

SOME QUESTIONS ABOUT #METOO AND JUDICIAL DECISION MAKING

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This essay addresses but does not purport to resolve some of the difficult issues raised by the social movement #MeToo and its relation to judicial decision making. A useful starting point for discussion is the decision of the Chief Justice of the United States to establish a Working Group to examine the sufficiency of safeguards then in place to ensure “an exemplary workplace for every judge and every court employee.”¹ This decision came shortly after a federal appeals judge had resigned from office rather than defend against allegations that he had sexually harassed his judicial clerks.² Following investigation and recommendations,³ the Judicial Conference of the United States, as well as the Administrative Office of the U.S. Courts and some circuit courts, provided new guidance and took other steps to address sexual misconduct by judges—and others—in the workplace. The process for reporting such misconduct will now be more accessible to complainants; moreover, information about workplace complaints and decisions will be separately categorized in the judiciary’s statistical reports, and retrievable through an electronic database. In addition, the Working Group clarified that complaints that are finally resolved by remedial action (other than by private censure or reprimand) are posted on a public website. Presumably those interested, especially litigants and potential claimants, will monitor this information, and law schools will take it into account when recommending that students apply for judicial clerkships. Enhanced training conducted by the Federal Judicial Center and others also will be provided to judges to reduce the incidence of sexual misconduct.⁴

These developments are important, salutary, and critical to preserving public trust in the judicial system. Significantly, the Working Group underscored that its report did “not conclude its work,” and that it intended “to monitor ongoing initiatives.”⁵ Moreover, comments submitted to the Working Group suggested that

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¹ See JOHN G. ROBERTS, JR., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017).

² See Statement of Alex Kozinski, J., 9th Cir. (Dec. 18, 2017), <https://assets.documentcloud.org/documents/4332061/Alex-Kozinski-s-full-statement-announcing-his.pdf> [<https://perma.cc/UTJ2-AR39>].

³ See REPORT OF THE FEDERAL JUDICIARY WORKPLACE CONDUCT WORKING GROUP TO THE JUDICIAL CONFERENCE OF THE UNITED STATES (2018) [hereinafter WORKING GROUP, REPORT].

⁴ See James C. Duff, *The Federal Judiciary Workplace Conduct Working Group*, 57 JUDGES’ J. 8 (2018) (explaining the recommendations and reforms that resulted from the Working Group’s investigation).

⁵ WORKING GROUP, REPORT, *supra* note 3, at 5.

the termination of a disciplinary action “should not prevent the Judiciary from continuing an institutional review to determine if there are systemic problems within a court ... that require correction.”⁶ In that spirit, this essay shifts attention from complaints against judges of alleged sexual misconduct in the workplace, to complaints of alleged gender-related workplace violations—for example, claims of pay equity, employment discrimination, and sexual harassment—that judges who have been accused of sexual misconduct may be tasked to decide. Should litigants know that a presiding judge is the subject of a pending sexual misconduct complaint or was the subject of a complaint found to be unsubstantiated? In other institutional contexts, it would be highly unusual to disclose information about disciplinary complaints before the matters are investigated and if they are not confirmed. However, courts are not ordinary institutions. Is there a danger that being the subject of a sexual misconduct claim, if later found to be unsubstantiated, might negatively impact the judge’s ability to credit claims of civil rights violations in an unrelated lawsuit, despite the judge’s best intentions to be impartial and to have an open mind?⁷

Inter-disciplinary research about decision making suggests that “[u]nconscious bias is everywhere,” as Professor Iris Bohnet writes.⁸ She urges that institutions adopt a conscious strategy of information disclosure on the view that transparency will make them fairer and more accountable. Arguably, raising questions about information disclosure that focus only on gender and judicial decision making (and, then, only with regard to judges who are or have been the subject of a dismissed sexual misconduct complaint) addresses too small a piece of the problem (or potential problem), with too little attention paid to gender bias generally and to other implicit biases, such as those relating to race and socioeconomic class, that likewise may require attention.⁹ On the other hand, some might argue that enhanced disclosure is not needed in any of these areas because norms of judicial self-governance, such as accountability, collegiality, and respect for the rule of law, work to immunize judges from forms of bias that infect decision making outside of the courthouse, and obviate the need for de-biasing strategies

⁶ *Id.* at 12. See also JOHN G. ROBERTS, JR., 2018 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2018) (discussing on-going consideration of the Working Group’s recommendations to revise the judicial codes of conduct, to strengthen the court’s internal procedures, and to expand training programs).

⁷ The public’s interest in recusal for reasons of gender bias heightened following the Senate Judicial Confirmation hearings of then nominee-Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States. See Lawrence Hurley, *Justice Kavanaugh unlikely to heed calls for recusal*, REUTERS (Oct. 11, 2018), <https://www.reuters.com/article/us-usa-court-kavanaugh-recusal/justice-kavanaugh-unlikely-to-heed-calls-for-recusal-idUSKCN1ML18S> [<https://perma.cc/LK74-XSM2>] (reporting suggestions that “Kavanaugh. . .step aside in cases on women’s issues in light of sexual misconduct allegations made against him” which he “denied”).

