id.* at 125.

<sup>28</sup> Rule 501 of the Federal Rules of Evidence provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

<sup>29</sup> See, e.g., notes to FED. R. EVID. 501.

the light of day in court, clients would refrain from providing their attorneys with information important to their case. This, in turn, would prevent attorneys from providing appropriate representation to their clients.<sup>30</sup>

Judges occasionally come into contact with information protected by the attorney-client privilege. Even if they rule such evidence inadmissible, judges might have great difficulty disregarding this privileged information if it sheds light on the case. This, in turn, could mean that judicial decisions on the merits might be influenced inappropriately by inadmissible information.

This is precisely what Andrew Wistrich, Jeffrey Rachlinski, and I found in a recent study involving federal magistrate judges attending a conference in San Diego and state trial judges attending a conference in Phoenix.<sup>31</sup> We gave the judges a vignette entitled "Evaluation of a Contract Dispute."<sup>32</sup> In this vignette, the judges learned that they were presiding in a case involving a contract dispute between Jones, a consultant, and SmithFilms, a movie studio. The contract issue in dispute was whether the studio offered Jones producer credit when it hired him to work on the movie. The only writing in the case was a brief letter co-signed by Jones and Smith, the owner of the studio. It stated that "Jones will provide various services to SmithFilms, that Jones will continue to be paid a monthly salary as an independent contractor until the film is released, and that Jones will receive such other consideration as was agreed upon by the parties during the pre-signing breakfast."<sup>33</sup>

Jones contended that Smith offered him producer credit at the breakfast as part of the deal. To corroborate his claim, he offered testimony at trial from a waitress who stated that she thought she overheard Jones and Smith discussing producer credit. Unfortunately, Smith fell seriously ill and was unavailable to testify, so the studio's only viable rebuttal was to argue that SmithFilms generally does not offer such credit.

We randomly assigned the judges to either a control group or an experimental group. We asked the judges in both groups to rule for the plaintiff or the defendant. The only difference between the two groups was that we exposed the judges in the experimental group to information protected by the attorney-client privilege. Specifically, the experimental group judges learned that they had to resolve a discovery dispute before ruling on the merits of the case. They learned that SmithFilms had filed a motion to compel production of an audiotaped conversation between Jones and his business attorney (not the litigator representing him in this case). Jones argued that the conversation was protected by the attorney-client privilege, but SmithFilms argued that it was not protected because Jones was seeking business advice, not legal advice. To resolve this dispute, the judges listened to the tape in camera. It included the following excerpt:

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<sup>30</sup> See, e.g., *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

<sup>31</sup> Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1294 n.170.

<sup>32</sup> See *id.* at 1294-98, 1334-35.

<sup>33</sup> *Id.* at 1295.

Jones: I really needed this deal and I was afraid that asking for producer credit might be a turn-off, so I got nervous and did not ask for it. But I meant to. I need your legal opinion, Greg. Suppose that I send Smith a letter now saying that I meant for producer credit to be part of the deal. Would that be legally binding?

Gonzalez: No. If you and Smith did not agree on producer credit during breakfast, you don't have a leg to stand on. A letter now won't help.

Jones: Darn. That's a shame.<sup>34</sup>

Moreover, "[t]he rest of the audiotape confirm[ed] that Gonzales was functioning solely in a legal capacity." We then asked these judges to rule on the motion to compel, which most of them denied.<sup>35</sup>

We compared the liability determinations of the judges in the control group to the judges in the experimental group who ruled the conversation inadmissible. Despite the fact that the latter group of judges ruled the tape inadmissible, and thereby communicated by virtue of their ruling that it should not have any impact on their liability determinations, it did. In the control group, 55.6% of the judges (25 out of 45) ruled for the plaintiff in this contract case; by contrast, among the judges in the experimental group who heard the damning evidence but ruled it inadmissible, only 29.2% (7 out of 24) ruled for the plaintiff.<sup>36</sup> Thus, exposure to the privileged information appears to have influenced the judges' decisions. Although a majority of the judges who had not seen the privileged materials ruled in favor of the plaintiff, fewer than 30% of the judges who determined the materials were privileged ruled the same way. In other words, the privileged information reduced the plaintiff's win rate by nearly 50%. Even though the judges themselves ruled that the information was privileged, and therefore inadmissible, the information protected by the privilege appears to have had a substantial impact on their assessments of liability.

### 3. *Prior Criminal Conviction*

Under the Federal Rules of Evidence (and many companion state provisions), a dated criminal conviction is generally inadmissible at trial on the grounds that the judge or jury might be prejudiced against a litigant with a criminal past. Under Rule 609(b) of the Federal Rules, this evidence is inadmissible if more than ten years have passed since the completion of a sentence following from a conviction unless "the probative value of the conviction [is] supported by specific facts and circumstances [and] substantially outweighs its prejudicial effect."<sup>37</sup>

Even if judges appropriately exclude such evidence, they might nonetheless have difficulty ignoring it when assessing the credibility of a litigant with a criminal history, particularly if the crime bears some relationship to the credibility issue in dispute in the case at bar. Wistrich, Rachlinski, and I investigated this. To do so, we gave federal magistrate judges attending a conference

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1296. Two-thirds of the judges (24 of 36) denied the motion to compel. *Id.*

<sup>36</sup> *Id.* The difference in the responses of the two groups is statistically significant. *Id.*

<sup>37</sup> FED. R. EVID. 609(b).



in Minnesota and state judges attending a conference in Phoenix a vignette entitled "Assessment of Pain and Suffering Damages."<sup>38</sup>

In this vignette, the judges learned they were presiding in a products liability trial in which the only remaining issue in dispute was the appropriate amount of pain and suffering damages to award to a thirty-five-year-old automobile mechanic who was badly injured while operating a piece of machinery (either a lawnmower for judges in Arizona or a snowblower for judges in Minnesota). The machinery was equipped with a kill switch that should have prevented the injury, but a manufacturing defect caused the switch to fail, resulting in a serious injury to the plaintiff's non-dominant arm. The defendant manufacturer conceded liability and pecuniary damages but disputes the pain and suffering damages.

With respect to those damages, the plaintiff presented testimony from doctors concerning the extent of his injury. The doctors testified that his arm did not need to be amputated, but it was likely to remain useless nonetheless. The plaintiff testified that he had "continuing pain in his arm"<sup>39</sup> and that he had lost his job, that he experienced a lot of pain and frustration, and that he had to take prescription narcotics continuously to combat the discomfort. The manufacturer contended that the plaintiff was exaggerating his injury. To corroborate this defense, the manufacturer offered the testimony of an occupational therapist, who testified that people with injuries like these "usually can control their pain and lead relatively normal lives."<sup>40</sup>

We assigned some of the judges to a control group and some to an experimental group. We asked the judges in both groups to report the total pain and suffering damages they would award in this case. Before responding to this question, though, the judges in the experimental group learned that the manufacturer wanted to introduce evidence showing that the plaintiff "had been convicted of swindling schemes in which he obtained the life savings of elderly retirees by falsely promising them exorbitant rates of return, and then using their money to pay his living expenses."<sup>41</sup> The plaintiff's most recent conviction occurred fourteen years ago, and he completed his prison sentence twelve years ago. Thus, the plaintiff objected to the introduction of this testimony under Rule 609 on the grounds that the probative value of the dated conviction did not substantially outweigh its prejudicial effect. The judges in the experimental condition were asked to rule on the plaintiff's objection to the introduction of this evidence, and more than 80% of them granted the plaintiff's objection to suppress this evidence.<sup>42</sup>

We again compared the responses of the judges in the control group to those of the judges in the experimental group who ruled the evidence inadmissible. We found that the judges who ruled the evidence inadmissible were inclined to award the plaintiff less in pain and suffering damages than were those in the control group. Specifically, as shown in Table 1, the judges in the control group awarded a mean amount of \$778,000 and a median amount of

<sup>38</sup> Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1305.

<sup>39</sup> *Id.* at 1305.

<sup>40</sup> *Id.* at 1306.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1306-07.

\$500,000; judges in the experimental group awarded a mean amount of \$685,000 and a median amount of \$400,000.<sup>43</sup> Thus, this relevant, but inadmissible, information reduced the mean award by 12% and the median award by 20%. Even though the judges themselves ruled that the information was inadmissible, the information appears to have had a substantial impact on their damage awards.

TABLE 1. PRIOR CRIMINAL CONVICTION RESULTS<sup>44</sup>

	Mean	1st Quartile	Median	3rd Quartile
Control (43)	\$778,000	\$300,000	\$500,000	\$1,000,000
Experimental/ Suppression (61)	\$685,000	\$200,000	\$400,000	\$ 800,000

#### 4. Summary

This work, along with other work not reported here,<sup>45</sup> suggests that judges possess informational blinders that can make it difficult for them to deliberately disregard relevant but inadmissible evidence when making merits-based decisions in court. For litigants, this means that case outcomes can be influenced by evidence that should not, as a matter of law, affect those outcomes. In other words, these informational blinders can lead to misjudging and inaccurate outcomes in court.

#### B. Cognitive Blinders

Cognitive blinders can also lead to misjudging. These blinders, like the informational blinders discussed above, speak to the way judges (and others) make judgments and decisions. Psychologists have discovered that people do not make decisions based on a thorough accounting and rational calculation of all available information. Rather than behaving like fully rational actors, people use “heuristics” or simple mental shortcuts to make decisions.<sup>46</sup> These

<sup>43</sup> *Id.* This difference is marginally statistically significant. *Id.*

<sup>44</sup> *Id.* at 1307.

<sup>45</sup> We also found that information protected by rape shield laws as well as information protected by post-conviction cooperation agreements nonetheless influenced judges when such information came to light. *Id.* at 1298-1303, 1308-12. *But see id.* at 1313-22 (finding that judges were unaffected in criminal cases by inculpatory evidence illegally obtained in a search or by an inadmissible confession).

<sup>46</sup> Amos Tversky and Daniel Kahneman established the “heuristics and biases” research program in the early 1970s when they discovered that people tend to “rely on a limited number of heuristic principles which reduce the complex task of assessing probabilities and predicting values to simpler judgmental operations.” Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *Sci.* 1124, 1127-28 (1974) [hereinafter Tversky & Kahneman, *Judgment*]. Initially, they identified three basic heuristics, but most decision researchers use the phrase “heuristics and biases” to refer to a long list of mental shortcuts that people use to make judgments and decisions. For collections, see *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) [hereinafter *JUDGMENT UNDER UNCERTAINTY*].

heuristics often lead to good decisions,<sup>47</sup> but they can also create cognitive blinders that produce systematic errors in decision making.<sup>48</sup> To establish the impact and operation of cognitive blinders, I focus below on three, each of which can lead to misjudging: anchoring, hindsight bias, and self-serving bias.

