

MORAL PSYCHOLOGY AND THE LAW: HOW INTUITIONS DRIVE REASONING, JUDGMENT, AND THE SEARCH FOR EVIDENCE

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My talk today is about a delusion that is stalking the halls of the academy. “Delusion” is defined by Webster’s as “*a false conception and persistent belief unconquerable by reason in something that has no existence in fact.*”¹ In his book *The God Delusion*, Richard Dawkins used the word “delusion” in this way.² He defined the God delusion as the belief in “a superhuman, supernatural intelligence who deliberately designed and created the universe and everything in it, including us.”³ He then argued that religious people are unconquerable by reason, because if they were reasonable, they would see the falsity of their belief. He argued that there is no such thing as a God defined in this way. Whether or not you agree with Dawkins’ atheism, his book is a useful example of how one might go about arguing for the existence of a mass delusion.

The mass delusion that I want to talk about today is the *rationalist delusion* in ethics. I define it like this: “The belief in a reliable faculty of reasoning, capable of operating effectively and impartially even when self-interest, reputational concerns, and intergroup conflict pull toward a particular conclusion.” The word “rationalism” has a variety of meanings in philosophy. I am using the term to indicate a fairly moderate position—the view that reason is the *chief* source of valid knowledge about ethics—not the more radical claim that it is the *only* source.

So is reason the chief source of knowledge about ethical truths? In several review papers⁴ I have shown that there is a mountain of evidence demonstrating the deficiencies of human reasoning, and little or no evidence that reasoning can perform in the way that rationalist theories of

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1. WEBSTER’S 3D NEW INTERNATIONAL DICTIONARY 598 (1986).
2. RICHARD DAWKINS, *THE GOD DELUSION* (2006).
3. *Id.* at 52.
4. See especially Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 *SCIENCE* 998 (2007); Jonathan Haidt & Selin Kesebir, *Morality*, in 2 *HANDBOOK OF SOCIAL PSYCHOLOGY* 797 (Susan T. Fiske et al eds., 5th ed. 2010). See also JONATHAN HAIDT, *THE RIGHTEOUS MIND* chs. 2–4 (2012).

ethics require it to perform. So to have faith in a reliable faculty of reasoning, in this day and age, is structurally rather similar to having faith in God, in the specific way that Dawkins defined God.

Against the rationalist view of human cognition I'd like to set up an alternate view of how the human mind works. It was articulated by Judge Joe Hutcheson in 1929 in an essay on intuitive judgment in which he first described his legal training:

I had been trained to regard the law as a system of rules and precedents, of categories and concepts, and the judge had been spoken of as an administrator, austere, remote, "his intellect a cold logic engine," who, in that rarified atmosphere in which he lived coldly and logically determined the relation of the facts of a particular case to some of these precedents⁵

Hutcheson went on in his training and began to spend more time around actual lawyers and judges, "whose intuitive faculties were developed and made acute by the use of a trained and cultivated imagination" ⁶ Such exposure led to a gradual evolution in his thinking about legal thinking:

[W]hen the case is difficult or involved, and turns upon a hairsbreadth of law or of fact . . . I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.⁷

This is a very different view of judgment than the one held by rationalists. It's a very different view of how reasoning works, and of how judges work. Hutcheson continues: "I speak now of the judgment or decision, the solution itself, as opposed to the apologia for that decision I speak of the judgment pronounced, as opposed to the rationalization by the judge on that pronouncement."⁸ In other words, judgment and justification are two separate processes. Judgment comes first, based on educated intuition; justification is undertaken next.

5. Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 274 (1929).

6. *Id.* at 276.

7. *Id.* at 278.

8. *Id.* at 279.

My talk today is on how and why Judge Hutcheson was right. I claim that he was right, descriptively, about how judges and lawyers work. But I'll suggest, gingerly, that he's even right normatively. If the rationalism that Judge Hutcheson embraced as a young man is a delusion—if it is impossible for individuals to think in that way—then I think this empirical fact has a variety of normative as well as practical implications for scholars interested in law and public policy.

In place of the rationalist delusion, I'd like to describe a “new synthesis” that is taking place in moral psychology, based on a shift from rationalism to intuitionism. An enormous amount of work in the 1990s, from neuroscience, social psychology, and primatology, has shown us just how powerful automatic and intuitive processes are. In my recent book, *The Righteous Mind*,⁹ I've argued that the key ideas in this new synthesis can be described in just three principles:

- (1) Intuitions come first, strategic reasoning second;
- (2) There's more to morality than harm and fairness;
- (3) Morality binds and blinds.

