

I. Introduction

The judicial system is inherently flawed. Such a bold assertion requires a similarly audacious backing, which arises in both the philosophical and psychological settings. In the first half of this paper, I will explore the implications of morality in judicial decision-making. In order to do this, I will begin with an identification of morality as an integral part of law and shall rely on the Hart-Fuller debate. As Judge Patricia M. Wald aptly declares, “the concept of morality makes us all squirm a bit.”¹ As such, instead of offering a definition for morality (which brings about monumental debates), I simply assume a definition is not especially needed in order to establish its presence and relevance to legal matters. Also, every time I use the word morality in my paper, I actually mean moral beliefs. The distinction is a rather specific one, and holds much weight in the philosophical realm, but the simple reason for this note is to recognize that all people (which includes judges) have moral *beliefs*, whereas not everyone has a *definition* of morality (for reasons mentioned above). Thereafter, I discuss the two most relevant moral theories to law- consequentialism and non-consequentialism. The former takes place in Mill’s utilitarianism whereas the latter comprises of Kantian ideals. Afterwards, I move to the two most relevant jurisprudential theories: originalism and non-originalism. The reason for discussing both moral and jurisprudential theories here is to explore possible mindsets of judges in order to understand the moral rationale (if such an entity exists) in their decision-making process. Next, I discuss why judges are responsible for their moral beliefs. Once this is finished, I enumerate potential implications for my claim- namely its effects on justice and equality as we perceive these entities. Then, I take a step back to anticipate and respond to several objections to my

¹ [The Role of Morality in Judging: A Woman Judge's Perspective](#)

philosophical claims (which will also clarify my argument). For this, I call primarily on Rawls and Frankfurt's respective definitions of justice and equality. Here ends the philosophical portion of my paper, and subsequently begins the final half: a psychological lens. This part analyzes the effect of the most relevant cognitive biases and heuristics present specifically in the psyche of judges. Afterwards, I proceed to discuss implications of this and outline possible remedies to the status quo by way of specific bias training and utilization of the implicit-association test (IAT). Finally, I end my paper with a culminating recollection of the important takeaways in the grand scheme of the judicial setting.

II. Identifying Morality as a Part of Law

Before detailing how morality affects judicial decisions in a pernicious manner, it is paramount to establish the relationship between the law and morality. For this, I turn to Professor Lon Fuller, who defines the law as “a way of achieving social order by guiding human behavior according to rules.”² Yet he contends there is no *specific* definition of law. Likewise, even morality cannot be defined precisely- whether it is objective or subjective, emotive or relative, or normative or descriptive does not interfere with its relevance to law. For an example of this, look to the 14th Amendment of the United States Constitution which states an “equal protection of the laws.”³ Regardless of a judge's notion of the term equal, his job remains applying the law notwithstanding this qualification. Reverting back to Fuller, the lack of specific definitions for both the law and morality deems it futile to argue their separation.⁴ On this idea, he furthers a

² Banerjee, Sonali. “The Relevance of the Hart & Fuller Debate Relating to Law and Morality- A Critical Analysis.” International Journal of Law and Legal Jurisprudence Studies, Universal Multidisciplinary Research Institute Pvt Ltd, ijlljs.in/wp-content/uploads/2017/04/Jurisprudence_draft.pdf.

³ *U.S. Constitution, Article XIV*

⁴ *Ibid.*

societal compliance with the law only results if people are to believe the law is based on strong moral foundations enacted for their common good.⁵

When discussing the role of morality in law, we must look towards the famous Hart-Fuller debate. A series of exchanges between H.L.A. Hart (representing the legal positivists) and the aforementioned Lon Fuller (representing the natural law theorists) revealed much about how we perceive the law. Hart's legal positivism largely centered around the strict distinction between the law and morality, as well as emphasized the explicit, written, sources of law as the only source of precedence.⁶ An important criticism of positivism, which is relevant to the topic at hand, is the problem of penumbra. The literal meaning of this word is, "something that covers, surrounds, or obscures"⁷ and its connection is how dissidents of positivism question the theory when a judge attempts to derive the meaning of a word within the law, or when the established meaning is obsolete or inadequate so the judge is forced to interpret. This, critics contend, forces judges to make a decision about *what is* by using their interpretation of *what ought to be*.⁸ They extend this claim to reason the latter brings about a certain consideration of morals. Yet Hart says the classification of *what ought to be* amounts to a rational framework of legality.⁹ A branch of his legal theory, known as inclusive positivism, observes that sometimes the law the judge is supposed to apply actually *instructs* him to engage in moral reasoning.¹⁰ Look at a rather famous example which Hart utilizes: the vehicle story. Suppose there is a rule which says no vehicles in the park. There is a bicycle in the park and in court the judge rules the

⁵ Refer to footnote 2

⁶ <https://www.lawteacher.net/free-law-essays/jurisprudence/legal-positivism.php>

⁷ "penumbra." Merriam-Webster.com. Merriam-Webster, 2018. Web. 21 August 2018

⁸ Taken from the youtube video: "[The Hart-Fuller Debates on Morality and Law](#)"

⁹ Ibid.