### 1. Anchoring

When making numerical estimates, people commonly rely on the initial value available to them. The initial value provides a starting point that anchors the subsequent estimation process.<sup>49</sup> People generally adjust away from the anchor, but they do so insufficiently, giving the anchor greater influence on the final estimate than it should have. In short, “the number that starts the generation of a judgment exerts a stronger impact than do subsequent pieces of numeric information.”<sup>50</sup>

Often, anchoring is adaptive because the initial numeric value bears some relation to the value of the item being estimated. Other times, however, the initial numeric value can be quite misleading, and can still influence estimates. In the classic illustration,<sup>51</sup> Amos Tversky and Daniel Kahneman asked subjects to estimate the percentage of African countries in the United Nations. Before doing so, however, they spun a “wheel of fortune,” which they had rigged to stop either at ten or sixty-five. They asked their study participants, whom they had divided into two groups, whether the percentage of African countries in the U.N. was higher or lower than the number determined by the seemingly arbitrary spin of the wheel. They found that this number, which is obviously unrelated to the percentage of African nations in the U.N., nonetheless had a dramatic impact on the subjects’ estimates. When the wheel landed on ten, subjects estimated that 25% of African countries were members of the U.N.; when the wheel landed on sixty-five, however, subjects estimated that number at 45%.<sup>52</sup>

Researchers have found that anchoring influences the damages that mock jurors award in civil cases. In several studies,<sup>53</sup> for example, researchers have

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<sup>47</sup> See, e.g., Tversky & Kahneman, *Judgment*, *supra* note 46, at 1124 (noting that “[i]n general, these heuristics are quite useful”). For more on the adaptive properties of heuristics, see SIMPLE HEURISTICS THAT MAKE US SMART (Gerd Gigerenzer, Peter M. Todd & ABC Research Group eds., 1999).

<sup>48</sup> See e.g., Tversky & Kahneman, *Judgment*, *supra* note 46, at 1124 (observing that heuristics can “lead to severe and systematic errors”).

<sup>49</sup> *Id.* at 1128 (“[D]ifferent starting points yield different estimates, which are biased toward the initial values.”).

<sup>50</sup> Fritz Strack & Thomas Mussweiler, *Heuristic Strategies for Estimation Under Uncertainty: The Enigmatic Case of Anchoring*, in FOUNDATIONS OF SOCIAL COGNITION: A Festschrift in Honor of Robert S. Wyer, Jr. 79, 80 (Galen V. Bodenhausen & Alan J. Lambert eds., 2003).

<sup>51</sup> Tversky & Kahneman, *Judgment*, *supra* note 46, at 1128.

<sup>52</sup> *Id.*

<sup>53</sup> See Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519 (1996); Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445 (1999); Verlin B. Hinsz & Kristin E. Indahl, *Assimilation to Anchors for Damage Awards in a Mock Civil Trial*, 25 J. APPLIED SOC. PSYCHOL. 991 (1995); John Malouff

explored the impact that the plaintiff's lawyer's damages request can have on mock jurors. To do so, they randomly assigned mock jurors to different groups, all of whom learned the same basic facts about a hypothetical case. The only thing that varied across the groups was the amount of damages the plaintiff's lawyer requested. In all of the published studies, the damages request had a significant impact on the damages the mock jurors awarded.<sup>54</sup> In one study, for instance, mock jurors awarded slightly more than \$90,000 when the plaintiff's lawyer requested \$100,000 in damages; but when the plaintiff's lawyer requested \$500,000 in the same case, mock jurors awarded nearly \$300,000 in damages.<sup>55</sup>

Similarly, researchers have found that statutory damages caps can serve to anchor mock jurors' damages awards in civil cases.<sup>56</sup> In one study,<sup>57</sup> Jennifer Robbennolt and Christina Studebaker presented mock jurors with a case involving a plaintiff who had developed HIV through a blood transfusion. The mock jurors learned that the plaintiff had sued the company that had provided the infected blood, asserting that it had engaged in irresponsible testing practices. The researchers asked the mock jurors to indicate how much they would award the plaintiff in compensatory and punitive damages. Some jurors were told that the jurisdiction imposed a \$100,000 cap on punitive damages; others that the jurisdiction imposed a \$5 million cap on punitive damages; and still others that the cap was \$50 million.<sup>58</sup> The researchers found that the punitive damages caps anchored the subjects' assessments of both compensatory *and* punitive damages. For example, subjects in the \$100,000 condition awarded an average of \$1,518,100 in total damages, while subjects in the \$50 million condition awarded an average of \$22,642,417.<sup>59</sup>

Likewise, Rachlinski, Wistrich, and I have found that anchoring influences judicial decision making. In one study,<sup>60</sup> we demonstrated that a demand made at a pre-hearing settlement conference anchored judges' assessments of the appropriate amount of damages to award in the case. We presented the trial judges participating in our study with a lengthy vignette describing a civil case in which the plaintiff had suffered several injuries in a car accident caused by a negligent truck driver:

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& Nicola S. Schutte, *Shaping Juror Attitudes: Effects of Requesting Different Damage Amounts in Personal Injury Trials*, 129 J. SOC. PSYCHOL. 491 (1989); Allan Raitz, Edith Greene, Jane Goodman & Elizabeth F. Loftus, *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385 (1990). See also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 80 (1986) (reporting an experiment in which a mock jury appeared susceptible to a damage amount suggested by an attorney).

<sup>54</sup> See Chapman & Bornstein, *supra* note 53, at 526-27; Hastie et al., *supra* note 53, at 463; Hinsz & Indahl, *supra* note 53, at 1009; Malouff & Schutte, *supra* note 53, at 495; Raitz et al., *supra* note 53, at 393.

<sup>55</sup> Malouff & Schutte, *supra* note 53, at 495 tbl.1.

<sup>56</sup> See, e.g., Hinsz & Indahl, *supra* note 53, at 1001-6; Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 LAW & HUM. BEHAV. 353 (1999).

<sup>57</sup> Robbennolt & Studebaker, *supra* note 56.

<sup>58</sup> *Id.* at 360.

<sup>59</sup> *Id.*

<sup>60</sup> See Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1286-93.

Imagine that you are presiding over an automobile accident case in which the parties have agreed to a bench trial. The plaintiff is a 31-year-old male schoolteacher and the defendant is a large package-delivery service. The plaintiff was sideswiped by a truck driven erratically by one of the defendant's drivers. As a result of the accident, the plaintiff broke three ribs and severely injured his right arm. He spent a week in the hospital, and missed six weeks of work. The injuries to his right arm were so severe as to require amputation. (He was right-handed.)<sup>61</sup>

The judges learned that the truck driver's company admitted fault but disputed compensatory damages. At an unsuccessful pre-trial settlement conference, some of the judges learned that the plaintiff's lawyer demanded \$10 million on behalf of his client, while other judges learned only that the plaintiff wanted a lot of money. We asked the judges in both conditions to indicate the amount of compensatory damages they would award.

Consistent with the research on mock jurors, we found that the \$10 million anchor had a significant impact on the judges, as shown in Table 2. In the control group, judges awarded a mean amount of \$808,000 and a median amount of \$700,000; in the experimental group, judges awarded a much larger mean amount of \$2,210,000 and a median amount of \$1 million.<sup>62</sup> Clearly, the anchor had a significant impact on the judges' decisions.<sup>63</sup> This is particularly striking, of course, given that the information disclosed in settlement conferences is inadmissible and therefore inappropriate for the judges to consider at trial.<sup>64</sup>

TABLE 2. ANCHORING RESULTS (SETTLEMENT TALKS)<sup>65</sup>

	Mean	1st Quartile	Median	3rd Quartile
Control (37)	\$ 808,000	\$325,000	\$ 700,000	\$1,000,000
Experimental (38)	\$2,210,000	\$575,000	\$1,000,000	\$3,000,000

In a second study,<sup>66</sup> we tested whether a motion to dismiss would anchor judges' damages awards. In this study, we presented judges with the following description of a personal injury case in which only damages were at issue:

Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization,

<sup>61</sup> *Id.* at 1332.

<sup>62</sup> *Id.* at 1290.

<sup>63</sup> We also compared a control group of judges to an experimental group of judges who received a low, rather than a high, anchor, and we found an anchoring effect. *Id.*

<sup>64</sup> Thus, this study is consistent with the studies reported in Part I.A. above, illustrating what I have called "informational blinders."

<sup>65</sup> *Id.* at 1290.

<sup>66</sup> Guthrie, Rachlinski & Wistrich, *supra* note 2, at 790-92.

and pain and suffering, but has not specified an amount. Both parties have waived their right to a jury trial.<sup>67</sup>

We randomly assigned the judges to either a control group or an experimental group exposed to an anchor. We provided judges in the control group with the aforementioned paragraph and asked them, "how much would you award the plaintiff in compensatory damages?"<sup>68</sup> We provided the judges in the experimental group with the same information. In addition, we informed the subjects in the experimental group that "[t]he defendant has moved for dismissal of the case, arguing that it does not meet the jurisdictional minimum for a diversity case of \$75,000."<sup>69</sup> We asked these judges to rule on the motion, and then asked them "[i]f you deny the motion, how much would you award the plaintiff in compensatory damages?"<sup>70</sup>

Because the plaintiff clearly had incurred damages greater than \$75,000, we viewed the motion as meritless, as did all but two of the judges who ruled on it. Nonetheless, we hypothesized that the \$75,000 jurisdictional minimum would serve as an anchor, resulting in lower damages awards from those judges exposed to it. This is what we found. As shown in Table 3, the judges in the control group awarded the plaintiff, on average, \$1,249,000 (and a median amount of \$1 million), while the judges exposed to the anchor awarded the plaintiff, on average, \$882,000 (and a median amount of \$882,000).<sup>71</sup> By voting overwhelmingly to deny the motion to dismiss, the judges in the latter group indicated that the \$75,000 jurisdictional minimum contained no reliable information about the plaintiff's damages.<sup>72</sup> Still, the \$75,000 jurisdictional minimum anchored their awards, as they awarded, on average, roughly \$350,000 (or nearly 30%) less than the control group judges.<sup>73</sup>

TABLE 3. ANCHORING RESULTS (MOTION TO DISMISS)<sup>74</sup>

	Mean	1st Quartile	Median	3rd Quartile
Control (66)	\$1,249,000	\$500,000	\$1,000,000	\$1,925,000
Experimental (50)	\$ 882,000	\$288,000	\$ 882,000	\$1,000,000

## 2. Hindsight Bias

Hindsight, as we all know, is 20/20. People have a well-documented tendency to overestimate the predictability of past events due to the "hindsight bias."<sup>75</sup> Hindsight bias occurs because we update our beliefs about the state of

<sup>67</sup> *Id.* at 790.

<sup>68</sup> *Id.* at 790-91.

<sup>69</sup> *Id.* at 791.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 791-92. The difference between the responses of the judges in the two groups was statistically significant. *Id.* at 791.

<sup>72</sup> *Id.* at 791-92.

<sup>73</sup> *Id.* at 792.

<sup>74</sup> *Id.*

<sup>75</sup> Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288 (1975) (first documenting the effects of hindsight bias). See also Baruch

the world when we learn of some outcome, and we then use these updated beliefs to generate estimates about prior events.<sup>76</sup> For example, when we learn that one team has beaten another, we identify reasons why this occurred and believe the victory was more predictable than it actually was.

Hindsight bias can influence determinations of legal liability, where judges or juries are called upon to assess the reasonableness of some conduct after an event has occurred. In one study of a hypothetical negligence case,<sup>77</sup> Rachlinski and Kim Kamin instructed some study participants to make decisions in foresight and others to make them in hindsight about taking precautions to protect against a flood. They instructed participants judging in foresight to recommend that a potentially liable actor take a precaution if the participants believed that a flood was more than 10% likely to occur in any given year (which was based on a cost-benefit analysis). They told the subjects judging in hindsight that the precaution had not been taken and that a flood causing \$1 million in damage had occurred. They instructed these participants to find the defendant liable for the flood damage if the likelihood of the flood, from the perspective of the defendant before the fact, was greater than 10% in any given year.