In this Lecture, I'll focus on the first principle because it has the most direct implications for the legal community. To help me explain the principle, I'll invoke a metaphor: the mind is divided like a rider on an elephant, and the rider's job is to serve the elephant. I developed that metaphor in my previous book, *The Happiness Hypothesis*,¹⁰ but if you've read Daniel Kahneman's book *Thinking Fast and Slow*,¹¹ then you are familiar with the idea. The current view in psychology is that there are two basic and fundamentally different sorts of mental processes going on at all times in our minds: automatic processing (the elephant) and controlled processing (the rider). Most of human cognition is like that of other animals. All brains are neural networks, and they solve problems largely by pattern matching. This sort of process happens rapidly and automatically. When you open your eyes, you recognize objects and faces. You don't have to do any conscious work; your visual system just solves ferociously difficult computational problems nearly instantaneously, and it presents its results to your conscious awareness. This kind of cognition is hundreds of millions of years old.

But then there's the kind of cognition that is uniquely human. It uses words, and so cannot be any older than language, which is probably no

9. Haidt, *THE RIGHTEOUS MIND*, *supra* note 4.

10. JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS* (2006).

11. DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011).

more than five or six hundred thousand years old.¹² We have the ability to reason using language, but the process is slow and effortful. If you're tired or inebriated, the work becomes quite difficult, and you make frequent errors.

Automatic cognition—the elephant—is sometimes called “hot” cognition because it has the power to motivate us to action. The neurological systems for judgment are connected to the neurological systems for behavior. Controlled cognition, in contrast, is sometimes called “cool” cognition. It is not connected to behavioral centers in the brain. So please imagine the human mind as a small and somewhat ineffectual rider perched on the back of a large, powerful, and rather smart elephant. The rider can try to steer the elephant, and if the elephant has no particular desire to go one way or the other, it may listen to the rider. But if it has its own desires, it's going to do what it wants to do.

Now, in philosophy and in moral psychology, people have always given pride of place to the rider, who represents reason. In *The Phaedrus*, Plato gives us the metaphor of the mind or soul as divided into three parts, like a charioteer struggling to control two unruly horses—the noble passions and the baser passions.¹³ If a man studies philosophy and learns to control these horses, these passions, then when he dies, his soul will not be reborn into this degraded world. Rather, his soul will return to the heavens where all is perfect rationality and light. But if a man fails to master his passions, then he will be reborn on this earth in his next life as a woman.

Lawrence Kohlberg was the leading moral psychologist in the twentieth century, and he had a largely Platonic view of reason and the passions.¹⁴ He studied the development of moral reasoning. How do children go from being rather abysmal moral reasoners at age four to being rather skilled at it by the time they reach their teen years? A minority of adolescents ultimately reach the highest stage of moral reasoning, at which they come to see that justice is the foundation of all morality.¹⁵ Their judgment and their behavior are based on a commitment to justice. The rider attains complete control over the elephant. At least, that's how Kohlberg viewed moral development and moral maturity.

When I was in graduate school at the University of Pennsylvania, I read a lot of Kohlberg, and a little bit of Plato, and it just didn't ring true. I resonated much more with David Hume, who said that “[r]eason is, and

12. Language is unlikely to have preceded cumulative cultural evolution and shared intentionality, both of which seem to have emerged with *Homo Heidelbergensis*. See discussion in HAIDT, *THE RIGHTEOUS MIND*, *supra* note 4, at ch. 9.