¹⁰ [Judges as Moral Reasoners](#)

bicycle is not a vehicle because it *ought* not to be one since the law was probably made to stop pollution in the park. Positivists claim this reasoning is the result of considerations made solely based on existing legal rules, such as that vehicles most likely means ones with motors. Natural law theorists such as Lon Fuller, who are the biggest critics of positivism, claim the judge used morals to claim bicycle riding is a form of enjoyment which has no reasonable detriment to the park's facilities. Whichever side you adhere to, it is plain to see a "rational framework of legality" can just as easily be mistaken for moral reasoning and this is precisely why morality will unequivocally remain a part of the law. For even Hart admits, "The law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter the law either abruptly or avowedly (through legislation) or silently and piecemeal (through the judicial process)."¹¹

We finish the discussion of identifying the role of morality as an undeniable part of the law by understanding the importance of realizing the interwovenness of moral beliefs with the law. For this look to Fuller, who claims the "Fidelity to law can only be achieved if the law is in consonance with morals at all stages, be it at the time of the making of the law (core) or its application by the court (penumbra)."¹²

III. *Relevant Moral Theories*

When discussing morality, I find it imperative to discuss the certain moral theories which can plausibly be said to exist within a judge's mindframe. On this note, I see fit to explore two such theories: utilitarianism and Kant's non-consequentialism. Each theory will be defined and

¹¹ *The Concept of Law*, by H.L.A. Hart

¹² See footnote 2

explored in terms of its specific relevance to law and how a judge may be innately utilizing it in his or her judicial decision-making process.

Utilitarianism, at its core, is the idea that the right action is the one which results in the most good.¹³ Its founder, Jeremy Bentham, declared “when a man attempts to combat the principle of utility, it is with reasons drawn, without his being aware of it, from that very principle itself.”¹⁴ Legal professor Thomas Morawetz offers utilitarianism as a theory of optimal decision-making, a theory with criteria for evaluating judicial decisions within the range of what is permissible.¹⁵ Morawetz describes the distinction (and apparent connection) between legal reasoning and moral reasoning. The latter involves decisions which can reasonably be expected to affect persons in a beneficial or harmful way, and are hard to make for two main reasons:¹⁶

- a) Factual determinations are complicated and uncertain
- b) Even if a) could be made with certainty, different persons would weigh their moral importance differently

Specifically pertaining to utilitarianism, there is a particularly purposeful word: disinterested. Utilitarian decision-makers are expected to act in a disinterested way- that is, a way in which they must put aside their particular interest in the result and weigh benefits and harms for others. J.S. Mill, a disciple of Bentham, said between [an agent’s] own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.¹⁷

¹³ [utilitarianism-history](#)

¹⁴ Bentham in *Introduction to the Principles of Morals and Legislation*

¹⁵ Morawetz, Thomas, "A Utilitarian Theory of Judicial Decision" (1979). Faculty Articles and Papers. 87 https://opencommons.uconn.edu/law_papers/87

¹⁶ See footnote 26

¹⁷ Ibid.

A potential criticism of utilitarian jurisprudence, or rather utilitarianism itself, comes in the form of analyzing such cost-benefit driven thought processes. Specifically, unless there is an objective measure of moral worth, formulated in rules of justice as a theory of rights, it appears we must believe what benefits a person is only what he *thinks* benefits him.¹⁸ This claim supports the notion that our views on the objectivity of morality precede any sort of decision-making mindset. However, even if we assume morality is objective, there still exists the problem of what to do when moral rules conflict, as they are inevitably bound to do so. Mill says “It is not the fault of any creed, but of the complicated nature of human affairs, that rules of conduct cannot be so framed as to require no exceptions, and that hardly any kind of action can safely be laid down as either always obligatory or always condemnable.”¹⁹ On this note, we can safely state the presence and influence of morality in law regardless of our views on its objectivity.

Taking the relationship between legal and moral reasoning one step further, it is important to understand the moral decisions of a judge have substantially wider consequences than those made by mere citizens. For this reason, one can see where utilitarians find their moral philosophy to be the most prevalent. The idea that we are obligated to maximize aggregate happiness would place overwhelming demands on each of us to devote our entire lives and each of our actions to increasing the overall aggregate of global happiness, whether or not such actions ever contributed to our own lives.²⁰ However, such is the *exact* job description for a judge from the viewpoint of a judicial utilitarian, as they shall henceforth be referred to in my paper. Moreover, John Stuart Mill (albeit indirectly) describes the circumstances whereby judicial reasoning is on a separate level from most other types of analysis. He writes, “The multiplication

¹⁸ Ibid.