Although both sets of subjects reviewed identical information about the likelihood of a flood, they reached different conclusions about appropriate defendant behavior. Only 24% of foresight subjects concluded that the likelihood of a flood justified taking the precaution, while 57% of the hindsight subjects concluded that the flood was so likely that the failure to take the precaution was negligent.<sup>78</sup> The decision to refrain from taking the precaution seemed reasonable to most subjects *ex ante*, but because of the hindsight bias, it seemed unreasonable to most subjects *ex post*.

Courts usually evaluate events after the fact, so they are vulnerable to the hindsight bias. Besides negligence determinations, the hindsight bias likely influences claims of ineffective assistance of counsel (decisions a lawyer makes in the course of representing a criminal defendant can seem less competent after the defendant has been convicted), the levying of sanctions under Rule 11 of the Federal Rules of Civil Procedure (a motion or allegation seems less meritorious after a court rejects it), and assessments of the liability of corporate officers charged with making false predictions about their company's performance (which can look like fraud after the predictions fail to come true).<sup>79</sup>

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Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 335, 341 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

<sup>76</sup> See Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 *PSYCHOL. BULL.* 311, 312-13 (1990).

<sup>77</sup> Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 *LAW & HUM. BEHAV.* 89 (1995)

<sup>78</sup> *Id.* at 98.

<sup>79</sup> For applications of the hindsight bias to various legal issues, see Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 *U. CHI. L. REV.* 571, 602-24 (1998). On hindsight bias and securities fraud in particular, see Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 *Nw. U. L. REV.* 773 (2004).

To demonstrate hindsight bias on the part of judges, Rachlinski, Wistrich, and I gave them a hypothetical fact pattern based on an actual case, labeled "Likely Outcome of Appeal":<sup>80</sup>

In 1991, a state prisoner filed a *pro se* Section 1983 action in Federal District Court against the Director of the Department of Criminal Justice in his state, asserting, among other things, that the prison had provided him with negligent medical treatment in violation of Section 1983. The district court dismissed his complaint on the ground that the provision of negligent medical care does not violate Section 1983. The district court further found that the plaintiff knew his claims were not actionable because he had made similar claims several years earlier in a case that had been dismissed by the court. Thus, the district court sanctioned the plaintiff pursuant to Rule 11, ordering him to obtain the permission of the Chief Judge in the district before filing any more claims. The plaintiff appealed the district court's decision.<sup>81</sup>

We randomly assigned the judges to one of three conditions: the "Affirmed" condition; the "Vacated" condition; or the "Lesser Sanction" condition. Judges in each learned of a different apparent outcome on appeal:

"Affirmed" – "The court of appeals affirmed the district court's decision to impose this Rule 11 sanction on the plaintiff."<sup>82</sup>

"Vacated" – "The court of appeals found that the district court had abused its discretion and vacated the Rule 11 sanction against the plaintiff."<sup>83</sup>

"Lesser Sanction" – "The court of appeals ruled that the district court had abused its discretion under Rule 11 and remanded the case for imposition of a less onerous Rule 11 sanction against the plaintiff."<sup>84</sup>

We asked the judges in each of the groups to predict which of the three actions the court of appeals would have been most likely to take: "In light of the facts of the case, as described in the passage above, which of the following possible outcomes of the appeal was most likely to have occurred (assume that the three outcomes below are the only possible ones)?"<sup>85</sup> We then listed each of the three possible outcomes identified above.

Consistent with other research on the hindsight bias, the judges' assessments were influenced by learning the alleged outcome. Judges who learned of a particular outcome were much more likely than the other judges to identify that outcome as the most likely to have occurred, as noted in Table 4. Consider, for example, the judges' assessments of the likelihood that the court of appeals would affirm the district court's decision. Among the judges told that the court of appeals had affirmed, 81.5% indicated that they would have predicted that result.<sup>86</sup> By contrast, only 27.8% of those told the court of appeals had vacated, and only 40.4% of those told the court of appeals had remanded for imposition of a lesser sanction, indicated that they would have predicted an affirmance.<sup>87</sup> More generally, the sum of the percentage of judges in each of

<sup>80</sup> Guthrie, Rachlinski & Wistrich, *supra* note 2, at 801.

<sup>81</sup> *Id.* at 801-02.

<sup>82</sup> *Id.* at 802.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 802-03.



the three conditions who identified the outcome they were given as the “most likely to have occurred” was 172% (rather than 100%, which would have been technically accurate).<sup>88</sup> Learning an outcome clearly influenced the judges’ ex post assessments of the ex ante likelihood of various possible outcomes.<sup>89</sup>

TABLE 4. HINDSIGHT BIAS RESULTS<sup>90</sup>

	Percentage selecting as most likely:		
	“Affirmed”	“Vacated”	“Lesser sanction”
Affirmed Group (54)	<b>81.5</b>	11.1	7.4
Vacated Group (54)	27.8	<b>51.9</b>	20.4
Lesser Sanction Group (57)	40.4	21.1	<b>38.6</b>

### 3. *Self-Serving Bias*

People tend to make judgments about themselves, their abilities, and their beliefs that are “egocentric” or “self-serving.”<sup>91</sup> People routinely estimate, for example, that they are above average on desirable characteristics, including health,<sup>92</sup> driving ability,<sup>93</sup> occupational talent,<sup>94</sup> and the likelihood of having a successful marriage.<sup>95</sup> Additionally, people often overestimate their contributions to collective activities. Following a conversation, for example, people will exaggerate their participation,<sup>96</sup> similarly, when married couples are asked to estimate the percentage of household tasks they perform, their combined estimates typically exceed 100%, meaning that one or both overestimate their contribution.<sup>97</sup> And people often construe new information they discover in ways that reinforce their pre-existing opinions, regardless of what those opinions were.<sup>98</sup> In one study, for example, subjects, some of whom favored the death penalty and some of whom opposed it, learned new information about the death penalty. Both the pro-death penalty and anti-death penalty subjects con-

<sup>88</sup> *Id.* at 803.

<sup>89</sup> The differences in responses among the groups are statistically significant. *Id.* at 802, n.119.

<sup>90</sup> *Id.* at 803.

<sup>91</sup> See Michael Ross & Fiore Sicol, *Egocentric Biases in Availability and Attribution*, 37 J. PERSONALITY & SOC. PSYCHOL. 322 (1979).

<sup>92</sup> See Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

<sup>93</sup> See Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 145-46 (1981).

<sup>94</sup> See K. Patricia Cross, *Not Can, But Will College Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUC. 1, 9-10 (1977).

<sup>95</sup> See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 441-43 (1993).

<sup>96</sup> Ross & Sicol, *supra* note 91, at 324.

<sup>97</sup> *Id.* at 325-26.

<sup>98</sup> See, e.g., Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2102 (1979) (finding that upon learning factual evidence about the death penalty, subjects’ views were reinforced, whether they were pro- or anti-death penalty).

cluded that the new information bolstered their respective stances on this issue.<sup>99</sup>

Self-serving bias can have an unfortunate influence on the litigation process.<sup>100</sup> Due to self-serving bias, litigants, their lawyers, and other stakeholders might overestimate their own abilities, the quality of their advocacy, and the relative merits of the positions they are advocating.<sup>101</sup> These self-serving assessments, in turn, might thwart reasonable efforts to resolve cases.

In one illustrative study,<sup>102</sup> Linda Babcock and Greg Pogarsky randomly assigned student subjects to assume the role of plaintiff or defendant in a hypothetical personal injury case in which the only unresolved issue was the amount of damages the plaintiff should receive for pain and suffering. They provided the subjects with substantial information about the case and then asked them to predict the trial outcome. Plaintiff-subjects estimated that the judge would award them, on average, \$562,222; defendant-subjects, on the other hand, estimated that the judge would award the plaintiff only \$400,611, on average.<sup>103</sup>

In another study, George Loewenstein and colleagues asked undergraduates and law students to assess the value of a tort case in which the plaintiff had sued the defendant for \$100,000 in damages arising from an automobile-motorcycle collision.<sup>104</sup> These researchers assigned some of them to play the role of plaintiff and others the role of defendant, but they provided both sets of subjects with identical information about the case. Nevertheless, the subjects interpreted the facts in self-serving ways. When asked to predict the amount they thought the judge would award in the case, the subjects evaluating the case from the perspective of the plaintiff predicted that the judge would award \$14,527 more than the defendant-subjects predicted.<sup>105</sup> When asked to identify what they perceived to be a fair settlement value, plaintiff-subjects selected a value \$17,709 higher than the value selected by defendant-subjects.<sup>106</sup> These results, like those from the Babcock and Pogarsky study, suggest that self-serving or egocentric bias can lead to bargaining impasse and inefficient litigation.

Self-serving bias can also influence judges, leading them to believe that they are better decision makers than is in fact the case. To demonstrate self-

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<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP., 109, 110-11 (1997); Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. LEGAL STUD. 341, 352-54 (1999) [hereinafter Babcock & Pogarsky, *Settlement*]; George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 140-55 (1993).

<sup>101</sup> See, e.g., Babcock & Loewenstein, *supra* note 100, at 119 (noting that self-serving biases are likely to be "an important determinant of bargaining impasse"); Babcock & Pogarsky, *Settlement*, *supra* note 100, at 352-53 (noting that there is "abundant empirical evidence that individuals consistently exhibit 'self-serving biases' during negotiations").

<sup>102</sup> Babcock & Pogarsky, *Settlement*, *supra* note 100.

<sup>103</sup> *Id.* at 363. Even where the researchers informed the subjects that the jurisdiction imposed a \$250,000 cap on pain and suffering damages, they still found self-serving bias. In that case, plaintiff-subjects predicted that the judge would award, on average, \$199,420, while defendant-subjects predicted the judge would award only \$151,982. *Id.* at 363-64.

<sup>104</sup> Loewenstein, Issacharoff, Camerer & Babcock, *supra* note 100, at 145.

<sup>105</sup> *Id.* at 140.

<sup>106</sup> *Id.*

serving bias among judges, Rachlinski, Wistrich, and I asked federal magistrate judges participating in our study to respond to a simple question. In an item labeled "Appeal Rates,"<sup>107</sup> we asked the judges to estimate their reversal rates on appeal: "United States magistrate judges are rarely overturned on appeal, but it does occur. If we were to rank all of the magistrate judges currently in this room according to the rate at which their decisions have been overturned during their careers, [what] would your rate be?" We then asked the judges to place themselves into the quartile corresponding to their respective reversal rates: highest (> 75%), second-highest (> 50%), third-highest (> 25%), or lowest (< 25%).

As anticipated, the judges demonstrated self-serving or egocentric bias in their responses. Of the 155 judges who responded to this question, 56.1% reported that their reversal rate would place them in the lowest quartile, and 31.6% placed themselves in the second-lowest quartile.<sup>108</sup> In other words, 87.7% of the judges believed that at least half of their peers had higher reversal rates on appeal.