13. PLATO, *THE PHAEDRUS* (Christopher Rowe trans., 2005).

14. Lawrence Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 *J. PHILOSOPHY* 630 (1973).

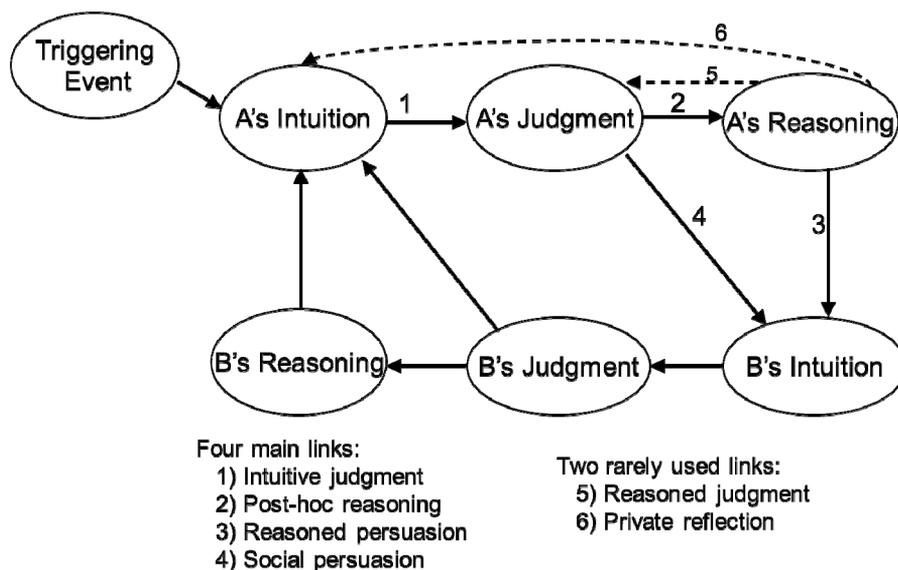
15. *Id.* at 630–32.

ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them.”¹⁶ Hume inverted Plato’s chariot, and put the horses in charge. But rather than speak of reason as a “slave,” or a servant, I think the best metaphor is to say that reason is the press secretary of the passions, or intuitions. The press secretary of a president serves the president, but it’s a partnership. Her job is not to figure out the truth, or to make policy; it is to justify whatever the president and his cabinet have decided to do. She might have some influence on the president—she might be a trusted advisor. But ultimately the president is in charge. He makes the decisions, and the press secretary’s specialty is choosing the most persuasive arguments to justify the president’s decisions. Judgment and justification are two separate processes, just as Judge Hutcheson said.

In my early research, I wasn’t a Humean. I thought that the passions and reasoning were separate, independent inputs into moral judgment, and I did a variety of experiments to try to pit them against each other. I interviewed thousands of people about harmless taboo violations—acts that were disgusting or disrespectful, so they felt wrong to most people, yet the actions harmed nobody. One such story was about a family whose dog was killed by a car in front of their house. They’d heard that dog meat was delicious, so they cut up the dog’s body and cooked it and ate it for dinner. Nobody saw them do this. What do you think about this? Is that okay for them to do that? Most people say no, and if you ask them to justify their judgment, they’ll say something like, “Well, they’ll get sick if they eat it.” The experimenter would then reply: “But it says here that the meat was cooked, so no germs can survive. If that’s true, then is it ok?” Removing the health threat hardly ever changes anyone’s judgment. People just send their press secretaries back out to search for other justification. And if the press secretary comes back empty handed, and admits that she can’t find a justification, does that change the judgment? Hardly ever. People often said things like “Gosh, I can’t explain it, but I just know it’s wrong.” I called this phenomenon “moral dumbfounding.” It’s difficult to explain the existence of moral dumbfounding if you’re a rationalist who believes that people used reasoning to reach their moral judgments, but it’s simple if you’re a Humean intuitionist. Intuitions come first, reasoning second.

These sorts of phenomena led me to formulate what I’ve called the social intuitionist model, shown below in Figure 1. It’s basically Hume’s model, updated with different terms, and made more social.

16. 2 DAVID HUME, *A TREATISE OF HUMAN NATURE: OF THE PASSIONS* 415 (L.A. Selby-Bigge ed., New York, MacMillan & Co. 1888) (1739).

Figure 1: The Social Intuitionist Model

Source: Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REVIEW* 814 (2001). Published by the American Psychological Association. Reprinted with permission.

Links 1 and 2 show what happens in the initial stages of moral judgment. As Hume and Hutcheson said, intuition leads to judgment, and then judgment leads to reasoning, which provides a justification or “apologia” for the judgment. What I’ve added is to embed that process into a social interaction, between person A and person B. We do all this post-hoc reasoning (link 2) in order to prepare for the possibility that we might have to justify ourselves to others (link 3). And if we do enter into a discussion or debate about a moral matter, we give those pre-rehearsed reasons to our partner, in the hope of changing their intuitions. We want them to “see it our way.” Typically the other person does not change his or her mind. Rather, they make up their own reasons to give to us, and the process goes around and around in a circle.