⁸ IRIS BOHNET, *WHAT WORKS: GENDER EQUALITY BY DESIGN* 21 (2016).

⁹ See, e.g., Joe Donald, *A Private Conversation on Implicit Bias and Race*, 90 WIS. LAW. 64 (2017) (recommending the need for a “private conversation” about implicit bias about race and its impact on mass incarceration); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) (discussing the impact of privileged socioeconomic status on judicial decision making).

within the courthouse.¹⁰ Indeed, putting the words judicial bias—let alone implicit bias—in the same sentence as judging for many would be a non-starter, to be dismissed as an oxymoron that runs counter to the national image of Blind Justice,¹¹ as well as the conventional trope that a Supreme Court Justice does the job best by calling balls and strikes without regard to personal qualities.¹² Quite apart from the events that triggered the Working Group, commentators have raised questions about the possible negative impact of implicit bias on judicial decisions in civil rights cases involving gender discrimination in the workplace.¹³ On the other hand, some commentators have warned against invoking implicit bias as a criticism of any specific judicial decision;¹⁴ more generally, the Chief Justice in a different context than gender relations has cautioned against basing recusal motions on an “amorphous ‘probability of bias.’”¹⁵

Justice Ruth Bader Ginsburg wrote more than two decades ago that paying “close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women’s voices”; further, she explained, it “heightens appreciation that progress ... requires a concerted effort to change habitual modes of thinking and action.”¹⁶ The very narrowness of the inquiry presented in this essay may make it a useful window into larger questions about

¹⁰ The federal judiciary has become increasingly aware of implicit bias and its effect on decision-making processes outside the courthouse in recent years. In *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, Justice Kennedy’s majority opinion recognized the role of “unconscious prejudices” in policy decisions such as enactment of zoning laws “that unfairly exclude minorities from certain neighborhoods,” underscoring the importance of “disparate-impact liability” as a way to counteract “disguised animus that escape easy classification as disparate treatment.” 135 S.Ct. 2507, 2522 (2015). See Kenji Yoshino, *Supreme Court 2015: The court acknowledges unconscious prejudice*, SLATE (June 25, 2015), <https://slate.com/news-and-politics/2015/06/supreme-court-2015-the-court-acknowledges-unconscious-prejudice.html> [<https://perma.cc/KY2D-X4PC>] (explaining that the Court’s recognition of “prejudices of which one is unaware that nonetheless drive one’s actions” is in line with the increasing awareness of such implicit bias by corporations which have taken steps to counteract such prejudices in order to make their workplaces more inclusive).

¹¹ See Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727 (1987) (discussing the history and use of justice imagery, and the role of the blindfold as one of the image’s attributes).

¹² See Kenneth D. Destek, *Of Reptiles and Velcro: The Brain’s Negativity Bias and Persuasion*, 15 NEV. L.J. 605, 622 (2015) (“Chief Justice John Roberts, during his Senate confirmation hearings, famously claimed that he was merely an umpire calling balls and strikes, relying only on the rule of law.”); see also Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 636–40 (2011) (discussing the 2009 confirmation hearings of Supreme Court Justice Sonia Sotomayor and the controversy over the compatibility of empathy with the umpire’s role).

¹³ See, e.g., Braden Campbell, *KPMG Ruling Casts Skeptical Light on Dukes Decision*, LAW360 (Dec. 5, 2018), https://www.law360.com/newyork/articles/1108458/kpmg-ruling-casts-skeptical-light-on-dukes-decision?nl_pk=4d704bbb-89c4-4f28-a159-fb5e76843d9d&utm_source=newsletter&utm_medium=email&utm_campaign=newyork [<https://perma.cc/ZNJ9-7XR3>] (asking whether the Supreme Court’s approach to determining commonality for class certification under Fed. R. Civ. P. 23 in employment discrimination cases has “a blind spot when it comes to ‘implicit bias’ and pay decisions”).

¹⁴ See, e.g., Bruce A. Green, *Legal Discourse and Racial Justice: The Urge to Cry “Bias!”*, 28 GEO. J. LEGAL ETHICS 177, 204 (2015) (arguing that “[o]n balance ... it is better to resist the temptation to import ‘implicit bias’ rhetoric into critiques of individual judicial decisions”).

¹⁵ *Caperton v. A.T. Massey*, 556 U.S. 868, 902 (2009) (Roberts, C.J., dissenting).

¹⁶ Ruth Bader Ginsburg, *Foreword to Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, reprinted in 84 GEO. L.J. 1651, 1651–52 (1996).

unintended barriers to our nation's ideal of equal access to justice. Part I surveys the judiciary's current information-disclosure regime about judicial sexual misconduct; Part II identifies particular cognitive biases that may generate or exacerbate implicit bias and negatively affect judicial decision making; and Part III considers the sufficiency of norms of judicial self-governance to counteract any unintended spillover effects of gender misconduct complaints in unrelated cases involving gender-related claims. The issues are complex, and reasonable minds certainly will differ on how best to secure judicial impartiality—both in appearance, and in actuality.¹⁷ This essay, which some might regard as provocative, is intended to be exploratory, not prescriptive.