In a separate study of bankruptcy judges, Ted Eisenberg explored whether these judges interpreted their behavior in self-serving ways.<sup>109</sup> To do so, he relied on survey data in which bankruptcy judges and bankruptcy lawyers responded to a series of questions about judicial behavior in court,<sup>110</sup> and he speculated that the judges would rate themselves more favorably than the lawyers on their performance.<sup>111</sup> For example, two questions asked about the speed with which judges rule on fee applications. Eisenberg hypothesized that the "[j]udges would like to be regarded as highly efficient actors in the system," which should lead them to perceive "themselves as acting quickly on such fee applications" relative to the way the lawyers perceived them.<sup>112</sup> As shown in Table 5, this is what he found. One of the two questions asked both bankruptcy judges and lawyers whether the bankruptcy judges in their districts rule on *interim* fee applications: at the hearing, within 30 days after the hearing, between 31-60 days after the hearing, between 61-120 days after the hearing, or more than 120 days after the hearing.<sup>113</sup> Among judges, 77.6% indicated that they rule at the hearing, while only 45.5% of lawyers so indicated.<sup>114</sup> The second question asked both groups whether the bankruptcy judges in their districts rule on *final* fee applications: at the hearing, within 30 days after the hearing, between 31-60 days after the hearing, between 61-120 days after the hearing, or more than 120 days after the hearing. Again, the bankruptcy judges interpreted their behavior more favorably than did the lawyers, indicating that they rule at the hearing 71.3% of the time relative to 42.5% of the time.<sup>115</sup>

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<sup>107</sup> Guthrie, Rachlinski & Wistrich, *supra* note 2, at 813.

<sup>108</sup> *Id.* at 814.

<sup>109</sup> Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979 (1994) [hereinafter Eisenberg, *Differing Perceptions*].

<sup>110</sup> *Id.* at 983-87.

<sup>111</sup> The study also asked about lawyer behavior. *See id.* at 987-89.

<sup>112</sup> *Id.* at 983.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

When evaluating their behavior, the data show “substantial egocentric biases” on the part of the judges.<sup>116</sup>

TABLE 5. SELF-SERVING BIAS RESULTS<sup>117</sup>

	<i>Interim</i>		<i>Final</i>	
	Judges	Lawyers	Judges	Lawyers
At the hearing	77.6	45.5	71.3	42.5
< 31 days after	18.9	33.7	25.2	35.4
31-60 days after	2.1	16.3	3.5	15.5
61-120 days after	1.4	1.7	0	5
> 121 days after	0	2.8	0	0

#### 4. Summary

This work, along with other work not reported here,<sup>118</sup> suggests that judges possess cognitive blinders that can make it difficult for them to make accurate decisions in court. This means that case outcomes can be influenced by such phenomena as hindsight bias, which can lead to the assignment of liability in cases where it might not be appropriate, and anchoring, which can have an impact on the damages a defendant might have to pay. In other words, cognitive blinders, like informational blinders, can lead to misjudging.

#### C. Attitudinal Blinders

Whether elected or appointed, judges come to the bench with political views. This is not to say that they have pre-committed to positions in particular cases, but it strains credulity to claim, as, for example, Justice Alito claimed during his Supreme Court confirmation hearings, that a judge “can’t have any preferred outcome in any particular case.”<sup>119</sup> Rather, judges do have opinions, and these opinions or attitudes can predispose them to rule in ways that are consistent with those opinions or attitudes.

To establish the presence of attitudinal blinders among judges, political scientists have developed, and provided empirical evidence to support, the so-called attitudinal theory or model.<sup>120</sup> Most of this work has focused on the

<sup>116</sup> *Id.* at 982.

<sup>117</sup> Eisenberg, *Differing Perceptions*, *supra* note 109, at 983.

<sup>118</sup> *See, e.g.*, John C. Anderson, D. Jordan Lowe & Philip M. J. Reckers, *Evaluation of Auditor Decisions: Hindsight Bias Effects and the Expectation Gap*, 14 J. ECON. PSYCHOL. 711 (1993) (reporting evidence of hindsight bias on the part of judges evaluating auditor behavior); Guthrie, Rachlinski & Wistrich, *supra* note 2, at 794-99, 805-11 (demonstrating that judges are also somewhat susceptible to framing effects and the inverse fallacy); Viscusi, *supra* note 2 (showing judges are prone to some biases). *But see* Viscusi, *supra* note 2, at 46-55 (finding, among judges attending a law and economics conference, little evidence of hindsight bias).

<sup>119</sup> *The Hearing of Samuel A. Alito, Jr.’s Nomination to the Supreme Court, Hearing Before the S. Judiciary Comm.*, 109th Cong. 56 (2006) (opening statement of Judge Samuel Alito).

<sup>120</sup> Some of the pioneers include C. Herman Pritchett, Glendon Schubert, David Rohde, and Harold Spaeth. *See* C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, 1937-47 (1948) (advancing a judicial behaviorist approach); DAVID

Supreme Court, but political scientists and legal scholars have also explored whether judicial attitudes influence judges on the courts of appeals<sup>121</sup> and on the trial bench.<sup>122</sup> The evidence suggests that attitudinal blinders are an issue not only at the highest court in the land but also in these lower courts.<sup>123</sup>

To examine the impact of attitudinal blinders on trial judges, Robert Carp,<sup>124</sup> C. K. Rowland,<sup>125</sup> and other scholars of judicial behavior<sup>126</sup> have generally employed the following methods (or something substantially similar): First, they categorize judges as “Democrats” or “Republicans,” typically on the basis of the party of the President who appointed them.<sup>127</sup> Thus judges appointed by Presidents Nixon or Reagan are coded as Republicans, while judges appointed by Presidents Carter or Clinton are coded as Democrats. The

ROHDE & HAROLD SPAETH, *SUPREME COURT DECISION MAKING* (1976) (proposing a refined version of Schubert’s original attitudinal model); GLENDON SCHUBERT, *THE JUDICIAL MIND: ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965) (specifying the first attitudinal model).

This work built on the theorizing of the legal realists of the 1920s and 1930s. *See, e.g.*, ROBERT A. CARP & RONALD STIDHAM, *THE FEDERAL COURTS* 123 (3d ed. 1998) (“By about the 1920s a whole school of thought had developed that argued that judicial decision making was as much the product of human, extralegal stimuli as it was of some sort of mechanical legal thought process. Adherents of this view, who were known as ‘judicial realists,’ insisted that judges, like other human beings, are influenced by the values and attitudes learned in childhood.”).

<sup>121</sup> *See, e.g.*, Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635 (1998) (using attitudinal and strategic theory to develop a positive account of en banc decision making on the circuit courts); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV. 374 (1966) (using a variety of variables, including political party affiliation, to explain circuit judge decision making); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975) (same).

<sup>122</sup> *See, e.g.*, ROBERT A. CARP & C. K. ROWLAND, *POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS* (1983) (reporting the results of a study of district court judge decision making); C. K. ROWLAND & ROBERT A. CARP, *POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS* (1996) (same).

<sup>123</sup> CARP & STIDHAM, *supra* note 120, at 116 (“It is often difficult to determine, in any given case, the relative weight that any specific influence can have on a judge. Studies have suggested, though, that when judges, especially trial judges, find no significant precedent to guide them – that is, when the legal subculture cupboard is bare – they tend to turn to the democratic subculture, an amalgam of determinants that include their own political inclinations.”).

<sup>124</sup> *See, e.g.*, *supra* note 122.

<sup>125</sup> *Id.*

<sup>126</sup> *See, e.g.*, Robert A. Carp, Donald Songer, C. K. Rowland, Ronald Stidham & Lisa Richey-Tracy, *The Voting Behavior of Judges Appointed by President Bush*, 76 JUDICATURE 298 (1993) (analyzing Bush’s appointees through the lens of attitudinal theory); C. K. Rowland & Bridget Jeffery Todd, *Where You Stand Depends on Who Sits: Platform Promises and Judicial Gatekeeping in the Federal District Courts*, 53 J. POL. 175 (1991) (studying the application of the attitudinal model to standing decisions).

<sup>127</sup> Note that party designation might reflect not only ideology but also partisanship, and each might influence judicial decision making. Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 413 (1995) (“Partisanship and ideology represent two separate phenomena, and using party labels solely to represent ideology misses the possible relationship between an affective, or psychological reference-group identification held by a judge, and the decisions the judge makes.”).

researchers then read case opinions, coding them according to well-established protocols for subject matter (e.g., “race discrimination”) and outcome (e.g., “liberal” for a pro-claimant outcome or “conservative” for a pro-defendant outcome in a race discrimination case).<sup>128</sup> Finally, they compare case outcomes to determine whether there are meaningful differences between judges appointed by Republican Presidents and those appointed by Democratic Presidents. Scholars like Carp and Rowland point to evidence of attitudinal influences if they find differences in the direction of the outcome of the cases between the Republican and Democratic appointees.<sup>129</sup>

Carp and Rowland published the most ambitious, important, and comprehensive studies of district judge decision making, first in 1983,<sup>130</sup> and then in 1996.<sup>131</sup> In the 1996 version, they assembled a database of 45,826 district court opinions issued over more than half a century (1933-87), involving more than 1,500 district court judges.<sup>132</sup> They placed these opinions into one of five categories<sup>133</sup> and twenty-six subcategories.<sup>134</sup> Overall, they found that Democratic judges ruled in the liberal direction 48% of the time, while Republican judges ruled in the liberal direction 39% of the time.<sup>135</sup> In other words, “using the odds ratio as our guide, one may say that Democratic judges are 1.42 times more likely to render a liberal decision than are judges of Republican backgrounds.”<sup>136</sup> The disparity is even greater in civil cases, where Democratic judges rendered liberal decisions in 56% of the cases and Republican judges in 46% of the cases.

In certain doctrinal areas, they found even more striking differences. These differences were greatest in cases addressing local economic regulations, race discrimination claims, and Fourteenth Amendment claims (which include gender discrimination claims).<sup>137</sup> The differences were more modest in cases addressing Indian rights claims, the Fair Labor Standards Act (FLSA), and rent control claims.<sup>138</sup> And in voting rights cases, Rowland and Carp found Republican appointees were actually more likely than Democratic appointees to vote in a “liberal” direction (i.e., in favor of the party asserting a violation of her voting rights).<sup>139</sup>

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<sup>128</sup> For a thoughtful treatment of what constitutes a “liberal” versus a “conservative” outcome, see Carp, Songer, Rowland, Stidham, & Richey-Tracy, *supra* note 126, at 299-300.

<sup>129</sup> For an account of these methods, see CARP & ROWLAND, *supra* note 122, at 14-24; ROWLAND & CARP, *supra* note 122, at 17-23.

<sup>130</sup> See CARP & ROWLAND, *supra* note 122.

<sup>131</sup> See ROWLAND & CARP, *supra* note 122.

<sup>132</sup> *Id.* at 18.

<sup>133</sup> *Id.* at 22 (criminal justice, government and the economy, support for labor, class discrimination, First Amendment).

<sup>134</sup> For a complete listing, see *id.* at 175-76.

<sup>135</sup> *Id.* at 24-25.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 176.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

TABLE 6. DISTRICT JUDGE DECISION MAKING IN SELECTED DOCTRINAL AREAS<sup>140</sup>

Doctrinal Area	% Liberal Decisions	
	Democratic Appointees	Republican Appointees
Local Economic Regulation	75	57
Race Discrimination	57	42
Fourteenth Amendment	48	34
Indian Rights	51	49
FLSA	57	55
Rent Control	61	59
Voting Rights	46	50

Attitudinal blinders become even more apparent when one focuses on the decision-making of the appointees of particular Presidents. As Table 7 illustrates, for example, Johnson and Carter appointees rendered liberal decisions in 52% and 53% of cases, respectively.<sup>141</sup> By contrast, Reagan and Bush appointees rendered liberal decisions in only 36% and 34% of cases, respectively.<sup>142</sup>

TABLE 7. DISTRICT JUDGE DECISION MAKING BY APPOINTING PRESIDENT<sup>143</sup>

Appointing President	% of Decisions in Liberal Direction
Kennedy (D)	41
Johnson (D)	52
Nixon (R)	39
Ford (R)	44
Carter (D)	53
Reagan (R)	36
Bush (R)	34

And if one compares the decisions of judges appointed by ideologically distinct Presidents in particular doctrinal areas, the role of attitudinal blinders in decision making comes into even sharper focus. As Table 8 demonstrates, the differences between Carter and Reagan appointees in such areas as race dis-

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 47.