There is a long history of classic experiments in social psychology¹⁷ showing the general tendency for one person’s judgment to influence others—quite apart from any reasons given. I’ve shown that process as link 4—the “social persuasion” link. We are, to some extent, sheep and lemmings. We are very influenced by what those around us are doing. If we

17. See, e.g., SOLOMON ASCH, *SOCIAL PSYCHOLOGY* (1987); MUZAFER SHERIF, *THE PSYCHOLOGY OF SOCIAL NORMS* (1936).

like them, if they're on our team, then we're going to be more strongly influenced. So there are a variety of sources of interpersonal influence.

I'm not saying that we never contradict our original judgments. We can all think of times when we've changed our minds and rejected our initial intuition. Most of those cases, I would bet, involved new information given to us by another person, or from something we read. But sometimes we simply think about a situation, we mull it over, and we come to a different judgment. I have shown this possibility as link 5, the "reasoned judgment" link. But I've shown it as a dotted line because I think it's rather rare. Do you think that you do this once a day or more? For most of us, probably not. Yet think how many moral judgments you make every day—while reading the newspaper, while driving on busy roads, or just while interacting with people. Dozens? Hundreds? It's just so easy for us to go with our first judgment, and it is so difficult for us to seek out evidence that disconfirms that judgment.

The big obstacle to questioning your initial intuition is the confirmation bias;¹⁸ it is one of the most robust and ineradicable biases in the literature of cognitive and social psychology. It's the finding that when we evaluate a proposition, we don't look for evidence on both sides and then weigh up which side is more likely to be true. Rather, we start with an initial hunch and then we set out to see if we can find any evidence to confirm it. If we find any evidence at all, we have confirmed the proposition, and we stop thinking.

I think the confirmation bias is among the most important psychological ideas that can be taught in a law school. Just think about police interrogators who have a hunch that a suspect is guilty. They're going to do everything they can to confirm that hunch, and precious little to disconfirm it. They will often arrive at a false positive—evidence that an innocent person is guilty. This is one reason why it's so valuable to have an adversarial legal system—somebody is appointed on each side to try to disconfirm the arguments of the other side.

Here's a set of studies showing the confirmation bias in action with regard to the evaluation of evidence. Deanna Kuhn, at Teachers College, brought children and adults into her lab, one at a time, and gave them a simple task.¹⁹ For example, decide which kind of cake—chocolate or carrot—is more likely to make kids sick, based on the evidence you're about to see. Kuhn then showed each subject a set of evidence cards. For example, the first card might show a piece of carrot cake and a drawing of

18. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

19. Deanna Kuhn, *Children and Adults as Intuitive Scientists*, 96 PSYCHOL. REV. 674, 676 (1989).

a child's face looking sick. That means: "Here's a kid who ate carrot cake and then felt sick." The next card might show a piece of chocolate cake followed by a child smiling. After subjects looked at eight such cards showing what happened to eight kids after they ate chocolate or carrot cake, each subject was asked to decide which kind of cake should be "convicted" as the kind most likely to make kids sick.

Now, most people start off with the prior assumption that carrots are healthy, whereas eating too much chocolate can make you sick, so what do you think they do when the weight of the evidence shows carrot cake to be more sickening? Well, they set out to confirm their bias. If they can't find a shred of evidence to support their prior hypothesis, they'll change their mind. But if there's even a single card showing a kid who ate chocolate cake and then got sick, people will typically conclude that chocolate cake is the culprit, even if the other seven cards point the other way. As Kuhn puts it, people seem to be saying to themselves, "Here is some evidence I can point to as supporting my theory, and therefore the theory is right."²⁰

Phil Tetlock, a social psychologist at Wharton, offers a unifying theory about judgment and decision making that is tailor-made for the legal community. He says our reasoning is heavily governed by accountability pressures.²¹ If you think that you might eventually be called on to explain yourself, you're going to reason much more carefully. But you're not going to work harder to figure out what's really true; you're going to reason much more carefully to figure out what is justifiable, what is defensible. Here's Tetlock's conclusion:

[A] central function of thought is making sure that one acts in ways that can be persuasively justified or excused to others. Indeed, the process of considering the justifiability of one's choices may be so prevalent that decision makers not only search for convincing reasons to make a choice when they must explain that choice to others, they search for reasons to convince themselves that they have made the "right" choice.²²

Tetlock studied ordinary people, not judges, but his theory seems likely to apply particularly well to judges, whose every written word may be scrutinized by an appellate court, by legal scholars, and by lawyers for interested parties.