I. DISCLOSURE OF JUDICIAL SEXUAL MISCONDUCT COMPLAINTS

In general, information about judicial misconduct comes from administrative complaints or recusal motions. Federal employees and litigants alleging that a judge has engaged in sexual misconduct may file administrative complaints under the Judicial Conduct and Disability Act and the Rules for Judicial-Conduct and Judicial-Disability Proceedings,¹⁸ or through the judiciary's internal framework of Employment Dispute Resolution Plans.¹⁹ The complaints trigger single-case investigation and individual discipline; to my knowledge, they are not analyzed with an eye toward identifying problems that might suggest a need for systemic or institutional reform. With limited exceptions, the complaint process is completely confidential. Orders will be made public through the clerk's office of the relevant regional circuit and on that court's website only after final action and a remedy has been imposed (other than a private censure or reprimand); the name of the subject judge but not the complainant will be disclosed.²⁰ The system is not designed to reveal substantive information about pending complaints or those that are found to be unsubstantiated. Until the Working Group's report, the judiciary did not separately identify information about sexual misconduct complaints in publicly available statistics, and this information was not accessible through electronic databases.²¹ In addition to the process for administrative complaints, litigants may

¹⁷ For a thoughtful exchange on judicial impartiality and Supreme Court recusal standards, see Sherrilyn A. Ifill & Eric J. Segall, *Judicial Recusal at the Court*, 160 U. PA. L. REV. PENNUMBRA 331 (2012).

¹⁸ See 28 U.S.C. §§ 351–364. Rule 3(h)(1) does not explicitly delineate courtroom behavior. “Misconduct” is defined as “conduct prejudicial to the effective and expeditious administration of the business of the courts,” which is a catchall provision, including courtroom behavior. 28 U.S.C. § 351(a); U.S.C.S. Jud. Con. and Disab. Proc. 3(h)(1). Rule 3 also notes that the list is non-exhaustive. U.S.C.S. Jud. Con. and Disab. Proc. 3(h)(1).

¹⁹ See WORKING GROUP, REPORT, *supra* note 3, at 9. The Working Group observed that under the Employment Dispute Resolution Plans, the district judges and bankruptcy judges are not required to inform their chief circuit judge of any complaints filed. *Id.* at 11.

²⁰ See 28 U.S.C. § 360(a)–(b); U.S.C.S. Jud. Con. and Disab. Proc. 23–24.

²¹ See, e.g., UNITED STATES COURTS, COMPLAINTS AGAINST JUDGES – JUDICIAL BUSINESS 2017, Table 10, <http://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2017> [<https://perma.cc/T6SV-ZZLV>]; Letter from James C. Duff, Admin. Office of the United States Courts, to Hon. Charles E. Grassley & Hon. Dianne Feinstein, Senate Comm. on the Judiciary (Feb. 16, 2018) [hereinafter Letter] [<https://perma.cc/B2ZW-GTNC>] (stating that in 2016 “there were no complaints

file motions for recusal (and the judge may self-recuse) under 28 U.S.C. § 455—“Disqualification of justice, judge, or magistrate,” and 28 U.S.C. § 144—“Bias or prejudice of a judge.” Information from motions for recusal can be gathered and analyzed from the case files themselves or from databases that are not designed specifically to analyze gender-related bias as a basis for the motion.²²

The availability bias—the heuristic that treats examples that quickly come to mind as representative—suggests a modicum of caution before designing reforms based on the latest headline about a particularly bad actor.²³ To date, the number of sexual misconduct complaints against judges has been impressively low.²⁴ Nevertheless, filing rates could be the result of the cumbersome complaint process that the Working Group has sought to improve.²⁵ The hope, of course, is that the Working Group’s recommendations of training and education will preemptively reduce explicit incidents of sexual misconduct in the future.²⁶ Moreover, by publishing statistics about complaints, increased transparency could create institutional incentives to curtail unacceptable behavior.²⁷

Whether to undertake further disclosure of complaints depends, in part, on whether it would be useful as a deterrent or as a marker of improvement still to be achieved. To answer this question, some comparative considerations might be useful. For example, it might be beneficial to explore the kinds of judicial biases that currently are treated as disqualifying when recusal motions are granted, when judges undertake self-recusal, or when an appeals court reassigns a matter because the district court judge has shown an inability to handle the case.²⁸ Likewise, one might want to distinguish cases in which judges have not been expected to self-recuse, for

alleging sexual harassment by a federal judge filed by courtroom staff or law clerks under the JC&D Act procedures”).

²² See, e.g., ROBERT J. HUME, *ETHICS AND ACCOUNTABILITY ON THE US SUPREME COURT: AN ANALYSIS OF RECUSAL PRACTICES* 49 (2017) (discussing empirical researcher’s adaptation of Supreme Court Database, developed by Harold Spaeth, to study recusal behavior).

²³ See Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1127 (1974) (explaining that the bias causes individuals to “assess the frequency of a class or the probability of an event by the ease with which instances or occurrences can be brought to mind”).

²⁴ Letter, *supra* note 21, at 7 (citing 2016 statistics).