<sup>142</sup> *Id.* In an update, Carp and his collaborators found that Bush appointees ruled in the liberal direction in 34% of cases. See Carp, Songer, Rowland, Stidham & Richey-Tracy, *supra* note 126, at 299. See also Donald R. Songer, Susan W. Johnson & Ronald Stidham, *Presidential Success Through Appointments to the United States District Courts*, 24 JUST. SYS. J. 283, 290 ("The analysis suggests that [P]residents are quite successful in securing the selection of district court judges who will support their political preferences. For both civil liberties and labor and economic cases, the relationships between judicial voting and presidential preferences are strongly positive and significant at the .001 level. The results are particularly strong for civil liberties cases.").

<sup>143</sup> See ROWLAND & CARP, *supra* note 122, at 47.

crimination, privacy, local economic regulations, and First Amendment claims (both speech and religion) are dramatic.<sup>144</sup>

TABLE 8. REAGAN V. CARTER APPOINTEES IN DIFFERENT DOCTRINAL AREAS<sup>145</sup>

Doctrinal Area	% Liberal Decisions	
	Carter Judges	Reagan Judges
Race Discrimination	78	18
Right to Privacy	78	45
Local Economic Regulation	81	58
Freedom of Expression	59	39
Criminal Conviction	46	25
Voting Rights	58	36
Fourteenth Amendment	45	26
Freedom of Religion	59	39
Alien Petitions	53	33
Women's Rights	56	36
Union v. Company	61	43
Union Member v. Union	43	28
Indian Rights	56	40
U.S. Commercial Regulation	77	65
U.S. Habeas Corpus	37	25
Criminal Court Motions	44	31
Employee v. Employer	45	33
Rights of the Disabled	58	46
Age Discrimination	50	40
State Habeas Corpus	31	24
NLRB v. Employer (FLSA)	68	63
Environmental Protection	65	61
NLRB v. Union	63	60

<sup>144</sup> The distinctions between Republican and Democratic appointees extend from substantive outcomes to procedural decisions. In an illuminating study of attitudinal blinders, Rowland and Bridget Jeffery Todd studied standing decisions in the federal trial courts. Rowland & Todd, *supra* note 126. Among other things, they found that Reagan appointees, relative to Carter and Nixon appointees, were much more resistant to “underdog” claimants seeking standing:

[F]or the Reagan cohort, where you stand depends in large measure on who you are . . . [T]he Reagan appointees who resisted upperdog access only 41% of the time resist underdog claims 78% of the time. These differences mean that the Reagan gatekeepers are almost twice as vigilant when underdogs seek standing as they are when upperdogs claim standing, and they are about 60% more resistant to underdog standing than the Carter or Nixon cohorts, which are virtually indistinguishable.

*Id.* at 181.

<sup>145</sup> *Id.* at 49.



Two important limitations of these studies are worth noting. First, and most significantly, Rowland and Carp used published opinions from the Federal Supplement to build their database.<sup>146</sup> Because district judges publish only a fraction of their opinions,<sup>147</sup> and because there is reason to believe that cases resulting in published opinions are among the more discretionary and policy-oriented cases that judges hear,<sup>148</sup> the opinions published in the Federal Supplement are not representative of the full body of case decisions that trial judges make.<sup>149</sup> Thus, as Rowland and Carp readily acknowledge, there may be meaningful selection effects in their database.<sup>150</sup> Second, because Rowland and Carp coded only those case types that could readily be classified as liberal or conservative,<sup>151</sup> they necessarily excluded many published opinions that could not be so easily categorized. Indeed, they estimate that they excluded as many published opinions as they included in their sample.<sup>152</sup>

Despite these limitations, and the more general limitations of attitudinal theory,<sup>153</sup> Rowland and Carp's studies provide insight into judicial decision

<sup>146</sup> ROWLAND & CARP, *supra* note 122, at 18. *But see id.* at 117-35 (exploring appointment effects on unpublished opinions, relying on case samples from Kansas City and Detroit).

<sup>147</sup> *See, e.g., id.* at 20 (acknowledging that "only a small percentage of district court decisions are ever formally published").

<sup>148</sup> *See, e.g., id.* at 19 ("[T]he best evidence suggests that, although not all discretionary policy decisions are codified and published, the vast majority of published opinions are explications of discretionary policy decisions that directly or indirectly allocate value beyond the litigants of record.").

<sup>149</sup> *See, e.g., id.* at 20 ("During the past decade several scholars have compared published with unpublished opinions in several diverse areas of the law and have concluded that there are real and substantive differences between the two types of cases.").

<sup>150</sup> *See generally id.* at 18-21, 117-35.

<sup>151</sup> *Id.* at 18 ("Only those cases were used that fit easily into one of twenty-six case types which appeared to contain a clear underlying liberal-conservative dimension.").

<sup>152</sup> *Id.*

<sup>153</sup> For all of the virtues of the attitudinal model, Rowland and Carp acknowledge its weaknesses, particularly when applied to trial judges (as opposed to Supreme Court justices). *See id.* at 145-146 ("The main difficulty in applying the attitudinal model to trial judges is its fundamental assumption that these jurists are motivated primarily by their personal policy preferences . . . . [T]o say that Supreme Court justices are motivated primarily by their constitutional policy preferences and that these preferences can be inferred from their 'votes' is fundamentally different from contending that trial judges' fact-finding or evidence evaluation is motivated by their personal preferences.").

Thus, they propose a social-cognitive model of trial judge decision making. *Id.* at 156 (borrowing from "cognitive psychology, social cognition, and social judgment theory to build a cognitive theory of trial judges' judgments"). Their proposed model acknowledges the role attitudes can play, but it also takes into account the cognitive processes judges use to make judgments:

[W]e proffer a conceptual model of judicial cognition. The model adopts from prospect theory [a descriptive theory of decision making that proposes a two-stage process of editing and then evaluating options] the notion that decision making is a two-stage process in which decisions are preceded by framing, that is, the mental transformation of ambiguous evidence and law into proximate decision cues. It also shares with prospect theory the assumption that all humans, including judges, have computational limitations that constrain the quality and quantity of their judgment protocols. And it accepts the behavioral premise that judges' policy preferences can influence their judgments. However, our model of judicial cognition rejects the general assumption that human judgment is necessarily goal-oriented and the axiomatic assumption of attitudinal models and their derivatives that judicial judgment is motivated by the judge's personal

making at the trial court level. Their work – along with the work of other scholars of judicial behavior<sup>154</sup> – suggests that attitudinal blinders can play a meaningful role in the decision making of trial judges, particularly in those instances where the judges have discretion and where the issues confronting them are politically salient.

This paper takes as a given that trial judges seek to make accurate decisions under the law; according to this view, judges try hard to get it right but are occasionally influenced by their attitudes or deeply held beliefs. It is worth noting that attitudinal theorists generally assume that judges are, in fact, “rational actors” seeking to maximize their policy preferences or attitudes.<sup>155</sup> For them, judges are not blinded by their attitudes; rather, judges consciously make decisions to further those attitudes,<sup>156</sup> subject to external constraints like the threat of reversal. Whether my assumption is right, or the attitudinalist assumption is right, is irrelevant here. In either case, judicial attitudes can lead to misjudging.

## II. FORUM-SELECTION IMPLICATIONS

Judges possess informational blinders, cognitive blinders, and attitudinal blinders. Largely unacknowledged by the legal system, these blinders increase the likelihood of misjudging. Courts of appeals exist in large part to remedy judicial error,<sup>157</sup> but they cannot fully address the misjudging problem because appeals are available only on limited bases,<sup>158</sup> occur infrequently,<sup>159</sup> and seldom lead to reversal.<sup>160</sup> Moreover, from the perspective of the litigants

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policy preferences. A judicial cognition model must rather attend to the process by which preferences influence judgment in the context of principal-agent relationships between federal trial and appellate judges.

*Id.* at 158. For more on prospect theory and its two-stage approach to decision making, see Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 274-77 (1979).

<sup>154</sup> See, e.g., sources cited in note 126, *supra*.

<sup>155</sup> See, e.g., Tracey E. George, *Developing a Positive Theory of Decisionmaking in U.S. Courts of Appeals*, 58 *OHIO ST. L.J.* 1635, 1646-55 (1998) (describing the development of the attitudinal model).

<sup>156</sup> *Id.*

<sup>157</sup> See sources cited in note 5, *supra*.

<sup>158</sup> ROWLAND & CARP, *supra* note 122, at 24; Maurice Rosenberg, *Standards of Review, in RESTRUCTURING JUSTICE: THE INNOVATIONS OF THE NINTH CIRCUIT AND THE FUTURE OF THE FEDERAL COURTS* 30, 31 (Arthur D. Hellman ed., 1990) (explaining that in many instances “the court of appeals [is] obliged by established standards to affirm unless, for example, crucial fact findings were not merely in error but clearly so,” and, likewise, that “[d]iscretionary rulings [have] to be not merely incorrect, but abusive”).

<sup>159</sup> See, e.g., ROWLAND & CARP, *supra* note 122, at 8 (observing that “only about 20 percent of all district court cases are appealed in any given year”); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 *J. EMPIRICAL LEGAL STUD.* 659, 685 (“About 20 percent of cases with definitive trial court judgments generate appeals, with tried cases appealed at about twice the rate of nontried cases.”) [hereinafter Eisenberg, *Appeal Rates*].

<sup>160</sup> See, e.g., ROWLAND & CARP, *supra* note 122, at 8 (“[M]ost appeals are unsuccessful, and, as anticipated by the expanded fact freedom inherent in the evolution of fiduciary jurisprudence, the reversal rate is declining. For example, the reversal rate in 1960 was almost 25 percent; by 1990 it had declined to 16 percent. In combination, the low rates of appeal

involved in a case, appeals, even if successful, add unwanted costs and delays to the dispute resolution process.

Because the prospect of misjudging is real – due not only to the blinders I have described in this paper but also due to “bad judging,”<sup>161</sup> electoral concerns,<sup>162</sup> desire for promotion,<sup>163</sup> and other non-legal factors<sup>164</sup> – disputants and their lawyers should not assume that they will obtain predictable outcomes in court. Informational, cognitive, and attitudinal blinders, along with the other factors noted above, decrease the likelihood that judges will accurately apply the governing law to the relevant facts of the case.

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and reversal ensure that only a very small number of district courts' judgments will be reversed on appeal – about 3 percent (.20 x .16 = .032).”); Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error?*, 25 LOY. L.A. L. REV. 893, 894-96 (1992) (finding in 1990 that only 30 trial verdicts were reversed for evidentiary error in the federal courts); Eisenberg, *Appeal Rates*, *supra* note 159, at 665 (emphasis in original) (“4.3 percent of the 2.1 million district court filings ended with an appellate court affirming the trial court and . . . 1.3 percent of such filings ended with an appellate court reversing the trial court. Thus, in rounded figures, 1 filing in 100 yields an appellate reversal. Simple computation reveals that about one-quarter of 1 percent of all cases filed from 1987 through 1995 led to an appellate court reversal of a *trial outcome* and that about one-half of 1 percent of such filed cases led to an appellate court affirmance of a trial outcome.”); Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights Into the ‘Affirmance Effect’ on the United States Courts of Appeals*, 32 FLA ST. U.L. REV. 357, 358, 359 (2005) (arguing that “affirmances are a defining feature of the courts of appeals” and reporting data to that effect).