20. *Id.* at 681.

21. Jennifer S. Lerner & Philip E. Tetlock, *Bridging Individual, Interpersonal, and Institutional Approaches to Judgment and Decision Making: The Impact of Accountability on Cognitive Bias*, in EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH 431 (Sandra L. Schneider & James Shanteau eds., 2003).

22. *Id.* at 433-34.

The explanation for why human reasoning is so bizarre—why we are terrible at some tasks and brilliant at others—is that our reasoning abilities were not designed to find the truth. Reasoning was designed for socially strategic functions. “Thinking is for doing,” as William James put it.²³ Our brains evolved just like our hands and our lungs and everything else in the animal kingdom. In evolution, usefulness trumps truth. Brains that helped people think in *useful* ways were better adapted than brains that concerned themselves only with tracking or discovering truth.

There’s an important recent review paper on this idea by the French cognitive scientists Hugo Mercier and Dan Sperber. I recommend it highly to the legal community. The title is *Why Do Humans Reason? Arguments for an Argumentative Theory*. The authors summarize their findings like this:

Our hypothesis is that the function of reasoning is argumentative. It is to devise and evaluate arguments intended to persuade. . . . Skilled arguers . . . are not after the truth but after arguments supporting their views. This explains the notorious confirmation bias. . . . [R]easoning does exactly what can be expected of an argumentative device: Look for arguments that support a given conclusion, and . . . favor conclusions for which arguments can be found.²⁴

To sum up my argument so far, I’ve told you about the rationalist delusion. I’ve told you that some people believe that there exists a reliable faculty of moral reasoning, capable of operating effectively and impartially even when self-interest, reputational concerns, and intergroup conflict pull toward a particular conclusion. I’ve told you that no such faculty exists. Hume and Hutcheson were right. Plato and Kohlberg were wrong—in their descriptive claims and view of human nature. If my claims here are correct, then I think the emerging intuitionist paradigm in moral psychology has at least three major implications for legal scholars and the legal community.

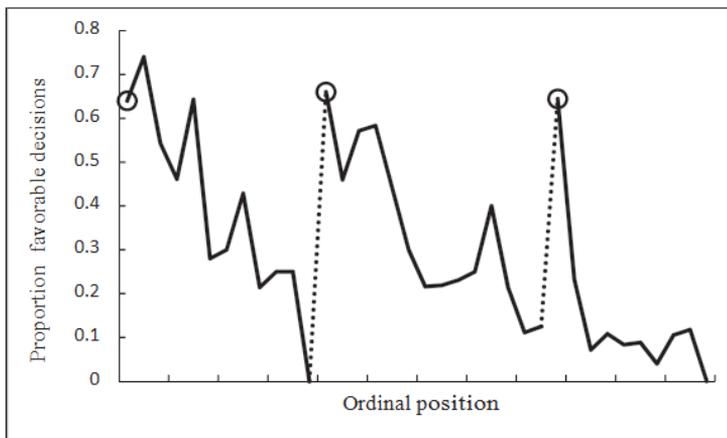
The first implication is that judges, like everyone else, are easily swayed by extraneous and improper influences. It is sometimes said that justice is what the judge ate for breakfast, but a recent study tested this idea and found that it is false. What the judge ate for breakfast is not terribly important, but *when* he ate breakfast can be among the most important determinants of his decisions. Israeli researchers looked at fifty full days of

23. This is a paraphrase of William James offered by Susan T. Fiske, *Social Cognition and Social Perception*, 44 ANN. REV. PSYCHOL. 155, 155, 171(1993).

24. Hugo Mercier & Dan Sperber, *Why Do Humans Reason? Arguments for an Argumentative Theory*, 34 BEHAV. & BRAIN SCI. 57, 57 (2011), available at <http://www.dan.sperber.fr/wp-content/uploads/2009/10/MercierSperberWhydohumansreason.pdf>.

judging by eight parole judges.²⁵ The parole applicants were Palestinians and Jews who were in prison, and were potentially eligible for early release. The researchers obtained the full record of each case, including the time that each decision was rendered, and they were able to plot what the likely result was at each ordinal position throughout the day.