¹⁹ See footnote 26

²⁰ *The Norton Introduction to Philosophy, Second Edition*

of happiness is, according to the utilitarian ethics, the object of virtue: the occasions on which any person (except one in a thousand) has it in his power to do this on an extended scale, in other words to be a public benefactor, are but exceptional; and on these occasions alone he is called on to consider public utility.”²¹ Judges exemplify Mill’s definition of a public benefactor as they are held to a stricter standard, and rightly so seeing as they influence the majority of society through their decisions. Acting as public officials consequently (no pun intended) compels judges to “consider public utility,” as Mill puts it, and those alone whose actions extend to society in general need concern themselves habitually about so large an object (public utility).²² Surprisingly enough, Mill’s ballpark of one person in a thousand who holds this exceptional role is not as far off by today’s estimates. According to the latest census data, there are 3,769 federal judges²³ out of 1,268,011 licensed lawyers²⁴ - a ratio which yields just under 3%. Although just an interesting coincidence, the purpose of this demographic is to bring attention to the special nature of a judge’s job and subsequently to his or her moral reasoning for carrying out this job. Although it is appropriate, even necessary, for the ordinary citizen’s moral reasoning to be *autonomous* (in the sense of its being incumbent upon her just to think morally for herself), it may not be appropriate for the judge’s moral reasoning to be autonomous in that sense.²⁵

Another moral theory which relates to judicial decision-making is Kant’s non-consequentialism. For those who do not know, Immanuel Kant promulgated the view that the driving force force behind our actions should be dictated by what is inherently good.²⁶ Kant’s

²¹ Mill’s *Utilitarianism*

²² Ibid.

²³ [Number of Federal Judges](#)

²⁴ [Number of Licensed Lawyers](#)

²⁵ See footnote 10

²⁶ [Immanuel-Kant's-Non-consequentialist-Ethical-Theory-PK466UZVC](#)

famous book, *Groundwork of the Metaphysics of Morals*, discusses one of his most important ideas: the categorical imperative. This idea states we ought to act only according to that maxim which we can at the same time will that it become a universal law.²⁷ For the purpose of definition, “a maxim is a subjective principle of acting and the principle in accordance with which the subject acts.”²⁸ Extending this, we see the law is the objective principle for every rational being, and the principle in accordance with which he ought to act; by stating “ought to act,” fidelity to the law becomes an imperative. More concretely, the judge must rely on his sense of injustice- an emotional, intellectual, and physiological reaction to wrong which exists in every man by way of his ability to project himself into others and thus treat them as he would treat himself.²⁹ This explains the categorical imperative in terms of its relation to the judiciary, as Kantian ethics say the morality of a choice is based on why we make the choice (intention) and not based on what happens after we make it (consequence). Judges who believe this couple legal precedents with moral judgments- the latter of which is determined by whether it would be moral for everyone else to follow such a ruling. By this, we see a clear distinction from utilitarian legal theory because Kant places more importance on *how* we make a choice than *why* we do so.

IV. Relevant Jurisprudential Theories

In this section, I will elaborate on two important theories of legal philosophy as well as advocate for a subset of one of these theories which is only discussed in a single scholarly article. Jurisprudential theories offer context for how judges should interpret the law and as such,

²⁷ See footnote 33

²⁸ See footnote 26

²⁹ Edmond Cahn in *The Moral Decision* (1955)

provide insight into the primary role of a judge- as an interpreter, activist, or combination of both.

The first theory I will explore is originalism, and it favors reliance on either legal text (Constitution) or the intentions (of the legislators at the time of making the law).³⁰ Robert Bork, a famous American judge and staunch originalist, describes the philosophy of original understanding (originalism) as a necessary influence from the structure of government apparent on the face of the Constitution.³¹ An originalist line of thinking is judges should not simply enforce what they think are good values, instead the Constitution meant to let people choose democratically to have a *public* morality.³² In other terms, judges are arbiters of what the law demands and, although arbitration requires judgment, judicial decisions ought to be fundamentally guided by the relevant legal standards.³³

Now, I will go over a few objections to originalism, starting with ones on its merits. If we are to believe judges must only act in the way the framers intended, eventualities would arise whose effects may range from simply unorthodox to rather catastrophic. For example, Thomas Jefferson's fear of constitutional monarchy is significantly understated. To this end, he believed the Constitution should be renewed every 19 years.³⁴ Although an extreme example, such is the danger with originalism: by limiting constitutional protection to the very narrow class of rights *expressly* envisioned by the Framers two centuries ago, judges ensure conventional or traditional morality will carry the day in *all* other cases.³⁵ Taking this one step further, a mechanical reliance

³⁰ [Theories of Judicial Philosophy](#)

³¹ Ibid.

³² See footnote 1

³³ See footnote 13

³⁴ [Constitution Must Be Renewed Every 19 Years](#)

³⁵ See footnote 10

on legal precedents is just an excuse to continue supporting an existing wrong, a self-indulgent shirking of the moral responsibility possessed by every individual.³⁶ These objections to originalism, largely based on its contextual infeasibility, give way for another jurisprudential theory- one which focuses less on precedent-following and more on precedent-setting judges.

A second theory of legal philosophy, named pragmatism, gives weight to judicial consequences. A central problem any theory of adjudication faces is how judges incorporate non legal considerations.³⁷ Such considerations include the resultant society which a ruling may lead to or how future judges may respond to a decision made today. For pragmatists, like the aforementioned Richard Posner, it is reassuring to think the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen.³⁸ It is a rather interesting point that legislative tyranny was also a fear of the framers and on this note, pragmatism can be seen as the utilitarian extension of originalism. The founder of pragmatism, Judge Benjamin Cardozo, says “The origin of the law is not the main thing- the goal is. There can be no wisdom in the choice of legal path unless we know where it will lead.”³⁹

The issue of judicial philosophy will not be defined as a choice between the theories of jurisprudence, instead the debate will no doubt be cast between those who appoint judges who interpret the law versus judges who will legislate.⁴⁰ This claim appears to be true in light of the debate between originalism and activism (another name for pragmatism).