<sup>161</sup> See Miller, *supra* note 8.

<sup>162</sup> See, e.g., Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (“We provide evidence that judges become significantly more punitive the closer they are to standing for reelection. In Pennsylvania, for the time period and crimes we analyze, we can attribute more than two thousand years of additional incarceration to this dynamic. This may imply judges sentence too harshly near elections, or too leniently early in their terms. In either case, it implies a downside to electoral control of judges.”).

<sup>163</sup> See, e.g., Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487-93 (1998) (finding evidence that promotion prospects had some influence on district judge decisions in cases challenging the constitutionality of the federal sentencing guidelines) [hereinafter Sisk, Heise & Morriss, *Charting*]. See also Mark A. Cohen, *Explaining Judicial Behavior or What’s ‘Unconstitutional’ About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 192 (1991) (same).

<sup>164</sup> See, e.g., CARP & STIDHAM, *supra* note 122, at 125 (observing that “personal factors – such as religion, sex, race, pre-judicial career, and the level of prestige of their law school education – may also play a role” in decision making, although “only political party affiliation seems to have any significant and consistent” explanatory force); Tracey E. George, *Court Fixing*, 43 ARIZ. L. REV. 9, 37 (2001) (providing an overview of the empirical research documenting the relationship, if any, between personal attributes, social background, and policy preferences on judicial behavior, particularly the behavior of appellate judges); Sisk, Heise & Morriss, *Charting*, *supra* note 163, at 1470-80 (finding evidence that prior employment background influenced federal district judge reactions to initial challenges to the constitutionality of the federal sentencing guidelines); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions*, 65 OHIO ST. L.J. 491, 614 (2004) (“In our study of religious freedom decisions [among district judges and circuit judges], the single most prominent, salient, and consistent influence on judicial decisionmaking was *religion* – religion in terms of affiliation of the claimant, the background of the judge, and the demographics of the community.”).

This observation has important implications for disputants and their lawyers because it calls into question the still-dominant assumption that the courthouse is the proper locus of dispute resolution. Indeed, the prospect of misjudging suggests that disputants might prefer other dispute resolution fora for three related reasons, each of which I advance below. First, because court outcomes are uncertain, disputants might opt for consensual dispute resolution processes as a way of removing the risk that they will be subject to binding, and potentially erroneous, decisions. Second, recognizing that accuracy is often elusive in court, disputants might decide to place a priority on other values in disputing, like self-determination, creativity, improved relationships, speedier and cheaper resolutions, and so forth. Consensual processes, like negotiation and mediation (and perhaps even some non-consensual processes, like arbitration), are more likely than litigation to enable disputants to give expression to these values. Third, if accuracy remains the disputants' primary goal, some processes other than litigation, including some forms of arbitration, might offer disputants more hope than litigation itself.<sup>165</sup>

#### A. *Avoiding Erroneous Decisions*

Courts impose binding decisions on the disputants who appear in front of them. Because the research on misjudging suggests that judges struggle to make fully accurate decisions, disputants might opt for consensual dispute resolution processes in order to avoid the possibility of facing potentially erroneous, but nonetheless binding, decisions in court.<sup>166</sup> In consensual processes like negotiation, mediation, and collaborative lawyering, disputants do not submit their dispute to a third party decision maker; rather, they retain responsibility for identifying, selecting, and rejecting the terms of any settlement. By seeking to resolve their disputes through such consensual processes, they avoid the risk that they will face a loss in court due to misjudging.

It is true, of course, that the disputants themselves are likely to be influenced by the very same blinders (as well as some others) that influence judges. There is a rich research literature demonstrating that disputants<sup>167</sup> (and, to a

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<sup>165</sup> In our earlier work, Rachlinski, Wistrich, and I identified several implications following from the research on what I am calling informational and cognitive blinders in this paper. With respect to the former, we argued that courts might benefit from bifurcating judicial roles; that jury trials might be preferable to bench trials; and that damage schedules might be appropriate in civil cases. See Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1325-29. With respect to the latter, we argued that judges might take steps to improve their judgment; that jury trials might be preferable to bench trials; and that the legal system can adopt, and has adopted in some cases, legal rules that minimize the impact of cognitive blinders. See Guthrie, Rachlinski & Wistrich, *supra* note 2, at 821-29. We have not addressed the impact of this research on dispute resolution forum selection, which is what I focus on here.

<sup>166</sup> Of course, a disputant who believes a judge will make an inaccurate decision – but one that favors her position – is quite likely to opt for trial over other processes.

<sup>167</sup> See, e.g., Linda Babcock et al., *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 296-97 (1995) (finding that framing effects influenced non-lawyer and lawyer subjects); Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003) [hereinafter Guthrie, *Options*] (reporting evidence that prospective disputants are influenced by such phenomena as contrast and compromise); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107

lesser extent, their lawyers<sup>168</sup>) are susceptible to cognitive blinders, which can lead them to make suboptimal decisions.<sup>169</sup> But there is a marked difference between making an erroneous decision and being subject to someone else's erroneous decisions. In consensual processes like negotiation and mediation, the disputants might err, but they will not find themselves at the mercy of an error committed by a decision maker empowered by the state to impose that erroneous outcome on them.

Given that so few cases are tried,<sup>170</sup> and so many cases settle,<sup>171</sup> one might argue that disputants pursuing litigation are effectively resolving their disputes through consensual processes anyway. Although this is certainly true – and, according to most, desirable<sup>172</sup> – the fact is that litigated disputes typi-

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(1994) (finding that psychological barriers influence prospective litigants in hypothetical suits).

<sup>168</sup> See, e.g., Babcock et al., *supra* note 167, at 296-97 (finding that framing effects influenced non-lawyer and lawyer subjects); Eisenberg, *Differing Perceptions*, *supra* note 109 (finding evidence of self-serving bias among lawyers); Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities That Are Described in Greater Detail*, 26 LAW & HUM. BEHAV. 159 (2002) (demonstrating decision-making biases when assessing probabilities). But see Guthrie, *Options*, *supra* note 167, at 642 (reporting evidence showing that lawyers appear to be less susceptible to contrast effects than non-lawyers); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997) (finding evidence that lawyers were less susceptible to psychological biases than non-lawyers); Jean R. Sternlight, *Lawyers' Representation of Clients in Mediation: Using Economics and Psychology to Structure Advocacy in a Nonadversarial Setting*, 14 OHIO ST. J. ON DISP. RESOL. 269 (1999) (arguing that lawyers can use insights from research on cognitive blinders to serve their clients better as advocates).

<sup>169</sup> Some scholars have argued that mediators might be able to help disputants overcome cognitive blinders in disputing. See, e.g., Robert A. Baruch Bush, "What Do We Need a Mediator For?": *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 12-13 (1996).

<sup>170</sup> See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461, 463 (2004) (reporting that trials accounted for only 1.8% of all case dispositions in U.S. district courts in 2002); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 768, 769 (2004) (finding, based on a review of data from twenty-two state courts, that 0.6% of civil case dispositions were jury trials and 15% were bench trials).

<sup>171</sup> See, e.g., Galanter, *supra* note 170, at 515 ("For a long time, the great majority of cases of almost every kind in both federal and state courts have terminated by settlement."); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340 (1994) (noting that roughly two-thirds of cases settle). But see Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 733 (2004) (tentatively reporting, based on adjusted data from the Administrative Office of the U.S. Courts, that "the overall settlement rate (including consent judgments) was six percentage points lower in 2000 than in 1970").

<sup>172</sup> Sam Gross and Kent Syverud articulate the conventional view:

A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial. Much of our civil procedure is justified by the desire to promote settlement and avoid trial.

cally settle late,<sup>173</sup> and often after judges have had the opportunity to rule on pretrial matters, including procedural motions, evidentiary motions, discovery disputes, and so on.<sup>174</sup> When making these pretrial decisions, judges are susceptible to the distortions that informational, cognitive, and attitudinal blinders can cause. Because disputants in litigation often settle in the shadow of legal rulings,<sup>175</sup> agreements reached while immersed in the litigation process might very well reflect the potentially distorted judgment of a judge. This suggests that disputants might benefit not only by pursuing consensual dispute resolution processes but also by doing so before a complaint has even been filed.<sup>176</sup>

### B. Pursuing Other Values

Trial involves a search for the truth. But if informational, cognitive, and attitudinal blinders lead judges to misjudge – perhaps by inducing them to grant

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Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991). For detractors, see Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEGAL STUD. 627, 629-35 (2004) (defending trial based on such “intangible benefits” as citizen education and reaffirmation of democratic values); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 24-32 (2000) (defending litigation and trial based in large part on a public goods argument); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (articulating the classic case against settlements); Galanter & Cahill, *supra* note 171 (challenging the superiority of settlements); Robert J. Rhee, *A Price Theory of Legal Bargaining: An Inquiry into the Selection of Settlement and Litigation Under Uncertainty*, 56 EMORY L.J. 619 (2006) (challenging the efficiency arguments made on behalf of settlement).

<sup>173</sup> See, e.g., William F. Coyne, Jr., *The Case for Settlement Counsel*, 14 OHIO ST. J. ON DISP. RESOL. 367, 367 (1999) (“Over my first ten years as a lawyer handling civil litigation I noticed that in many of my cases the first serious settlement discussions took place shortly before trial. This was not good.”); Rhee, *supra* note 172, at 622 (“Cases do not settle early when transaction cost savings would be the greatest. They settle in mid-litigation when previous settlement attempts, on roughly similar terms, have failed. Still many others settle late when most transaction costs have become sunk costs.”). But see Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2109-2110 (2002) (reporting, based on a study of state courts, that a reasonably high percentage of simple disputes is resolved fairly early in the litigation process, although the average contract case was resolved thirteen months into litigation and the average torts case 19.3 months into litigation).

<sup>174</sup> See, e.g., Stephen Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 593 (2004) (observing a substantial increase in recent years in the percentage of cases resolved by summary judgment); Galanter, *supra* note 170, at 481 (“Interestingly, although the number and rate of trials has fallen, judicial involvement in case activity – at least on some level – has increased.”); Hadfield, *supra* note 171, at 733 (tentatively reporting, based on adjusted data from the Administrative Office of the U.S. Courts, a significant increase in “nontrial adjudication” and arguing that we may be observing “a shift in the way judges decide cases, away from full-scale trial adjudication toward more piecemeal nontrial adjudication”).

<sup>175</sup> Hadfield, *supra* note 171, at 708 (noting that settlements “are negotiated in the shadow of a trial or in the shadow of a pretrial motion”). See generally Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

<sup>176</sup> Of course, most disputants, most of the time, resolve their disputes without filing a complaint or even hiring a lawyer. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 544 (1981) (reporting that of every 1000 grievances, only 103 involve lawyers and 50 involve court filings).

a motion that should be denied; to deny a motion that should be granted; to assign responsibility to the wrong party; or to award too much or too little in damages – the truth-seeking function of trial can be compromised. The research on misjudging reported above suggests that there is a risk that this might happen.