²⁵ See *id.* at 18 (explaining that statistics about sexual harassment had not been separately identified because the number of complaints was so low, but acknowledging that harassment complaints “are often not reported” because of filing “barriers”). Other factors also could have been at work: the power disparity between a judge and a judicial clerk; the short duration of a judicial clerkship; and the longer-term professional relationship between judges and clerks.

²⁶ For a discussion of efforts by the National Center for States Courts to study and mitigate the effects of implicit bias, see Dana Leigh Marks, *Who, Me? Am I Guilty of Implicit Bias?*, 54 *JUDGES’ J.* 20 (2015).

²⁷ See Duff, *supra* note 4, at 10–12 (discussing rate of filing, complaint process, and education reforms); see generally BOHNET, *supra* note 8 (discussing how mandatory information disclosure could create incentive effects that influence behavior). *But see* Nancy Gertner, *Sexual Harassment and the Bench*, 71 *STAN. L. REV. ONLINE* 88, 98 (2018) (discussing a draft of the Working Group’s proposals and stating that “[t]he best approach may well be all about prevention rather than formal complaints and enhanced procedures . . . to train, not in a way to suggest this is ancillary to judicial education, but in a way that makes it clear this is an important part of it”).

²⁸ *But cf.* Robert M. Howard, *I’m Sorry, Please Recuse Me Before I Hurt Myself*, 28 *JUST. SYS. J.* 442, 442 (2007) (discussing cases that found recusal not warranted “because of past associations or known preferences”).

example, because of their status as a member of a particular racial group or engagement in private conduct as a partner in a same-sex relationship.²⁹ These comparisons could provide insight into how courts conventionally assess a judge's point of view, experience, and conduct when challenged as factors that are said to affect impartiality or its appearance. In theory, professional norms afford sufficient protection against forms of generic bias that affect all judges and legal situations.³⁰ The American legal system has long put faith in norms as a constraining influence on public decision making; that approach, however, has come under serious stress during the Trump Administration.³¹ In any event, even if broader disclosure of pending complaints or of complaints that are not substantiated is determined to be neither appropriate nor useful, questions nevertheless might remain about the impact of the complaint process on subject judges in unrelated lawsuits involving gender issues.

II. COGNITIVE BIASES THAT COULD LEAD TO IMPLICIT GENDER BIAS

The Model Code of Judicial Conduct Rule 2.3 states that “[a] judge shall perform duties of judicial office ... without bias,” and that “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias”³² The word “bias” is freighted with negative undertones—in particular, irrational and even hostile treatment of a person or an idea. It suggests a close-minded attitude, a disregard of facts, and a reflexive rejection of reasoned argument. All of these qualities are antithetical to the role of the judge in democratic society.³³ But judges are human,³⁴ and the psychological research about human decision making

²⁹ Comparisons of this sort might gesture toward a theory of when the wrongfulness of an action (such as sexual harassment) ought to be grounds for recusal, and so provide a helpful way to distinguish baseless motions motivated by strategic concerns. See, e.g., Linda Greenhouse, *Recuse Me*, N.Y. TIMES: OPINIONATOR (May 4, 2011), <https://opinionator.blogs.nytimes.com/2011/05/04/recuse-me/> [<https://perma.cc/2RXG-7NRB>] (“The effort to force or shame off a case a judge deemed likely to be unsympathetic is becoming the latest weapon in a litigator’s arsenal — litigation by other means. The tactic is not limited to one side of the ideological spectrum.”).

³⁰ One study reported that Israeli judges handed down harsher decisions on parole requests later in the day than earlier, with more favorable decisions made after the judges took a break for a snack. Although no one would suggest that a judge’s pre-lunch hunger should be grounds for disqualification, the information may be important as to how a court manages its schedule and assignment practices. See Kurt Kleiner, *Lunchtime Leniency: Judges’ Rulings Are Harsher When They Are Hungrier*, SCI. AM. (Sept. 1, 2011), <https://www.scientificamerican.com/article/lunchtime-leniency/> [<https://perma.cc/P5RD-JUK9>] (discussing study of Israeli judges).

³¹ See, e.g., Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 43–44 (discussing President Trump’s disregard of norms as they pertain to women’s equality) (forthcoming 2019).

³² MODEL CODE OF JUDICIAL CONDUCT r. 2.3(A) & (B) (AM. BAR. ASS’N 2007); see also MODEL CODE OF JUDICIAL CONDUCT r. 2.3 cmt. (AM. BAR. ASS’N 2007) (“A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.”).

³³ See Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 909 CAL. L. REV. 1485, 1496 (2011) (“For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality.”).

