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JUDGING JUDGES AND DISPUTE RESOLUTION PROCESSES

John Lande*

I. INTRODUCTION

"I'm *shocked, shocked* to find that gambling is going on in [this casino]!" says Captain Louis Renault, just before the croupier hands him his winnings in the classic movie *Casablanca*.¹ Would disputants² be similarly shocked to discover that judges make psychological errors that Professor Chris Guthrie describes in *Misjudging*,³ the provocative lead article in this symposium? That article is the latest work in his important project of analyzing conventional wisdom in the dispute resolution field.⁴ For example, in a recent award-winning article, he presents empirical evidence challenging a widely-held belief that brainstorming many options for solving a problem leads to better results. Always measured, Guthrie does not categorically recommend against brainstorming or other processes to generate options, but rather urges negotiators to recognize risks involved and to use caution in developing and evaluating options.⁵ Similarly, in *Misjudging*, Guthrie presents evidence of three types of decision-making errors that judges make and he cautions disputants about using judicial adjudication, though he does not categorically recommend against it.⁶

Misjudging makes two major arguments. The first is a descriptive, empirical argument that judges are prone to error because of three types of "blindness" and that people underestimate the amount of such judicial error.⁷ The second

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¹ Internet Movie Database, Memorable Quotes from *Casablanca* (1942), <http://www.imdb.com/title/tt0034583/quotes> (last visited Mar. 14, 2007) (emphasis added).

² In this Article, references to represented disputants include their lawyers, except as obvious from the context. References to lawyers do not include their clients, however.

³ Chris Guthrie, *Misjudging*, 7 NEV. L.J. 420 (2007) [hereinafter Guthrie, *Misjudging*].

⁴ For example, he presents empirical evidence challenging a widely-held belief that brainstorming many options for solving a problem leads to better results. See Chris Guthrie, *Panacea or Pandora's Box?: The Costs of Options in Negotiation*, 88 IOWA L. REV. 601 (2003) [hereinafter Guthrie, *Panacea*]. In 2003, this article received the CPR Institute for Dispute Resolution's prestigious award as the best professional article of the year. (The Institute subsequently changed its name to the International Institute for Conflict Prevention & Resolution).

⁵ *Id.* at 605-06.

⁶ See Guthrie, *Misjudging*, *supra* note 3, at 458.

⁷ *Id.* at 421. In *Misjudging*, Guthrie relies, in part, on data from two recent articles he co-authored. See Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251 (2005). For convenience, this Article refers to Guthrie as the author of these studies.

argument is prescriptive, recommending that, because of these judicial blinders, disputants should consider using non-judicial dispute resolution processes generally, and particularly facilitative mediation⁸ and arbitration. Guthrie qualifies both arguments, recognizing that the blinders do not cause judges to err in all their decisions and that disputants may rationally choose to have judges adjudicate their disputes in some cases.⁹

This Article briefly reviews both arguments. Part II notes that although *Misjudging* presents evidence that judges do make the kinds of errors that Guthrie describes, it does not address the critical questions of whether judges make these errors more than others, and it presents no evidence that people generally underestimate the amount of error that judges make. Judges are human and so it would be surprising if they do not make human errors.¹⁰ Part II cites evidence suggesting that judges do not generally make decision-making errors more often than others do and questions whether people underestimate the amount of judicial error.

Part III argues that most lawyers (and many disputants) are probably well aware of judges' fallibility and already take that into account in deciding whether to seek court adjudication. As reflected by generally low trial rates, most litigants go to trial as a last resort – when other processes seem even more problematic than trial. Although disputants may wisely choose facilitative mediation or arbitration in some cases, they may reasonably believe that evaluative mediation and trial are suitable in others. Part IV is a brief conclusion arguing that the empirical data presented in *Misjudging* do not support general recommendations about choice of dispute resolution processes, which disputants should base on a wide range of factors such as their values, interests, resources, relationships, and constraints.

⁸ Mediators using a facilitative style focus on eliciting the parties' opinions and refrain from expressing their opinions about preferable settlement options. Mediators using an evaluative style express their opinions about preferable settlement options and may try to influence parties to accept them. See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 23-24 (1996). Riskin later suggested using the terms "elicitive" or "party-influenced" instead of facilitative and "directive" or "mediator-influenced" instead of evaluative. See Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 30-33, 37-38 (2003).

⁹ Guthrie, *Misjudging*, *supra* note 3, at 420.