³⁶ See footnote 41

³⁷ See footnote 1

³⁸ See footnote 42

³⁹ [philosophy-of-legal-pragmatism](#)

⁴⁰ See footnote 51

V. Assigning Moral Responsibility

What I seek to achieve in this portion of my paper is simply to validate the responsibility inherently present when judges use morality. For this, I think it is helpful to foreshadow some of the elements which will be presented in the psychological portion of my paper. I claim most, if not all, judges may *not* be held responsible for any cognitive biases until they have been specifically made aware of these biases. In other words, until they take an Implicit Association Test (which is defined in the possible solutions section) and learn about which biases they are susceptible to, they cannot be responsible for them. It is a rather short step from there to note that judges are not responsible for their moral beliefs unless they are purposely adhering to a specific moral theory. But, it seems to me, very few judges openly declare themselves to be, say, a staunch utilitarian. Even in the philosophical field, there are very few who *only* believe in a single theory. To this end, it is important to understand a judge's responsibility for his or her moral beliefs is only established after recognition of those very beliefs. It is my hope that such awareness arises after reading papers such as my own.

VI. Implications

In this section, I will observe how topics discussed in my paper affect equality, justice, and culture. It is crucial to remember the topic of my paper is the implications of morality in legal decision-making. Up until this point, I have explained why morality is, and will be, forever entwined with the law, and gave examples of both relevant moral and jurisprudential theories. Now, the time has come to extend these topics in order to figure out their real-world applications and, for lack of a better term, their implications.

A definition of equality is perhaps as elusive as one for morality. Thus, I will assume a consensus can be reached on how to define equality and will instead discuss how it pertains to my topic. Philosopher Harry Frankfurt says “how sizeable the economic assets of others are has nothing much to do, after all, with what kind of person someone is.”⁴¹ This assertion clearly has much to do with how the judicial system views minorities, but it also points toward the notion that equality (much like morality I might add) requires a holistic analysis, one which encompasses a plethora of mundane aspects. We must consider much more than, say race, religion, gender, or any other single categorization. To this end, it seems judges must simply be aware of the slippery slope to inequality when acting based on a single characteristic.

For a discussion about justice, I refer to John Rawls- a quintessential moral philosopher. In his view, unfair laws are only that insofar as they treat equal persons in indefensibly different ways.⁴² Rawls delineates justice as a process whereby we redress the bias of contingencies in the direction of equality.⁴³ Rawls says the social system is not an unchangeable order which is beyond any human control, rather it is a platform of human action.⁴⁴ On this note, we see the connection to an activist jurisprudential theory. It is important to first come to terms whether Rawls’s social system is the law itself or the judicial system. If it is the former, then this problem is left primarily to the legislature and secondarily to the judiciary. If his social system is the judicial system, then it can be reasonably said to include an activist mindset. Nevertheless, it is important to understand the importance of equality in the pursuit of justice. Rawls even accounts for varying definitions of justice among people and says this reality is *not* a reason for depriving

⁴¹ Harry Frankfurt’s *Equality as a Moral Ideal*

⁴² See footnote 33

⁴³ Rawls’s *Two Principles of Justice*, Chapter 17: The Tendency to Equality

⁴⁴ *Ibid.*

those with a lesser capacity of justice in the fullest sense.⁴⁵ This statement, once again, relates to the significance of minorities, which will be elaborated on shortly. Rawls also says justice requires fair terms of social cooperation.⁴⁶ Now, most of my paper has been focused on empirical sources, largely philosophical, but the specific term social cooperation sparked the recollection of an important experience in my life. A summer camp called Economics for Leaders, sponsored by the Foundation for Teaching Economics, teaches the basic of economic principles. The hypothesis which guided the week was that human prosperity and social cooperation develop spontaneously in societies that protect private property rights and encourage voluntary trade.⁴⁷ The beginning portion, specifically the mentioning of social cooperation caught my interest when I was reading through Rawls and got me thinking about the wide applications of my paper. I mean, if what one of the most important contemporary moral philosophers discussed can be related to an economics lesson from a summer camp, is this not a beautiful exemplification how pervasive the need for justice is? On this note, if social cooperation is believed to lead to equality, and eventually justice, it follows that judges must act in ways which society would accept. This acceptance appears to fundamentally rest on a moral ground, because as mentioned before with Lon Fuller, people will comply with the law only if they are convinced the law is based on strong moral foundations enacted for their common good.