³⁴ See Cassandra Burke Robinson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 759 (2018) (“[J]udges are human—and therefore susceptible to the same unconscious biases that afflict us all.”).

underscores the ubiquity of bias,³⁵ understood as “a pattern of judgment that systematically departs from the prescription of a normative rule.”³⁶ Judges, like others, use heuristics to make decisions—mental shortcuts that in some situations may produce error and illusion.³⁷ And judges, like others, are subject to emotion that in some situations may produce less than optimal outcomes in court decisions.³⁸

Cognitive bias refers to the everyday shortcuts that human beings use to make decisions.³⁹ The existence of cognitive bias is analytically separate from implicit gender bias,⁴⁰ stereotypes about women that may negatively impact or distort decisions involving equal treatment in the workplace or other private and public spaces.⁴¹ In some situations, however, the ordinary cognitive biases that characterize decision making could lead to implicit gender bias, notwithstanding the best of judicial intentions.⁴² Generally, implicit bias, as psychologists understand that term, is not a ground for recusal or disqualification.⁴³ Whether implicit bias nevertheless should be a matter of concern to the federal courts is a separate question—one that was not addressed by the Working Group, but may be worth considering. The narrow inquiry here is whether a sexual misconduct complaint filed

³⁵ See, e.g., Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously, Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOY. U. CHI. L.J. 627, 648 (2012) (explaining that “cognitive and cultural traits make dispassionate rational analysis more difficult even in judges who have not a shred of what is normally described as unconscious racial, gender, or ethnic bias”).

³⁶ Linda Babcock, George Lowenstein, & Samuel Issacharoff, *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 916 (1997).

³⁷ See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 779 (2001) (“Empirical evidence suggests that even highly qualified judges inevitably rely on cognitive decision-making processes that can produce systematic errors in judgment.”).

³⁸ One study found that the “emotional shocks associated with unexpected outcomes of football games” produced tougher judicial decisions in Louisiana’s juvenile courts. See Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, (Nat’l Bureau of Econ. Research, Working Paper No. 22611, 2016), <http://www.nber.org/papers/w22611> [<https://perma.cc/C3NR-7B6H>].

³⁹ See, e.g., Arin N. Reeves, *The Ineffectiveness of Efficiency: Interrupting Cognitive Biases for Critical Thought*, 54 JUDGES’ J. 34 (2015) (“Most of these cognitive shortcuts, or biases, are helpful, productive biases that allow us to live our lives more fully . . . , but many biases may speed up our brain activity at the cost of critical thought and analysis.”)

⁴⁰ See Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114, 114 (2013) (distinguishing between cognitive bias and implicit gender or racial bias); see also Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187 (1995) (“Before the 1970s, few psychologists seriously entertained the notion that normal cognitive processes related to categorization might in and of themselves product and perpetuate intergroup bias.”).

⁴¹ See Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 10–11(2010) (discussing implicit gender bias as a “cognitive association connecting women to the home and family” and “stereotypes about women’s work styles, character traits, and job competencies”).

⁴² See Gregory Mitchell, *Second Thoughts*, 40 MCGEORGE L. REV. 687, 693 (2009) (stating that “implicit biases toward disadvantaged groups can be seen as inevitable byproducts of ordinary cognitive processes that help us organize our world into manageable categories”).

⁴³ See Green, *supra* 14, at 184 (stating that “judicial bias under the law means something else entirely” from implicit bias). Research has pioneered the utility of the Implicit Association Test, which enables a person to discover unconscious biases otherwise hidden to the self. See generally MAHZARIN R. BANAJI & ANTHONY G. GREENWALD, *BLIND SPOT: HIDDEN BIASES OF GOOD PEOPLE* (2016).

against a judge, later found to be unsubstantiated, has negative spillover effects when the judge presides over an unrelated claim of gender equality. If such effects do exist, one might want to know whether their scope and nature differ in significant ways from those of unsubstantiated complaints based on different forms of conduct. One also would be interested to know the tilt or direction of the bias; conceivably, wrongful accusations could make a judge more sympathetic—and not less sympathetic—to gender claims.⁴⁴

In the context of judicial misconduct complaints, a number of conventional cognitive biases could generate the unintended result of negative implicit gender bias among those judges who have been subject to unsubstantiated sexual harassment claims. For example, the availability heuristic is a mental shortcut in which information that is more easily recalled is considered more common or relevant. One study showed that the biased recall of more violent crimes, which are more frequently publicized, leads to the assumption that harsher sentences should be implemented.⁴⁵ In addition, persons wrongfully accused of illicit conduct likely are changed by that experience, and, feeling wronged, may bring a perspective of skepticism when faced with comparable charges against others.⁴⁶ Relatedly, the heuristic known as confirmation bias raises the question: whether judges who have gone through an investigative and disciplinary process may tend to accept evidence that conforms to their experience, while discounting contrary evidence.⁴⁷ A judge's experience could produce the illusion that complainants are to be treated as unreliable, or that a stricter standard of evidence ought to be imposed on evidence that validates the story of an accuser in a case that is now bending before the judge.⁴⁸ Unsurprisingly, false or unsubstantiated accusations against laypersons have been linked with emotion bias (including anger and skepticism).⁴⁹ Depending on when a disciplinary action is filed within the span of a judge's career, the judge could be subject to a path-dependent or primary-effect bias in which an early event generates

⁴⁴ See Joel Cohen, *How Will the Kavanaugh Confirmation Battle Affect His Judging of the Accused*, LAW & CRIME (Oct. 7, 2018, 2:21 PM), <https://lawandcrime.com/opinion/how-will-the-kavanaugh-confirmation-battle-effect-his-judging-of-the-accused/> [<https://perma.cc/DRW9-M7H4>] (raising this possibility, but questioning whether false accusations produce greater empathy).