Once disputants and their lawyers acknowledge the risk that litigation might not produce fully accurate liability and damages determinations, they might reasonably conclude that they should pursue other values in the disputing process (unless, of course, they believe that judicial error is likely to favor them in the litigation).<sup>177</sup> Proponents of consensual dispute resolution processes like negotiation and mediation have long argued that these processes are preferable to trial precisely because they enable disputants to vindicate such values as self-determination;<sup>178</sup> party satisfaction;<sup>179</sup> speedy resolutions;<sup>180</sup> cost savings;<sup>181</sup>

<sup>177</sup> As noted above, if disputants conclude that they will fare better as a result of the judge's erroneous decision, they might pursue litigation for that very reason. See *supra* note 166.

<sup>178</sup> See, e.g., Bush, *supra* note 169, at 18-19 (arguing that mediation provides disputants with "process control" or "the opportunity for meaningful participation in determining the outcome of the procedure (whatever it may ultimately be) and the opportunity for full self-expression"); Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 88 (1998) [hereinafter Kovach & Love, *Mapping Mediation*] (arguing that facilitative mediation enhances self-determination, which is "the fundamental goal of mediation"); Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 33-35 (1982) [hereinafter Riskin, *Mediation*] (noting that in mediation "the ultimate authority resides with the disputants"); Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 918 (1998) (arguing that mediation "provides parties with . . . a greater opportunity to participate directly in resolving these disputes"); Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 16 (2001) (observing that mediation relies "on the parties' active and direct participation in the process and in decision-making" and therefore gives participants "a means to wrest control over both the dispute resolution process and the dispute resolution outcome from judges and lawyers").

<sup>179</sup> For a summary of the then-extant literature, see Chris Guthrie & James Levin, *A "Party Satisfaction" Perspective on a Comprehensive Mediation Statute*, 13 OHIO ST. J. ON DISP. RESOL. 885, 887-98 (1998). See also Barbara McAadoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 377 (1997) ("It appears that ADR processes, especially mediation, do consistently result in increased litigant satisfaction."); Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211 (2004) (showing through experimental methods that ex ante disputants prefer mediation to other dispute resolution methods).

<sup>180</sup> See, e.g., Craig McEwen, *Mediation in Context: New Questions for Research*, 3 DISP. RESOL. MAG. 16, 16 (1996) (reporting that research shows that mediation results in a "reduction in typical settlement times when agreements are reached but delays when they are not"); Riskin, *Mediation*, *supra* note 178, at 32-35 (observing that mediation often delivers "speedy processing" and is "faster" than adversary processes); Stulberg, *supra* note 178, at 918 (observing that courts have successfully established mediation programs to facilitate speedy processing). *But see* McAadoo & Welsh, *supra* note 179, at 377 ("Recent studies, however, do not always appear to support the claims that ADR produces substantially quicker settlements . . .").

<sup>181</sup> See, e.g., McEwen, *supra* note 180, at 16 (reporting that there is "some evidence of cost-savings to parties as a result of mediation"); Riskin, *Mediation*, *supra* note 178, at 33-35 (observing that mediation often saves disputants time and money and is "cheaper" than adversary processes); Stulberg, *supra* note 178 at 918 (observing that courts have successfully established mediation programs to reduce costs). *But see* McAadoo & Welsh, *supra*

creative agreements that truly meet their needs;<sup>182</sup> enhancing the relationship between the parties;<sup>183</sup> and equipping the parties to resolve future disputes on their own.<sup>184</sup>

Some consensual processes, like “facilitative” mediation, are more likely than other consensual processes, like “evaluative” mediation,<sup>185</sup> to enhance pursuit of these values.<sup>186</sup> In facilitative mediation, mediators help the parties “resolve their own disputes, listen to each other differently, broaden their own capacities for understanding and collaboration, and create resolutions that build relationships, generate more harmony, and are ‘win-win.’”<sup>187</sup> Facilitative mediators may “push disputing parties to question their assumptions, reconsider their positions, and listen to each other’s perspectives, stories, and arguments,”<sup>188</sup> but they may not offer “an opinion or judgment as to the likely

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note 179, at 377 (“Recent studies, however, do not always appear to support the claims that ADR produces . . . reduced expenses for litigants or the courts.”).

<sup>182</sup> See, e.g., Riskin, *Mediation*, *supra* note 178, at 33-35 (arguing that mediation is “potentially more hospitable to unique solutions that take more fully into account nonmaterial interests of the disputants”); Frank E. A. Sander, *Some Concluding Thoughts*, 17 OHIO ST. J. ON DISP. RESOL. 705, 709 (2002) [hereinafter Sander, *Thoughts*] (reporting that mediation and interest-based negotiation are more likely to “focus on creating value and reaching Pareto-optimal solutions”).

<sup>183</sup> See, e.g., Riskin, *Mediation*, *supra* note 178, at 33-35 (observing that mediation can help parties “learn to work together and to see through cooperation both can make positive gains”).

<sup>184</sup> See, e.g., Sander, *Thoughts*, *supra* note 182, at 709 (noting that a skillful mediator seeks “to teach the parties how to handle future disputes”); Welsh, *supra* note 178, at 17-18 (arguing that mediation provides disputants with “a sense of their own value and strength and own capacity to handle life’s problems”). See generally Robert A. Baruch Bush & Joseph P. Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (1994).

<sup>185</sup> For the classic explanation of the distinction between facilitative and evaluative mediation, see Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996) [hereinafter Riskin, *Grid*] (attempting to “categorize the various approaches to mediation” through use of a “grid”). See also Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTERNATIVES TO HIGH COST LITIG. 111 (1994) [hereinafter Riskin, *Mediator Orientations*] (same). But see John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 850 n.40 (1997) (arguing that “it is more useful to think of this as a continuum rather than a discrete dichotomy”); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing A Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949, 952 (1997) (arguing that “the view that mediators act as either facilitators or evaluators represents a triumph of excessively formalist thinking at a time when effective dispute resolution law and policy require a functional approach”); Joseph B. Stulberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 FLA. ST. U. L. REV. 985, 986 (1997) (calling Riskin’s “facilitative/evaluative dichotomy” a “false one”).

For a more recent attempt by Riskin to capture approaches to mediation, see Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003).

<sup>186</sup> For support, see, e.g., Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation Is an Oxymoron, 14 ALTERNATIVES TO HIGH COST LITIG. 31 (1996); Kovach & Love, *Mapping Mediation*, *supra* note 178; Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937 (1997).

<sup>187</sup> Love, *supra* note 186, at 943-44.

<sup>188</sup> *Id.* at 939.



outcome or a 'fair' or correct resolution of an issue in a dispute."<sup>189</sup> In evaluative mediation, by contrast, mediators try not only to facilitate party communication but also to provide the parties with information and opinions about the substance of the dispute. An "evaluative mediator assumes that the participants want and need the mediator to provide some direction as to the appropriate grounds for settlement – based on law, industry practice or technology."<sup>190</sup> In evaluative mediation, in other words, mediators help the parties bargain in the shadow of the law by providing them with case evaluations.

The research on misjudging suggests that evaluative mediators are unlikely to make accurate predictions about case outcomes. Of course, predicting case outcomes accurately is difficult, even if one assumes away the blinders described in this paper.<sup>191</sup> But when one takes these blinders into account, it becomes clear how difficult case evaluation really is because these blinders (at least the informational and cognitive ones)<sup>192</sup> can influence not only the judges whose decisions the mediators are trying to predict but also the mediators themselves. These flawed evaluations, in turn, are likely to influence the behavior of the disputants,<sup>193</sup> leading them to settle on the basis of the flawed evaluations rather than on the basis of other important values (or on the basis of accurate evaluations).<sup>194</sup>

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<sup>189</sup> Kovach & Love, *Mapping Mediation*, *supra* note 178, at 75 ("The mediator should not 'answer' the question posed by the dispute (i.e., what is a fair, just, or likely court outcome). That job belongs to the parties.").

<sup>190</sup> Riskin, *Mediator Orientations*, *supra* note 185, at 111.

<sup>191</sup> See, e.g., Murray S. Levin, *The Propriety of Evaluative Mediation: Concerns About the Nature and Quality of an Evaluative Opinion*, 16 OHIO ST. J. ON DISP. RESOL. 267, 288 (2001) (reporting that available data "displays the difficulty of predicting litigation outcomes – giving cause for concern about the quality of evaluative opinions by mediators."); Rhee, *supra* note 172, at 642 (observing that attorneys often lack the trial experience necessary to make good predictions about court outcomes); *id.* at 21 (observing that because the facts of any given legal case are unique, no data exists from which to make good predictions about court outcomes); *id.* at 30 (arguing that "[c]ase assessments cannot be quantified").

<sup>192</sup> The attitudinal blinders, by contrast, might make a particular judge's ruling more predictable, at least in cases with a clear ideological dimension.

<sup>193</sup> See, e.g., Kovach & Love, *Mapping Mediation*, *supra* note 178, at 100 ("The exact impact of actions and words is unknowable. If a precondition to giving an evaluation is determining that an evaluation will be 'non-directive' or will not interfere with self-determination, the safest and wisest course is to give no evaluation at all."); Love, *supra* note 186, at 943 (arguing, for example, that "[t]he mediator's opinion that one of the parties . . . does not have standing to bring a particular claim in court carries enormous weight.").

<sup>194</sup> The emerging empirical literature suggests that parties prefer facilitative mediation to evaluative mediation. See E. Patrick McDermott & Ruth Obar, "What's Going On" in *Mediation: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 97 (2004) (finding, based on an analysis of EEOC mediations, that "while all forms of mediation had high participant satisfaction ratings, the purely facilitative mediation is most satisfactory to the charging party."); Shestowsky, *supra* note 179, at 245-46 (reporting experimental evidence suggesting that disputants prefer facilitative to evaluative mediation). *But see* McDermott & Obar, *supra* at 97 (identifying a National Institute of Justice survey showing that mediator style did not influence party evaluations). However, there is also some evidence showing that charging parties fared better in EEOC mediations when the mediators were evaluative rather than facilitative. *Id.* at 101.

In short, because litigation cannot promise perfectly accurate and fully predictable outcomes, disputants might opt for consensual dispute resolution processes as a way of pursuing other important values in disputing. These processes, particularly those that are consciously conducted outside the shadow of the law, may give disputants a way to vindicate the very values that litigation can thwart.

### C. *Seeking Enhanced Accuracy*

Even though perfectly accurate outcomes are elusive, in court or elsewhere, some disputants will nonetheless place a primacy on obtaining an accurate resolution of their disputes. Arbitration *might* enhance their chances of doing so.

At first glance, this seems unlikely. After all, arbitration is essentially private litigation. In both arbitration and litigation, a third-party decision maker is empowered, either by the state or by the disputants themselves, to render a binding decision. This suggests, of course, that an arbitrator, like a judge, is susceptible to informational, cognitive, and attitudinal blinders, and that arbitrators are as prone to “misarbitrating” as judges are to “misjudging.”<sup>195</sup> By implication, then, parties in arbitration are as likely as parties in litigation to face a binding decision shaped by non-merits based factors, like the blinders identified above.

On closer inspection, however, it becomes clear that arbitration might nonetheless hold the promise of greater accuracy and predictability. Arbitration, in contrast to litigation, frequently requires participants to appear in front of a panel of arbitrators rather than an individual arbitrator.<sup>196</sup> Panel or group decision makers might be better able to avoid the cognitive blinders that can undermine individual decision making.