Figure 2: Hunger and Parole



Source: Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 Proceedings of the Nat'l Acad. of Sciences of The U.S. 6889 (2011). Copyright 2011, Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso. Reprinted with permission.

The graph shows that if you are first on the docket, right after the judges ate breakfast, you'll probably be granted parole. But your odds decline drastically as the morning goes on, reaching pretty close to zero if you have the bad fortune to be the case heard just before the judges' late morning snack. After the snack your odds of parole shoot back up, to around 60%, but decline drastically again until the lunch break. Same story after lunch.

The assignment of parolees to time slots is truly randomized—the judges don't tackle the easy cases when they are freshest. Rather, the timing depends on when the lawyers for each case show up. The researchers controlled for many other variables. Reassuringly, it didn't matter whether the prisoner was Jewish or Muslim, and it *did* matter whether the applicant had prior convictions. But the most important single

25. Shai Danziger, Jonathan Levav, & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES OF THE U.S. 6889 (2011), available at <http://www.pnas.org/content/108/17/6889.full.pdf+html>.

determinant of these people's futures was the number of minutes since the judges had last eaten.

The second implication of the new intuitionism is that Hutcheson and the legal realists are right, at least descriptively. Empirical findings don't directly dictate normative conclusions, but I don't think you can engage in normative discussions until you have an accurate description of the kinds of creatures we happen to be. And I think the legal realists were right about the kinds of creatures we happen to be. Oliver Wendell Holmes put it like this:

The more we examine the mechanisms of thought, the more we shall see that the automatic unconscious action of the mind enters largely into all its processes. Our definite ideas are stepping stones. How we get from one to the other, we do not know. Something carries us. We do not take the step.²⁶

In light of Holmes's statement, consider the famous quote from then-Judge Sonia Sotomayor, which was widely discussed in her Supreme Court confirmation hearings: "a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."²⁷ Compare that with the more rationalist assertion of Justice O'Connor: "A wise old man and a wise old woman will reach the same conclusion in deciding cases."²⁸ In easy cases, where the evidence and the law are both clear, I imagine that Justice O'Connor is correct. Judges do indeed follow and apply the law with great skill. But Judge Sotomayor was talking about the hard cases. She was talking about cases where a person's situated experience as an immigrant, a woman, or a mother, for example, could be relevant to the case. Might there be a difference between the way that a wise old man and a wise Latina woman look at the case? Might there be a difference in their initial intuition about a case, and the conclusion they'd like to reach, and the hypotheses they'd try to confirm? Of course. To believe otherwise is to subscribe to the rationalist delusion.

This brings us to a third implication, which is the problem of conflicts of interest. Conflicts of interest are so powerful because we are so good at lying to ourselves. We reach the conclusion we are motivated (or paid) to reach, and then ask ourselves: Did I make an objectively defensible

26. OLIVER WENDELL HOLMES, *MECHANISMS IN THOUGHT AND MORALS: AN ADDRESS BEFORE THE PHI BETA KAPPA SOCIETY OF HARVARD UNIVERSITY*, JUNE 29, 1870, at 48–49 (Boston, James R. Osgood & Co., 1871).

27. Charlie Savage, *A Judge's View of Judging Is on the Record*, N.Y. TIMES (May 14, 2009), <http://www.nytimes.com/2009/05/15/us/15judge.html>.

28. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1558 (1991).

decision? It's so easy to confirm that hypothesis that we all end up convinced that we were not influenced by extraneous motives. We convince ourselves that we decided the case on its merits.

Judges seem particularly blind on this point, perhaps because of their vulnerability to the rationalist delusion and the belief, expressed by Justice O'Connor, that they are simply applying the law. Just look at the case of *Caperton v. Massey*.²⁹ This was a precursor case to *Citizens United*.³⁰ In the late nineties, Hugh Caperton was president of a mining company, and Massey Coal backed out on a major deal with Caperton's company. That pushed Caperton's company into bankruptcy. Caperton sued Massey Coal and won a fifty million dollar jury verdict in West Virginia. Massey appealed the case to the West Virginia Supreme Court. While the appeal was pending, there was an election, and Brent Benjamin was a candidate for the Supreme Court. The CEO of Massey Coal, Don Blankenship, gave three million dollars to Benjamin's campaign. He started a charity called "For the Children," which was really just a front for supporting Benjamin's campaign. This front group contributed the majority of all money raised by Benjamin, more than all other donors combined. Benjamin won the election and *did not recuse himself* from the Massey case. He decided to rule on it—on a case involving the man who gave him the majority of his campaign chest—and he cast the deciding vote. Not surprisingly, his vote overturned the jury's verdict and award.