¹⁰ Guthrie cites Jerome Frank's article entitled *Are Judges Human?* and states that the answer is self-evident. *Id.* at 421 (citing Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931)). He also cites Geoffrey Miller's typology of "bad judging" that generally involves such things as incompetence, bias, and corruption, and he states that his argument does not address such problems. *Id.* (citing Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 432-33 (2004)). Similarly, references in the present Article to judicial errors or misjudgments do not include the problems identified in Miller's typology. Rather, such references track Guthrie's focus on systematic psychological errors. References in this Article to "fallibility" refer to propensity to make such systematic errors rather than merely random or idiosyncratic errors.

II. DO JUDGES MISJUDGE MORE OFTEN THAN OTHER PEOPLE – AND DO PEOPLE MISJUDGE HOW MUCH JUDGES MISJUDGE?

Professor Guthrie presents empirical research finding that judges make certain types of informational, cognitive, and attitudinal errors.¹¹ Referring to the first type of errors, he writes that “judges (as well as jurors) possess informational blinders that can prevent them from disregarding this inadmissible information when making merits-based decisions, like assessing liability or awarding damages.”¹² The cognitive blinders lead people to make decisions using simple mental shortcuts (called “heuristics”) rather than rational calculation of all available information.¹³ Guthrie describes three such heuristics: anchoring (where people make evaluations based on initially stated values, which may be quite arbitrary), hindsight bias (where people revise their accounts of their beliefs at a particular time after gaining new information), and self-serving bias (where people overestimate favorable attributes about themselves).¹⁴ Attitudinal blinders predispose people to perceive things in ways that are consistent with their attitudes, such as general political philosophies.¹⁵

Guthrie’s argument in *Misjudging* is based primarily on experiments comparing judges’ responses to different experimental conditions rather than comparing judges’ responses to those of other populations.¹⁶ He recognizes that

¹¹ For convenience, this Article refers to these errors collectively as psychological errors or blinders.

¹² Guthrie, *Misjudging*, *supra* note 3, at 422 (footnote omitted). Examples of such inadmissible evidence include subsequent remedial measures, communications protected by the attorney-client privilege, and prior criminal convictions. *Id.* In these situations, judges actually do consider inadmissible evidence in making decisions, so it might be more accurate to say that the judges *do not* use blinders when they know that they are legally required to do so.

¹³ *Id.* at 429.

¹⁴ *Id.* at 430.

¹⁵ *Id.* at 440.

¹⁶ For the sake of argument, this Article assumes that the phenomena that Guthrie describes are generalizable to the real world even though the degree of generalizability is questionable. Experimentation is a powerful research method that can help to identify causal relationships. Researchers randomize assignment of subjects to experimental and control groups and rigorously limit the stimuli that subjects respond to. As a result, researchers can screen out possible extraneous causes for differences they observe and thus have greater confidence in the causal effect of their experimental manipulations. Screening out subject selection biases and other factors in the real world, however, reduces the generalizability of the findings to the real world. Guthrie recognizes these limitations of his data:

The decisions that judges made in response to our materials differ from the decisions that they make in their courtrooms in several important ways. In the courtroom, judges must make decisions based on more detailed and complicated records, are more highly motivated to make accurate judgments, and have more time and resources to devote to the decision. Many cases also doubtless turn on issues less subject to the effects of cognitive illusions. Others are so straightforward that cognitive illusions should not influence the outcome. These differences suggest that we should be cautious in interpreting our results.

Guthrie et al., *supra* note 7, at 819.

Moreover, even if the experimental results were fully generalizable, they do not indicate that all judges make errors when presented with illusive stimuli or that all judges give correct responses to less-confusing stimuli. See Thomas A. Lambert, *Two Mistakes Behavioralists Make: A Response to Professors Feigenson et al. and Professor Slovic*, 69 *MO. L. REV.*

“[i]t is true, of course, that the disputants themselves are likely to be influenced by the very same blinders (as well as some others) that influence judges.”¹⁷ Citing one of his studies, he argues that judges actually are less susceptible to certain blinders than other people:

[T]he judges in our study appear to be just as susceptible as other decision makers to three of the cognitive illusions we tested: anchoring, hindsight bias, and egocentric bias. Though still susceptible to framing and the representativeness heuristic, the judges appear less susceptible than other decision makers to these effects.¹⁸

Indeed, in an earlier article, he summarizes other research showing that jurors are prone to many blinders:

Decades of research on juries indicate[] that cognitive illusions adversely affect the quality of adjudication. Researchers have found, for example, that juries believe that litigants should have predicted events that no one could have predicted, allow irrelevant or inadmissible information to influence liability determinations, defer to arbitrary numerical estimates, and rely on incoherent methods to calculate damages.¹⁹

That article points out that not only do juries of laypersons make such errors, but many professionals also make such errors. “Empirical studies demonstrate that cognitive illusions plague assessments that many professionals, including doctors, real estate appraisers, engineers, accountants, options traders, military leaders, and psychologists, make. Even lawyers fall prey to cognitive illusions.”²⁰