⁴⁵ See Loretta J. Stalans, *Citizens' Crime Stereotypes, Biased Recall, and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources*, 17 LAW & HUM. BEHAV. 451, 467–68 (1993) (reporting that the recall of more violent crimes, which are more frequently publicized, leads to the assumption that harsher sentences should be imposed for all crimes).

⁴⁶ See Cohen, *supra* note 44 (questioning the impact of the Senate confirmation hearing on Justice Kavanaugh's approach to the criminally accused).

⁴⁷ See generally Deborah Davis & William C. Follette, *Toward an Empirical Approach to Evidentiary Ruling*, 27 LAW & HUM. BEHAV. 661, 664 (2003).

⁴⁸ See Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023 (2002) (discussing judicial bias caused by past traumatic events).

⁴⁹ See Ros Burnett, Carolyn Hoyle, & Naomi-Elle Speechley, *The Impact of Being Wrongly Accused of Abuse in Occupations of Trust*, 56 HOW. J. CRIME & JUST. 176, 184, 189 (2017) (reporting that lay persons who are falsely accused tend to be less trusting of others putting forward accusations); see also CAROLYN HOYLE, NAOMI-ELLEN SPEECHLEY, & ROS BURNETT, *THE IMPACT OF BEING WRONGLY ACCUSED OF ABUSE IN OCCUPATIONS OF TRUST: VICTIMS' VOICES* 17 (2016) (discussing the effects of false accusations of sexual abuse on the accused).

responses that reinforce later decisions.⁵⁰ Finally, judges who have gone through the complaint process may believe that the experience impairs the impartiality of others who have faced claims of sexual harassment, but that they are immune, a situation referred to as overconfidence or “Bias Blind Spot.”⁵¹

III. ASSESSING UNINTENDED EFFECTS OF JUDICIAL MISCONDUCT CLAIMS AND THE SUFFICIENCY OF JUDICIAL SELF-GOVERNANCE NORMS AS DEBIASING STRATEGIES

The Model Code of Judicial Conduct states “[a] judge shall uphold and promote the independence, integrity, and impartiality of the judiciary.”⁵² A distinct set of negative effects may arise when a judge is unaware of a bias that unconsciously, but negatively, affects impartiality. The litigants may be denied a fair process for their dispute; the public may suffer an erosion of trust in an important democratic institution; and judges may experience a decline in collegiality and reputation.⁵³ An institution’s self-awareness of the existence of bias is an important step to determining whether improvement is needed. As the President-elect of the American Bar Association warned in August 2018: “[T]he challenges in both the civil and criminal justice arenas ... are greatly exacerbated—if not partly caused—by the hesitancy of many in the legal profession and the business community to acknowledge and seek correction of the shortcomings of the justice system,” including those that are “rooted in a lack of cultural and language awareness, racism or sexism, bias, [or] power inequities.”⁵⁴

The Working Group’s assignment was not to investigate whether sexual misconduct complaints against judges have spillover effects on court decision

⁵⁰ See Isabelle Brocas & Juan D. Carrillo, *The Neurobiology of Opinions: Can Judges and Juries be Impartial?*, 86 S. CAL. L. REV. 421, 434–35 (2013) (explaining the path-dependent bias); see also Matthew I. Fraudin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 944–45 (2013) (discussing primary bias in family court dependency proceedings).

⁵¹ See Melinda A. Marbes, *Refocusing Recusals: How the Bias Blind Spot Affects Disqualification Disputes and Should Reshape Recusal Reform*, 32 ST. LOUIS U. PUB. L. REV. 235, 250–51 (2013) (explaining the Bias Blind-Spot). To borrow from former Judge Richard Posner, “[W]e have all heard of ‘cognitive dissonance’ and how people will fool themselves in order to erase it. There is a well-defined ‘official’ judicial role and most judges would be uncomfortable if they realized that in reality they were playing a different role. So they suppress the realization.” Richard A. Posner, *Some Realism about Judges: A Reply to Edwards and Livermore*, 59 DUKE L.J. 1177, 1181 (2010).

⁵² MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR. ASS’N 2007).

⁵³ See generally Charles Gardner Geyh, *The Dimensions of Judicial Impartiality*, 65 FLA. L. REV. 493, 497 (2013) (offering a three-part typology of impartiality that looks at its procedural, political, and ethical dimension); see also CHARLES GARDNER GEYH, *JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1* (Kris Markarian ed., 2d ed. 2010) (“It is not enough that judges *be* impartial; the public must *perceive* them to be so.”).