I will now explore the various aspects of culture which are most prevalent to my topic, specifically those of minorities. For this I turn to Susan Moller Okin, who coins the term multiculturalism: the notion that minority cultures or ways of life are not sufficiently protected

⁴⁵ Ibid. Chapter 77: The Basis of Equality

⁴⁶ See footnote 33

⁴⁷ [lesson-1-economic-growth-and-scarcity](#)

by the practice of ensuring the individual rights of their members.⁴⁸ Statistically speaking, there are roughly 0.64 lawyers for every 10,000 people in poverty.⁴⁹ This is in sharp contrast to 40 lawyers for every 10,000 people in the general population.⁵⁰ In addition to lack of representation, the lack of legal knowledge among a majority of the population forces judges to accept the burden of adjusting to accommodate those who aren't as savvy about legal proceedings. Although these may seem like arbitrary and unrelated stats, they just add to the undoubtedly important place for morality in a judge's mind. Especially when dealing with minorities, a judge must be aware of any cognitive biases present as well as how his view of morality may affect his decision- and ultimately whether that decision is best for society. It is through these lenses that judges can begin to reach the most just decisions. Lower court decisions in a large legal system rarely receive attention from appellate courts, thus even a lower court must accept the likelihood that its decision is the first determination of how the state will treat the matter.⁵¹ This reality is precisely why each and every judge's awareness of his or her morality is pivotal for our legal system to operate in its highest capacity for ensuring justice.

VII. *Objections*

In the final section of the philosophy portion of my paper, I will attempt to respond to a few of the most pressing objections to my paper as a whole. In doing so, I believe, my paper's main argument will not only be made clearer, but also stronger.

⁴⁸ Susan Moller Okin's *Is Multiculturalism Bad for Women?*

⁴⁹ [0.64 lawyers for every 10,000 in poverty](#)

⁵⁰ [too-poor-for-justice](#)

⁵¹ See footnote 13

One objection is no clearer or higher moral standard may emerge from the collective moral decisions of judges than from that of any regular citizen. This objection fails to recognize the true purpose of my paper, which isn't to improve the status of morality. Rather, my paper observes moral beliefs and attempts to improve their effect on judicial decisions in the hopes that our society will thus be closer to justice. It is important to understand that we must first assume judges are not morally enlightened or above average moral thinkers.⁵² Such an assumption allows us to take a holistic approach in observing the way in which morality affects a judge's mind instead of making the blanket assertion that judges are simply acting in a morally superior way. On this subject, another objection arises: the courts can do better in applying and clarifying the mandates of the Constitution which provide at least some continuity for the judicial process than in setting off on the uncharted paths of a moral crusade.⁵³ To this, I say once again that judges aren't expected to act in a morally superior way. The response to this objection is found in the true purpose of moral beliefs in a judge's mind. My view is that in order for judges to promote justice, they must be vigilant and utilize morality in their decision-making process so as to provide the ruling best suited to maximize a socially, as well as morally, acceptable result.

The next objection is courts are collegial institutions, and it might be the moral competence of the court which should be the focus of our my interest, not the moral competence of its individual members (judges). This objection merits a rather simple response, which is when dealing with lower courts that have only one judge, it is essential to keep our analysis on a judge-basis as opposed to a system-basis. Nonetheless, even if dealing with higher courts, how are we to control the court's morality without observing that of its constituents? My focusing on

⁵² [Do Judges Have an Obligation to Enforce the Law?](#)

⁵³ [Morals and the Courts: The Reluctant Crusaders](#)

individual judges and their mindsets stems from the assumption that by creating awareness among each judge, the system will consequently improve.

VIII. Cognitive Biases and Heuristics

In this section, I will begin the psychological aspect of my paper by describing what cognitive biases and heuristics are, as well as how they play a role in specifically impacting judicial decision-making. Philosophy Angela M. Smith defines implicit biases as “relatively unconscious and relatively automatic features of prejudiced judgment and social behavior,”⁵⁴ and I will extend this categorization to observe a few specific cognitive biases. We must realize irrelevant factors which should not affect judgment might cause systemic and predictable biases in judges’ decision-making processes in a way that can be explained with cognitive biases.⁵⁵ Heuristics are cognitive shortcuts whereby people generate judgments and make decisions without consulting all relevant information.⁵⁶ I will use the terms cognitive biases and heuristics interchangeably. These responses to stimuli are often subconscious and, much like most biases, people do not recognize their presence until they are specifically made aware. I will now introduce arguably the most important duo in the entire field of behavioral psychology: Daniel Kahneman and Amos Tversky. These two individuals have written numerous papers, a few of which will be used in my paper. Kahneman also wrote *Thinking Fast and Slow*, wherein he discusses decision-making in terms of two systems: System 1 thinks and judges on a more

⁵⁴ Angela M Smith’s “Implicit Bias, Moral Agency, and Moral Responsibility” taken from *The Norton Introduction to Philosophy, Second Edition*

⁵⁵ Peer, Eyal, and Eyal Gamliel. “Heuristics and Biases in Judicial Decisions.” *Court Review*, Court Review, 2013, aja.ncsc.dni.us/publications/courtrv/cr49-2/CR49-2Peer.pdf.