Caperton didn't take this lying down. He appealed to the U.S. Supreme Court, which agreed with him. This was indeed a constitutional issue, and Justice Kennedy agreed with the argument that the corruption was so strong in this case that Caperton was denied his constitutional right to due process. Justice Kennedy wrote:

Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and pending case—"offer a possible temptation to the average . . . judge . . . to lead him not to hold the balance nice, clear and true."³¹

Yet in rendering this judgment, Justice Kennedy shows a general reluctance to criticize or question the integrity of another judge. So he says:

[B]ased on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and

29. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009).

30. *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

31. *Caperton*, 556 U.S. at 886 (alteration in original) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).

inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.³²

This makes me want to scream. I can understand the awkwardness of asserting that a state supreme court judge was influenced by a three million dollar campaign contribution, and of course we can't prove it in a single case. But as a social psychologist, I can say that most people are influenced by gifts whose value is trivial. Reciprocity is among the most powerful forces in the social world. If a waitress gives you a free mint with your check, you're likely to leave her a larger tip. If you accept a free sample in a store, you're more likely to buy something from that store. If someone gives you something, and you take it, you owe them. You want to repay.³³

A representative from the National Science Foundation once visited me at the University of Virginia. We went out to get coffee, and I tried to pay for us both. She said that federal guidelines prohibit her from accepting a cup of coffee, and upon reflection I had to agree that it was a wise policy. I knew that if she accepted that cup of coffee from me, she would be more likely to look upon my grant applications favorably, and she would therefore not be a wise steward of public money. This is obvious once you put it this way. We don't want people giving gifts to those who have the responsibility to judge petitions from the gift givers. We all know this—all of us except for judges. I am very concerned that some states elect their judges, forcing those judges to raise money from the very people they are going to be judging. And I am shocked that judges get to decide for themselves whether or not to recuse themselves from cases. Judges seem to have a culture of non-judgmentalism toward each other—they trust each other to know when they will or will not be influenced by massive cash gifts. Such trust might be warranted in a world of rationalist perfection. It is not warranted in the world that we actually inhabit.

Now back to the *Caperton* case, which as I said was a precursor to the *Citizens United* case which unleashed a tidal wave of additional money into our electoral system. Here is an excerpt from Justice Kennedy's ruling in that case:

This Court now concludes that independent expenditures, including those made by corporations, *do not give rise to corruption or the appearance of corruption*. That speakers may have influence over or access to elected officials *does not mean that those officials are*

32. *Id.* at 882.

33. For a review of studies on the power of trivial gifts to produce reciprocal behavior, see ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* (4th ed. 2001).

*corrupt. And the appearance of influence or access will not cause the electorate to lose faith in this democracy.*³⁴

I cannot comment on Justice Kennedy's legal reasoning, but to the extent that he is making claims about human behavior, and about the way people perceive and interpret the behavior of others, I am professionally qualified to render a verdict: This is among the worst psychological reasoning I have ever seen. I have italicized the empirical claims that I and most social psychologists would say are false. Does Justice Kennedy have any authority or justification for his false claims? Why yes, he does include a citation: *Caperton v. Massey*. He cites his own reasoning in the earlier case, where he bent over backwards to avoid criticizing a fellow judge, and now he extends that courtesy to all elected officials. With one decision, Justice Kennedy has extended the corruption of our Democracy by a giant leap. With one paragraph of bad psychological thinking, Justice Kennedy has caused vast swaths of the electorate to lose even more faith in this Democracy.

In conclusion, there is a delusion stalking the academy. Not just in departments of psychology and philosophy, but in schools of law and in the highest court in the land. It is the belief that there exists a reliable faculty of reasoning, capable of operating effectively and impartially even when self-interest, reputational concerns, intergroup conflict, and a three million dollar donation pull toward a particular conclusion.

I would like to close by suggesting that the practice and teaching of law could be improved by the incorporation of more psychology into the curriculum. Judges should evaluate laws with a proper understanding of human nature and its vicissitudes. Just as important, they should have a proper understanding of themselves and their own limitations.

34. *Citizens United*, 130 S. Ct. at 884 (emphasis added).