⁵⁴ Judy Perry Martinez, *How Lawyers and Judges Can Help Rebuild Public Trust and Confidence in Our Justice System*, ABA JOURNAL (Aug. 9, 2018), http://www.abajournal.com/news/article/how_lawyers_and_judges_can_help_rebuild_public_trust_and_confidence [<https://perma.cc/TP7E-KHA9>]; see also Jonathan A. Rapping, *Implicitly Unjust: How Defenders Can Affect Systemic Racist Assumptions*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 999, 1042 (2013) (questioning whether judges in criminal proceedings will view implicit race bias “as a widespread phenomenon that warrants their intervention”).

making; nor was its focus whether sustained workplace complaints against a specific judge carry an unacceptably high risk to impartial adjudication that presumptively should disqualify the judge from hearing cases within particular legal categories. However, analogous questions have been raised in other contexts affecting the judiciary. For example, a great deal of law is designed to control jury decision making, and the federal judiciary recognizes that a potential juror's experiences and attitudes may signal biases that could impair the appearance of or actual impartiality of lay decision making. For this reason, courts have held valid preemptory challenges to remove a juror who has been falsely accused of a crime.⁵⁵ By contrast, trust in the judge's ability to exercise sound judgment is the foundation of the legal system and its promise of fairness. To be sure, it may be that norms of judicial self-governance are sufficiently robust to overcome impermissible biases. However, unfounded judicial misconduct claims may pose novel challenges to the sufficiency of judicial self-governance norms. Indeed, paradoxically, in this context, judicial norms may be an obstacle to the self-reflection associated with de-biasing strategies.

Self-governance norms operate in different ways depending on court hierarchy. Consider the norm of collegiality. Collegiality typically refers to the process of group decision making among a multi-member court. A definition of collegiality—and its stated rationale—by an influential federal appellate judge is that of “a process that helps to create the conditions for principled agreement, by allowing all points of view to be aired and considered.”⁵⁶ Collegiality, similar to other group decision making, “forces individuals to discuss their reasoning in a way that facilitates de-biasing.”⁵⁷ Yet, some commentators express concern that the norm of collegiality produces conformity, self-censorship, and deference to consensus as a means of horse-trading.⁵⁸ In the context of #MeToo, the norm potentially could incentivize members of the bench to “look away” if the attitude or conduct, although inappropriate, is considered tolerable under the circumstances.⁵⁹ Indeed, the homogeneity of members of a multi-panel court could tend toward “group-think,” and encourage an echo effect in which unacceptable behaviors are recast as appropriate to the role.⁶⁰ What may make a difference to the gender de-biasing of a

⁵⁵ See, e.g., *U.S. v. Burks*, 402 Fed. App'x 486, 488 (11th Cir. 2010).

⁵⁶ Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003) (emphasis omitted).

⁵⁷ Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 587 n.76 (1998).

⁵⁸ See, e.g., William M. Richman & William L. Reynolds, *Elitism, Expedience, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 324 (1996) (“Judges who know, like, and depend on each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other.”).

⁵⁹ See generally Sumi Cho, “Unwise,” “Untimely,” and “Extreme”: *Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change*, 39 U.C. DAVIS L. REV. 805, 809–10 (2006) (criticizing the concept of workplace collegiality as reflective of “the normative values of the dominant culture”).

⁶⁰ For a collection of articles on group think, see Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 NOTRE DAME L. REV. 1021, 1027 n.17 (2014).

collegial court is the presence of a woman on the bench,⁶¹ but this is a long-term reform not likely to be available in the near future. The norm of collegiality operates differently in first-instance courts. District court judges preside over and decide cases alone, and so the sharing of ideas operates outside the space of the decisional courtroom. It is generally assumed that the norm of collegiality has less efficacy when individuals work alone, but whether this is the case for judges is a question to consider.⁶²

Another norm of judicial self-governance is accountability, which is related to respect for the rule of law and the appropriate roles of the three branches of government.⁶³ District court judges are subject to a strong norm of accountability in the sense that their opinions are subject to review by a higher court that ensures decisions are within precedential boundaries.⁶⁴ An important part of accountability is the writing of decisions and the giving of reasons, both of which allow the district court to engage in a process of self-evaluation and enable the appeals court to provide meaningful oversight.⁶⁵ The robustness of the accountability norm may be questioned, given trends in appellate decision making, including: the increase in resolutions without opinions with precedential value,⁶⁶ the role of judicial clerks in appellate decision writing;⁶⁷ and the significance of discretion in many procedural rulings.⁶⁸ The problems have been fully ventilated by former Judge Nancy Gertner, who has explained the ways in which caseload pressures and case management

⁶¹ See Stephanie Francis Ward, *Times Up, Legal, Judicial Systems Slow to Adapt to Sexual Harassment and Assault Issues*, ABA JOURNAL (June 2018), http://www.abajournal.com/magazine/article/timesup_legal_judicial_harassment_assault [<https://perma.cc/ASG4-5AZX>] (reporting studies showing “that if a woman is added to an appellate panel, the panel is more likely to find against a summary judgment motion in a sex discrimination claim”); see also Angela Nicole Johnson, *Intersectionality, Life Experience & Judicial Decision Making: A New View of Gender at the Supreme Court*, 28 NOTRE DAME J.L. ETHICS & PUB. POL’Y 353, 363–65 (2014) (collecting literature on the effect of women judges on colleagues’ views of civil rights claims).

⁶² See Rachlinski, *supra* note 57, at 587–88 n.76 (noting that “[g]roups seem to show slightly less bias than individuals”); see also Ben Grunwald, STRATEGIC PUBLICATION, 92 TUL. L. REV. 745, 750 (2018) (stating that publication decisions “reinforce[] existing fears that unpublished opinions may impair judicial accountability”).

⁶³ See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2029 (1994) (arguing that judicial accountability derives from judicial rationality, which is related to the reasons a judge gives for a decision).