⁵⁶ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *Sci.* 1124 (1974).

intuitive and experiential level whereas System 2 is more analytical, relying on facts and normative entities.⁵⁷ He argues a more System 2-based is presumably better for the average Joe, but I find this may not necessarily be the case for judges. Nevertheless, it has largely been the case that people rely on mental shortcuts or heuristics to make complex decisions.⁵⁸ On this note, I contend there is no decision of a more complex nature than the one a judge has to make. As mentioned throughout this paper, legal decision-making is, at face value, a mix of morals and ethics surrounded by implications for the future. For any normal decision made by an individual, even one of the aforementioned entities is sufficient to cause a dilemma. And yet judges are expected to juggle all three whilst making decisions for the whole of society. It follows that the heuristics which everyday citizens are susceptible to may also affect judges, with potentially greater repercussions. It is important to make the distinction that cognitive biases are not the same as racial or gender biases, which are social biases. Rather, cognitive biases function on a behavioral level which is largely independent from societal prejudices. The only link to society, for cognitive biases, is they are similar throughout most members of a society.

IX. Relevant Examples

In this section, I will explore the most relevant cognitive biases and heuristics which may specifically impact judicial decision-making. These will be presented in order of importance, with the most widely recognized heuristic first: the anchoring bias.

⁵⁷ DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011)

⁵⁸ See footnote 70

Anchoring bias, also known as anchoring and adjustment bias, is defined such that when making a decision, an external figure can predictably affect our choice.⁵⁹ More specifically, it is the process of assimilation of a numeric estimate toward a previously considered standard.⁶⁰ Many say anchoring bias is a strong, robust, reliable, and persistent psychological effect.⁶¹ For studies showing the effect on regular people, refer to Tversky and Kahneman's Africa experiment. However, as will be with all the heuristics I enumerate, I endeavor to utilize studies and examples wherein judges were the subjects. This is because studies done on regular citizens are not immediately subject to application in the judicial setting. On this note, a study was done where both novice and experienced judges were presented with two different demands for sentence by an alleged prosecutor on a hypothetical rape case—12 months or 34 months. Given an anchor of a relatively severe punishment, 34 months, the judges retrieved more information that was consistent with this sentence—that is, evidence and details that were consistent with more severe punishment. The opposite was true for the 12 months anchor (a more lenient punishment); the judges retrieved more information that was consistent with this sentence—evidence and details that were consistent with less severe punishment. As a result, the rulings of the judges were affected by the given anchor, whether it was more relevant and informative or less so.⁶² Another study used an anchor set by a journalist- an irrelevant source, as the media should not affect judicial decisions- and found similar effects on judges who were

⁵⁹ Luttrell, Andy. "Anchoring Heuristic: When Irrelevant Numbers Bias Judgment." Social Psych Online, Social Psych Online, 12 Aug. 2015, socialpsychonline.com/2015/08/anchoring-heuristic-introduction/.

⁶⁰ See footnote 69

⁶¹ See, e.g., Thomas Mussweiler, *The Malleability of Anchoring Effects*, 49 EXPERIMENTAL PSYCHOL. 67 (2002); Fritz Strack & Thomas Mussweiler, *Explaining the Enigmatic Anchoring Effect: Mechanisms of Selective Accessibility*, 73 PSYCHOL. 437 (1997); Timothy D. Wilson, Christopher E. Houston, Kathryn M. Etling, & Nancy Brekke, *A New Look at Anchoring Effects: Basic Anchoring and Its Antecedents*, 125 J. EXPERIMENTAL PSYCHOL.: GENERAL 387 (1996).

⁶² Birte Engh & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535 (2001).

experts in criminal law versus others who were not.⁶³ The journalist asked whether the judge thinks the sentence would be greater than or less than 1 year. Other times, the journalist asks whether it will be greater than or less than 3 years. People who saw the 1 year version ended up deciding on prison sentences that averaged about 25 months. Those who saw the 3 year version, however, ended up deciding on prison sentences which averaged about 33 *months*. So a simple suggestion from a journalist- whom judges promptly and correctly ignored consciously- made an 8-month difference in sentencing decisions.⁶⁴ These observational experiments demonstrate just putting a number out there may subtly nudge final decisions in a particular direction.⁶⁵ In fact, a similar scenario was carried among jurors with similar results⁶⁶ thus corroborating the other studies and powerfully asserting anchoring bias as a prevalent, albeit irrelevant, factor in legal decision-making. However, as Socrates tell us, “An unexamined life is not worth living”⁶⁷ and as such we see how judges may circumvent the side effects of anchoring bias- by being willing to not only acknowledge its presence, but also able to interpret their decision from multiple viewpoints so as to eliminate the possibility of an anchor skewing the ruling. Whether this means consulting outside counsel or simply looking at judgments from the perspective of multiple parties, there are actual measures which judges can take in order to reduce the likelihood of an anchor hampering the best possible judicial decision.

⁶³ Birte English et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188 (2006).

⁶⁴ Luttrell, Andy. “Cognitive Biases in Legal Decisions | Social Psychology.” Social Psych Online, Social Psych Online, 12 Aug. 2015, socialpsychonline.com/2015/08/cognitive-biases-legal-decisions/.

⁶⁵Ibid.

⁶⁶ Hastie, Reid, et al. “Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards.” *Law and Human Behavior*, vol. 23, no. 4, 1999, pp. 445–470. JSTOR, JSTOR,www.jstor.org/stable/1394389.