Considering that all groups of humans are human and thus prone to error, it is not particularly helpful to note that one group – in this case, judges – is fallible. Some groups are less fallible than others and, indeed, in his earlier article Guthrie argues that judges are especially likely to reduce their errors:

Judges are likely to be better decision makers in circumstances where decision-making experience can blunt the effects of cognitive illusions. For example, even though our results suggest that judges rely on anchors as much as juries do, judges might avoid some of the unwanted effects of anchoring if they are aware of awards in comparable cases and can use this information as a source of anchors. Although anchors from similar cases might be somewhat inaccurate, at least they are not provided by litigants. In contrast to judges, jurors are less likely to have comparable information at their disposal and may be more susceptible to partisan anchors, such as damage requests made by plaintiffs’ attorneys.²¹

Similarly, in another article, Guthrie argues that “lawyers are more likely than their clients to evaluate decision options in a rational manner.”²² He writes:

1053, 1054 n.6 (2004) (collecting criticisms of over-generalization of research on decision-making). Thus Guthrie’s findings of statistically significant differences indicate some degree of increased *risk* (rather than certainty) of judicial error. Considering the contextual differences between experimental and real world stimuli, it is hard to extrapolate the experimental data to predict the frequency or consequences of judges’ errors in the real world.

¹⁷ Guthrie, *Misjudging*, *supra* note 3, at 449.

¹⁸ *Id.* at 458 n.216 (citing Guthrie et al., *supra* note 7, at 816).

¹⁹ Guthrie et al., *supra* note 7, at 780-81 (footnotes and emphasis omitted).

²⁰ *Id.* at 782-83 (footnote omitted).

²¹ *Id.* at 826.

²² Guthrie, *Panacea*, *supra* note 4, at 643.

Lawyers are more likely than others to use compensatory rules [which are technically more rational than non-compensatory rules] when assessing negotiation options because lawyers are among the more rational and analytical members of society. . . . This is not to say, of course, that lawyers are pure “rational actors” who are impervious to the effects of psychological “biases” in decision making; in fact, lawyers, like other novice and expert decision makers, are susceptible to such biases. However, experimental evidence suggests that lawyers are more likely than others to be able to resist these biases and make decisions rationally.²³

Virtually all judges in U.S. courts of general jurisdiction are lawyers, who not only have the benefit of individual characteristics, training, and experience of lawyers but also that of judges.

Even if judges generally do make the same amount of psychological mistakes or even less than others, disputants may nonetheless underestimate judges’ fallibility, perhaps even expecting that judges would not make any psychological mistakes. In *Misjudging*, Guthrie argues, without support, that there is a “still-dominant assumption that the courthouse is the proper locus of dispute resolution” and the “legal system implicitly assumes that judicial error is infrequent, random, and often ‘harmless.’”²⁴ To the extent that this is an accurate description of an assumption in the legal system, it is probably more of an operating assumption needed to make it function effectively than an actual belief about empirical fact.²⁵ Many judges, lawyers, and other knowledgeable observers (as well as many laypersons) may be as shocked to discover that judges are fallible as they would be to find out that gambling takes place in casinos.²⁶

III. SHOULD JUDGES’ MISJUDGMENTS CAUSE DISPUTANTS TO AVOID COURT ADJUDICATION?

Professor Guthrie rightly highlights some of the benefits of disputants agreeing to resolve their disputes without court adjudication, which include

²³ *Id.* at 641 (footnotes omitted).

²⁴ Guthrie, *Misjudging*, *supra* note 3, at 448, 421. The article provides no evidence supporting these assertions. In an earlier article, Guthrie notes a division of opinion by judges and legal scholars about judges’ ability to disregard inadmissible evidence. *See* Wistrich et al., *supra* note 7, at 1255-58.

²⁵ Guthrie cites eight judicial opinions referring to a *presumption* that judges can disregard inadmissible evidence as well as several secondary sources to the same effect. *See* Wistrich et al., *supra* note 7, at 1255 nn.21-22. These clearly seem to be statements of legal policy rather than assertions of empirical fact. It is hard to believe that these writers actually believe that judges invariably do disregard inadmissible evidence. Indeed, if the writers believed that this were an empirical fact, they would not need to presume it to be so. It seems more likely that the writers believe that judges sometimes – but not always – can disregard inadmissible evidence and are supporting a legal policy intended to make the legal system operate smoothly. Such writers may seek to avoid disruption that would result from generally precluding judges from presiding over cases where they have heard some inadmissible evidence and reversing trial court decisions where they had heard some such evidence.