The evidence on the relative susceptibility of groups and individuals to cognitive blinders is decidedly mixed.<sup>197</sup> There is at least a hint in the litera-

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<sup>195</sup> In a 2004 article, Chris Drahozal surveyed the then-extant empirical literature and argued that arbitrators are more likely to make decisions like judges than jurors, though noting the paucity of empirical evidence on this point. See Christopher R. Drahozal, *A Behavioral Analysis of Private Judging*, 67 *LAW & CONTEMP. PROBS.* 105, 107 (2004).

<sup>196</sup> See, e.g., Rule 607(a)(1) of the NYSE Arbitration Rules, [http://rules.nyse.com/NYSE/NYSE\\_Rules/](http://rules.nyse.com/NYSE/NYSE_Rules/) (select “Arbitration Rules”; then scroll to Rule 607) (last visited Feb. 18, 2007) (requiring appointment of at least three panel members in any controversy over \$10,000 or “where the matter in controversy does not involve or disclose a money claim”); Rule 10308(b)(1)(B) of the NASD Rules, <http://nasd.complinet.com> (select “Procedural Rules”; then select “10300. Uniform Code of Arbitration”; then scroll to Rule 10308) (last visited Feb. 18, 2006) (requiring the appointment of a panel of three arbitrators if the amount in dispute is greater than \$50,000).

<sup>197</sup> See, e.g., Norbert L. Kerr, Robert J. MacCoun & Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 *PSYCHOL. REV.* 687, 713 (1996) (“The central question of this paper has been, ‘Which is more likely to make a biased judgment, individuals or groups?’ Our overview of the relatively small and diverse empirical literature suggested that there was no simple empirical answer to this question.”); Norbert L. Kerr, Keith E. Niedermeier & Martin F. Kaplan, *Bias in Jurors vs Bias in Juries: New Evidence from the SDS Perspective*, 80 *ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES* 70, 83 (1999) (noting that “the relative susceptibility of individuals vs groups to judgmental biases will depend on a variety of task, group, and group member factors”).

ture, though, that group decision makers might be better equipped to combat some of the more pernicious cognitive blinders, like hindsight bias.<sup>198</sup> One of the reasons hindsight bias occurs is that, when people learn of an outcome, their memories of prior events are altered. They remember information consistent with the known outcome better than information inconsistent with that outcome. Because groups usually remember more of the relevant facts than individuals and because group members can deliberate with one another, they might be better able to remember information that is inconsistent with the alleged outcome, thereby enabling them to avoid some of the hindsight bias's influence.<sup>199</sup> This suggests that arbitration might yield more accurate determinations than bench trials.<sup>200</sup>

Relatedly, a panel of arbitrators might be less susceptible to attitudinal blinders than an individual judge. When facing a bench trial, disputants confront a single decision maker, endowed with her own set of attitudes. As described above, the literature demonstrates that attitudinal blinders sometimes influence the way individual judges decide cases, at least in cases with a clear ideological dimension.<sup>201</sup> Assuming that an arbitration panel contains members with diverse views – and this seems plausible, particularly in those cases where each disputant selects one of the panelists<sup>202</sup> – it seems reasonable to speculate that the panel might attenuate the influence of individual attitudinal blinders on the outcome. Although there is reason to suspect that a panel of arbitrators is less likely than an individual judge to be influenced by attitudinal blinders, I do not want to push this argument too far. There is ample evidence demonstrating that attitudinal blinders influence outcomes on multi-member courts, like the U.S. Courts of Appeals<sup>203</sup> and the Supreme Court.<sup>204</sup> And it is

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<sup>198</sup> See Kerr, MacCoun & Kramer, *supra* note 197, at 692 (summarizing the scant literature to date and reporting that groups appear “slightly less susceptible than individuals” to the hindsight bias).

<sup>199</sup> See Dagmar Stahlberg, Frank Eller, Anne Maass & Dieter Frey, *We Knew It All Along: Hindsight Bias in Groups*, 63 ORGANIZATIONAL BEHAV. & HUMAN DECISION PROCESSES 46, 51-55, 56 (1995) (finding no difference between individuals and groups in one study but marginally greater hindsight bias on the part of individuals in another study and concluding that “groups are as prone to hindsight bias as individuals when making hypothetical predictions”, but “[w]hen asked to recall previous decisions . . . groups apparently have better access to their previous judgments . . .,” which suggests that “group discussion may often have a corrective effect on social judgment biases.”). *But see* Ed Bukszar & Terry Connolly, *Hindsight Bias and Strategic Choice: Some Problems in Learning from Experience*, 31 ACAD. MGMT. J. 628 (1998) (finding generally that group discussion had essentially no impact on the hindsight bias of individuals).

<sup>200</sup> As Rachlinski, Wistrich, and I have observed elsewhere, this argument might also apply to juries. Guthrie, Rachlinski & Wistrich, *supra* note 2, at 827.

<sup>201</sup> See *supra*, Part II.C.

<sup>202</sup> See, e.g., Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27, 31 (1995) (“The arbitrators are private individuals selected by the parties, and usually there are three arbitrators. The parties each select one, and the parties jointly, the arbitrators, or an institutional appointing authority select the third.”).

<sup>203</sup> See, e.g., Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1459, 1459 (2003); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301 (2004).

certainly true that a panel of like-minded arbitrators, like any other group, is susceptible to polarization and intensification of individual attitudes.<sup>205</sup>

Finally, in many areas, like securities, labor, and construction, the arbitrators who hear those cases are subject-matter experts, rather than general-purpose judges. In our earlier work, Rachlinski, Wistrich, and I argued that “[g]reater experience, training, and specialization should enable judges to make better decisions.”<sup>206</sup> Likewise, arbitrators, by virtue of their specialized subject-matter knowledge, might be better able than general jurisdiction judges to make accurate decisions, suggesting, again, that arbitration might be preferable to litigation.<sup>207</sup>

There are, of course, countervailing arguments. Unless an arbitrator has substantive expertise in the subject matter of the dispute, the arbitrator is less likely than a judge to know the governing law. Moreover, arbitrators, in contrast to judges, are market players often selected by parties; this might influence arbitrators’ decisions, prompting them to favor repeat-player disputants (from whom they are more likely to get repeat business)<sup>208</sup> or to propose “split-the-baby” outcomes (as a way of placating the disputants on both sides of the dispute).<sup>209</sup>

Still, there is reason to believe that disputants seeking an accurate outcome might fare better in arbitration, particularly where the arbitration involves a diverse panel of subject-matter experts. In this paper, I have focused on the potential advantages of arbitration panels; in earlier work, Rachlinski, Wistrich, and I explored the potential advantages of juries.<sup>210</sup> Some of the arguments in

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<sup>204</sup> For the classic treatment, see C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937-1947* (1948); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965).

<sup>205</sup> See, e.g., David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602 (1976); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000) (according to group polarization theory, “members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ predeliberation tendencies”).

<sup>206</sup> Guthrie, Rachlinski & Wistrich, *supra* note 2, at 825-26.

<sup>207</sup> *But see* Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Inside the Bankruptcy Judge’s Mind*, 86 B.U. L. REV. 1227, 1230-31 (forthcoming 2007) (finding that one group of specialized judges appeared to make decisions in much the same way as generalist judges).

<sup>208</sup> See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 685 (1996) (“[A]rbitrators may be consciously or unconsciously influenced by the fact that the company, rather than the consumer, is a potential source of repeat business.”). See generally Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL’Y J. 189 (1997).

<sup>209</sup> See, e.g., Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 523 (1997) (“The dynamic of arbitrator self-interest has long been familiar in collective bargaining cases and is thought, for example, to provide one explanation for the apparently common practice of compromise awards.”). *But see* Stephanie E. Keer & Richard W. Naimark, *Arbitrators Do Not “Split the Baby” – Empirical Evidence from International Business Arbitrations*, 18 J. INT’L ARB. 573, 573 (2001) (finding that arbitrators are not making compromise awards).

<sup>210</sup> See, e.g., Guthrie, Rachlinski & Wistrich, *supra* note 2, at 826-27; Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1327-28.

support of arbitration panels differ from those in support of jury trials.<sup>211</sup> In arbitration, for example, arbitrators often offer the potential advantage of subject-matter expertise. This is seldom the case in jury trials. On the other hand, in jury trials, judges can often shield jurors from inadmissible evidence, thereby decreasing the likelihood that their decision making will be distorted by informational blinders.<sup>212</sup> This is not possible in arbitration. Despite these differences, though, the potential advantage of both arbitration panels and juries is that their decisions reflect the wisdom of multiple decision makers.<sup>213</sup>

#### D. Summary and Caveat

Disputants and their lawyers should take misjudging into account when selecting a dispute resolution forum. Assuming they do, they may find that alternative dispute resolution processes, particularly those that are consensual, hold more appeal than previously anticipated. To be clear, I am not arguing that disputants and their lawyers should base their forum-selection decisions solely on the risk of misjudging or that they should inexorably gravitate to ADR processes. Obviously, choosing a dispute resolution forum or process is (or at least should be) a complicated decision, involving the consideration of many factors. Moreover, given the state (limited) and nature (largely experimental) of the research on which I rely in this paper, the forum-selection arguments I advance above are necessarily tentative. Still, the prospect of misjudging is real – even the best-intentioned judge, like any other human being, is subject to informational, cognitive, and attitudinal blinders – and disputants and counsel should not turn a blind eye to this possibility when deciding where to resolve disputes.

### CONCLUSION

The goal of this paper is not to criticize judges, though a small number of them might be “bad,”<sup>214</sup> and an even smaller number might be corrupt.<sup>215</sup> Rather, the goal of this paper is to suggest that good judges, who make up the vast majority of the trial bench, are prone to predictable blinders that can lead them to misjudge.

To say that judges misjudge is to say simply that they are human, and that their decision making, though often quite good and arguably better than that of many other expert and novice decision makers,<sup>216</sup> is subject to error. The problem with flawed judicial decisions – in contrast to the bad decisions the rest of

<sup>211</sup> See generally Drahozal, *supra* note 195, at 105 (comparing arbitral and jury decision making).

<sup>212</sup> Wistrich, Guthrie & Rachlinski, *supra* note 2, at 1327-28.

<sup>213</sup> See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004) (advancing the argument that groups and markets often produce wise outcomes).

<sup>214</sup> Miller, *supra* note 8, at 432.

<sup>215</sup> *Id.*

<sup>216</sup> In our earlier work, Rachlinski, Wistrich, and I wrote as follows:

[D]o these cognitive illusions influence judges as much as they influence other decision makers? It is difficult to answer this question accurately, because different studies use different materials and methodologies. Nevertheless . . . the judges in our study appear to be just as susceptible as other decision makers to three of the cognitive illusions we tested: anchoring, hindsight bias, and

us make – is that they shape the lives of untold numbers of disputants. This does not necessarily mean that disputants and the lawyers who represent them should avoid litigation and trial, but it does mean that they should not simply assume that the courthouse is the best place to resolve their disputes.<sup>217</sup>

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egocentric bias. Though still susceptible to framing and the representativeness heuristic, the judges appear less susceptible than other decision makers to these effects.

Guthrie, Rachlinski & Wistrich, *supra* note 2, at 816.

<sup>217</sup> Or, to state the point in a somewhat different way, they should seek to resolve their disputes in a “multi-door courthouse” in which they select an appropriate process from an array of available processes. See Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 111, 130-31 (1976) (advocating the adoption of multi-door courthouses).