⁶⁷ Plato's *Apology*

The next heuristic which I will look at is hindsight bias, a simple term for which there is a particularly complicated definition: when people evaluate events or outcomes as being more predictable after it has occurred than it was before it actually happened.⁶⁸ The study bolstering this bias's authenticity found judges who were informed that a psychiatric patient became violent were more likely to find the patient's therapist negligent than those who did not receive information about the outcome and its severity.⁶⁹ A direct proportionality was found between the severity of the outcome and the impact of the bias; in other words, the hindsight bias became more prevalent as the circumstances got more severe.⁷⁰ This bias originates from the "we knew it all along" mindset or, more popularly, from the proverb "Hindsight is always 20/20." Nonetheless, it is crucial to remember few judgments in ordinary life require people to assess the probability of past outcomes, but such judgments are pervasive in the law.⁷¹ Especially since judges are required to recall precedents, it seems to me all together too easy for them to fall prey to hindsight bias and interpret a prior case in a different way than in which it should be interpreted. Of course, blame cannot be reasonably placed on the judge himself because a subconscious bias is at play. However, judges can *consciously* take care to only utilize precedence in the same capacity as the case originally handled. This does not mean judges are limited to exact conditions in order to apply previous cases, for that would bring our judicial system to a standstill. What I contend is judges must be aware of when they may be interpreting an event in a certain way simply because it has already happened. For this revelation to occur, judges can either think about how they would have acted if they had *not* known the outcome of

⁶⁸ See footnote 69

⁶⁹ Craig R. Fox & Richard Birke, *Forecasting Trial Outcomes: Lawyers Assign Higher Probability to Possibilities That Are Described in Greater Detail*, 26 L. & HUM. BEHAVIOR 159 (2002).

⁷⁰ Ibid.

⁷¹ [Judging by Heuristic](#)

the prior case or by simply understanding how judges in the future should *not* interpret the *present* case in order to realize the care with which they must handle precedents. Only with these safeguards specifically against hindsight bias can the judicial system help us arrive at a more just society.

In the final part of this section, I will discuss a rather strange, and apparently idiosyncratic, anomaly present among judges: they tend to rule differently before and after meal breaks. In their study, Danziger and his colleagues examined 1,112 judicial rulings by 8 Israeli judges, made over 50 days in a 10-month period, all regarding parole requests.⁷² The study showed about 65% of the rulings were in favor of the plaintiff at the beginning of each session (in the morning, after breakfast break, and after lunch break), and gradually decreased to 0-10% at the end of each session. The authors concluded the repeated rulings depleted the judges' mental resources, causing judges to have a higher likelihood of granting parole in the first cases after a break.⁷³ However, additional analyses showed overlooked factors—such as non-random ordering of cases (cases with representation sometimes go first), and the fact that the parole board tries to complete cases from one prison before taking a meal break—could have accounted for some of the observed downward trend.⁷⁴ My reason for including this alleged bias, and its most significant objection, is to create a stark contrast between the two prior heuristics which I have discussed and one. The former group has all been not only vetted, but also are psychologically present among every citizen- not just judges. The reason, I believe, the meal breaks bias (as I shall refer to it) fails is due to its lack of reliability. There are too many

⁷² Shai Danziger et al., *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 17, 6889-92 (2011).

⁷³ *Ibid.*

⁷⁴ Keren Weinshall-Margel & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions* 108 PROC. NAT'L ACAD. SCI. (2011, Oct. 18) (Letters, online only), available at <http://www.pnas.org/content/108/42/E833.full.pdf+html>.

extraneous factors, many of which are as legitimate (if not *more* compelling) causes of the meal breaks bias. Unlike this insignificant bias, anchoring and hindsight heuristics have a clear stake in my article because they are present in mundane citizens as well as judges- with the sole reality that their presence in the latter group amplifies their impact on society as a whole. This broad impact is precisely why I reason that anchoring and hindsight biases must be a point of focus for anybody who wishes for a more just judicial branch of government.

X. Implications and Possible Solutions

The final section of the psychological portion of my paper deals largely with the consequences of cognitive heuristics in judicial decision-making as well as potential solutions for judges which will help the legal system overall. As stated in the first section, cognitive heuristics are shortcuts whereby people arrive at decisions quicker. When this occurs, many of us leave out large chunks of analysis, beliefs, or plain old instincts in favor of reaching an acceptable decision in the least amount of time possible- especially when the stakes of our choices are particularly low, as they usually are for most of us. Similarly, in the judicial setting, the discrepancies between the number of factors that should have been considered and the number of those actually considered were higher when offense characteristics were less serious.⁷⁵ This is so important because of the high frequency of plea bargaining in U.S. courts⁷⁶; Plea bargains are “agreements between defendants and prosecutors in which defendants agree to plead guilty to some or all of the charges against them in exchange for concessions from the prosecutors.”⁷⁷

⁷⁵ See footnote 69

⁷⁶ Bettina von Helversen & Jörg Rieskamp, *Predicting Sentencing for Low-Level Crimes: Comparing Models of Human Judgment*, 15 J. EXPERIMENTAL PSYCHOL: APPLIED 375 (2009).