⁶⁴ See Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations*, 95 GEO. L.J. 909, 912 (2007) (explaining that inferior courts should be held accountable “by the prospect of reality of appellate review”).

⁶⁵ See Donald E. Ziegler, *Collegiality and the District Courts*, 75 JUDICATURE 24, 24 (1991) (discussing *Vadino v. Valley Engineers*, 903 F.2d 253 (3d Cir. 1990), where the Third Circuit required the district court judges “to explain their reasons when granting a dispositive motion, unless the reason is apparent from the pleadings”).

⁶⁶ See Elizabeth Earle Beske, *Rethinking the Nonprecedential Opinion*, 65 UCLA L. REV. 808, 814–15 (2018) (discussing the “dramatic surge” of nonprecedential opinions).

⁶⁷ See Albert Yoon, *Law Clerks and the Institutional Design of the Federal Judiciary*, 98 MARQ. L. REV. 131, 132 (2014) (stating that “reliance on law clerks for substantive parts of judging is arguably exacerbated by the relatively homogenous demographic profile of the typical law clerk”).

⁶⁸ See Stempel, *supra* note 35, at 685–86 (discussing the perverse effect of the Supreme Court’s changes in the standard governing Federal Rule 56 motions for summary judgment and the importance of the scintilla rule to “anchor judges”).

practices encourage district court judges to place excessive reliance on heuristics that tend to reinforce a bias against civil rights plaintiffs in decisions that often evade meaningful review.⁶⁹ Most telling, she noted that her colleagues saw no problem in the decisional results.⁷⁰

The judiciary's internal examination of these possibilities could be helpful in identifying whether a problem exists. If it does, different solutions could reasonably be considered. In particular, the Working Group has recommended enhanced training programs that will help judges be alert to bias, and presumably be better equipped to regulate inappropriate emotion and to develop de-biasing strategies as a preventive approach.⁷¹ Excellent programs already exist and provide a foundation for further institutional reform.⁷² Moreover, although consideration of these issues implicates important confidentiality interests,⁷³ the investigation of trends can be undertaken without disclosing the name of the subject judge or of the complainant.

CONCLUSION

#MeToo has raised important questions for American society about the prevalence of sexual harassment in the workplace. The Chief Justice exercised leadership in calling for the judiciary to address employment problems identified within the courthouse. But the primary role of the courthouse is to provide justice. The literature on behavioral psychology invites further consideration regarding whether ordinary cognitive biases may in some settings produce forms of implicit gender bias that mar the impartiality of a judge's decisional process. The narrow (and so-far infrequent) situation of unsubstantiated sexual misconduct claims against

⁶⁹ See Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113–16 (2012) (discussing how the requirement for formal decisions only when plaintiffs lose leads to an asymmetry in the law that disadvantages civil rights plaintiffs, which is in turn reinforced by heuristics facilitating case resolution); see also Marcia L. McCormick, *Let's Pretend that Federal Courts Aren't Hostile to Discrimination Cases*, 76 OHIO ST. L.J. FURTHERMORE 1, 7 (2015).

⁷⁰ See Gertner, *supra* note 69, at 109 (recounting that when asked why federal courts are hostile to discrimination claims, “[o]ne judge after another insisted that there was no hostility”).

⁷¹ It may be that diversifying the bench is more effective than training aimed at the development of de-biasing strategies, although one needs to consider whether training in the first instance is merely cosmetic. Cf. Frank Dobbin & Alexandra Kaley, *Training Programs and Reporting Systems Won't End Sexual Harassment Promoting More Women Will* HARV. BUS. REV. (Nov. 15, 2017), <https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will> [<https://perma.cc/FV89-JUKC>] (“Men who score high on a psychological scale for likelihood to harass women come out of training with significantly worse attitudes toward harassment, thinking it is no big deal.”) (citing Lori A. Robb & Dennis Doverspike, *Self-reported proclivity to harass as a moderator of the effectiveness of sexual harassment-prevention training*, 88 PSYCHOL. REP. 85 (2001)).

⁷² See, e.g., *New Federal Judicial Training Program to Debut at Vanderbilt Law School*, VAND. LAW SCH. (Mar. 14, 2014), <https://law.vanderbilt.edu/news/new-federal-judicial-training-program-to-debut-at-vanderbilt-law-school/> [<https://perma.cc/MM52-26CB>].

⁷³ But see John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193, 199–200 (1994) (contrasting the secrecy of federal judicial disciplinary process with that of Oregon, and questioning whether confidentiality is necessary for judicial independence or consistent with democratic values).

a judge opens a window onto this broader question. To be sure, some might argue that even surfacing the question puts the courts on a slippery slope that not only threatens the privacy interests of the complainant and subject judge, but also jeopardizes judicial independence by inviting a host of baseless claims. Both concerns have merit, but surely the judiciary has institutional guardrails sufficient to prevent these undesirable ends. Through tough self-examination, the Working Group has moved the federal courts closer to the goal of “an exemplary workplace for every judge and every court employee.”⁷⁴ Further self-examination might now be in order to move closer to the ideal of equal justice for all.

⁷⁴ See ROBERTS, *supra* note 3.