⁷⁷ [Plea bargain](#) definition from Cornell Law Library

Some say the aforementioned discrepancy (among considered factors) could possibly exist because of time constraints and plea bargaining backs this up- these agreements allow prosecutors to focus their time on other cases, and reduce the number of trials judges need to oversee.⁷⁸In fact, 97 percent of federal cases and 94 percent of state cases end in plea bargains⁷⁹ so it is of utmost importance that judges take the time to acknowledge the existence of seemingly irrelevant factors, such as anchors and hindsight, and make decisions accordingly.

The institutional legitimacy of the judiciary depends on the quality of the judgments judges make.⁸⁰ In order for citizens to put faith in the judicial branch's mission to lay down a legal foundation for society, they must first believe in the rulings of judges. Yet, it seems, even judges- maybe *especially* judges- are susceptible to these cognitive heuristics. In other words, how do we get past the representativeness problem to think about things we are not thinking about? It may require discipline to consciously push the ideas that naturally flow into our immediate consciousness out of the way and then we search our minds for other ideas- which may not be so readily accessible but nonetheless may do some good.⁸¹ I contend for judges in particular, their ability to reflect upon and correct error is one of the great strengths in their reasoning. Judges should not believe everything they think, but should believe much of what they think, especially if they can develop the habit of checking up on themselves.⁸² To this end, many suggest the solution to counter sources of bias is to raise judges' awareness in order to deal with metacognitive deficits in informal reasoning by ensuring greater objectivity in making.⁸³

⁷⁸ Ibid.

⁷⁹ [stronger-hand-for-judges-after-rulings-on-plea-deals.html](#)

⁸⁰ See footnote 86

⁸¹ [Don't Believe Everything You Think](#)

⁸² Ibid.

⁸³ Perkins, D. N. (1989). Reasoning as it and could be: An empirical perspective.

Two particular examples include the Implicit Association Test (IAT) and conducting a premortem. The former is a racial bias test, which permits them to understand that they may need to account for implicit bias and alerts others to the need for training judges who possess such bias.⁸⁴ The latter is a hypothetical exercise in which an examination of a disastrous outcome for your case or argument is performed in advance. This counteracts a natural tendency to suppress doubt as well as allows for imagination to deal with some unseen weaknesses.⁸⁵ Other remedies include practicing mindfulness meditation and requiring written opinions for all decisions. These latter two solutions, I contend, may be the most *understated* yet the ones, I believe, which must be the most *underscored*. Mindfulness is a tenet for any and every action which a human being does and, especially when taken in terms of the gravity of a judicial decision, being clear-headed and focused is unequivocally more important than any other fix, for no remedies will ever work in the long term if judges are not mindful. Another particularly powerful solution is through writing because despite all our efforts, judges will still be prone to cognitive (and social) heuristics; however, if we require them to write out their opinion, it forces them to truly analyze their decisions since in my view, there is nothing worse for a judge than to lay down a weak or faulty precedent. Writing down opinions will not only increase the quality of the judgment they make, which will stabilize the legitimacy of the judiciary (see beginning of paragraph), but also bolster judges' resolve in believing their decision to be the best possible one which could have been made.

⁸⁴ [what-judges-can-do-about-implicit-bias](#)

⁸⁵ Munsinger, Damien. "When Not to Trust Your Gut: Cognitive Bias in Legal Decision-Making." ABA Law Practice Today, ABA Law Practice Today, 14 Sept. 2016, www.lawpracticetoday.org/article/cognitive-bias-legal-decision-making/.

XI. Conclusion

This paper is about a topic which has always been of paramount interest to me- although I have not always known it. It has been almost two years since I was asked to write a research paper about any single event in American history and I chose the court case *Marbury v. Madison*. My article was about the case's relevance to today's society and I ended up discovering how seemingly ancient judicial decisions were still points of contention in today's courts.

Up to this point, I have defined the presence, as well as discussed the implications, of both morality and cognitive heuristics in terms of legal decision-making. I began by establishing morality as an integral component of the law, referencing the Hart-Fuller debates. Afterwards, I looked towards the implications of morality in judicial decision-making wherein I started to talk about entities such as justice and equality seeing as these ideals arise when we evaluate the effectiveness of the judiciary. To wrap up the philosophical portion of my paper, I discovered some potential objections and clarified my argument accordingly. Now onto the psychological part, I started by defining what cognitive biases and heuristics are and then moved to some relevant examples. I ended with possible solutions to some of the biases, which helped me arrive at a critical conclusion: the judicial system has been, is, and will continue to be flawed- through no fault of its own, I might add. The blame must be unilaterally placed on the human psyche because we constantly have varying definitions so the term itself has become moot- for nothing in this world is definite. Rather, everything appears to be relative or a matter of perspective, so to speak. Foreseeing some skepticism in my audience, I believe the clear connection is that my paper's topic is timeless. There will always be issues with the judicial system insofar as there continues to be a judicial system. Nevertheless, this simply means judges have to be cognizant

(no psychology pun intended) of the factors which reasonably affect their decision-making process. As far as I am concerned, these include morality and a select few cognitive heuristics. In order for judges to experience the maximum contentedness with their decision (however relative it may be), and for citizens to feel the same, I assert that judges must deal with these factors in the best possible way so as to ensure the purest method of impartial decision-making.

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