²⁶ For such an analysis, it would be helpful to gauge people’s perceptions about the frequency, nature, and consequences of judges’ errors. This data might be hard to obtain because people may have a hard time distinguishing between errors due to psychological blinders and other causes such as bias, incompetence, or corruption. *See supra* note 10 (distinguishing judges’ psychological errors from “bad judging”).

avoidance of the risk of adverse binding decisions resulting from judicial error.²⁷ As he acknowledges, disputants may already take such risks into account in their decisionmaking, considering the relatively small proportion of disputants who seek legal services, file suit, and seek court adjudication in their cases.²⁸ Indeed, empirical evidence suggests that disputants generally seem to be quite discriminating in their decisions about whether to engage lawyers and actually obtain court adjudication. When people do invoke the legal system, the norm is “litigotiation” – “the strategic pursuit of a settlement through mobilizing the court process”²⁹ – rather than actual adjudication. Social scientists Sally Engle Merry and Susan Silbey found that people who feel aggrieved typically go to court only if they are unsatisfied by avoiding the problem or talking it out.³⁰ Guthrie cites data suggesting that in the vast majority of situations where individuals have disputes that might be taken to court, only about 10% consult lawyers and 5% file suit in court.³¹ In cases where disputants actually file suit, only a relatively small percentage actually go to trial, and the trial rate has been steadily declining for decades.³² For example, Professor Gillian Hadfield finds that in contested federal civil cases in 2000, only 4.6% of cases were terminated at trial.³³ In 23.3% of the cases, the termination was by nontrial adjudication and litigants settled 72.0% of the cases.³⁴

Professors Samuel Gross and Kent Syverud state that “[s]cholars are unanimous in recognizing that trials are not representative of the mass of litigated disputes.”³⁵ Analyzing California civil cases that went to jury trial, they found that

[The] few cases that do go to jury trial, perhaps 2% of civil filings, and less than 1% of all civil claims are very different from the mass of cases that settle. They are typically high-risk, all-or-nothing cases, cases with unusual facts or intransigent parties, cases that defy compromise. Their outcomes, by comparison with ordinary

²⁷ See Guthrie, *Misjudging*, *supra* note 3, at 448. He writes, “[i]n consensual processes like negotiation and mediation, the disputants might err, but they will not find themselves at the mercy of an error committed by a decision maker empowered by the state to impose that erroneous outcome on them.” *Id.* at 449.

²⁸ See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

²⁹ Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

³⁰ See Sally Engle Merry & Susan S. Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 171-76 (1984).

³¹ Guthrie, *Misjudging*, *supra* note 3, at 451 n.176 (citing Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 544 (1981)).

³² See *id.* at 451. Marc Galanter finds that trial rates have been declining in both federal and state courts in recent decades. See Galanter, *supra* note 28, at 459-60.

³³ Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 732 (2004) (includes directed verdicts as trials).

³⁴ *Id.* (includes consent judgments as settlements). In addition, courts adjudicate various non-dispositive pretrial issues, such as evidentiary and procedural matters. See generally Herbert M. Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161 (1986).

³⁵ Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996).

work-a-day settlement cases, are costly, unpredictable, and sometimes bizarre. Because jury trials and jury verdicts are the most visible products of litigation, these extreme and unrepresentative cases distort public perception of the administration of civil justice. In the process, they perpetuate the image of litigation as terror, which helps drive all but the most hopeless disputes out of court³⁶

Similarly, Syverud concludes that “the civil jury trial appears to be an alternative for the freaks – an alternative to be avoided.”³⁷ Overall, this pattern suggests that disputants generally are discerning users of courts, using litigation and, in particular, adjudication only when they believe it to be necessary. Guthrie presents no evidence that disputants overuse court services because they overestimate judges’ decisionmaking capabilities.

When considering what process to use to resolve a dispute, disputants do not have the luxury of choosing between fallible and infallible decisionmakers. Rather, they must choose between different groups of fallible decisionmakers, including their adversaries and even themselves.³⁸ Disputants are often suspicious of their adversaries, who they can presume to have strong interests to present one-sided arguments and extract partisan advantage. As Guthrie points out, people have “egocentric” or “self-serving” biases that can cause “litigants and their lawyers [to] overestimate their own abilities, the quality of their advocacy, and the relative merits of their cases.”³⁹ Disputants are also subject to a related bias called “reactive devaluation,” where disputants devalue offers merely because they are presented by their opponents.⁴⁰ Although these particular biases would normally prompt disputants to be extra vigilant in negotiating with adversaries, they contribute to adversarial dynamics, which can undermine the rationality of negotiation processes and results.⁴¹ Thus disputants must “choose their poison.” One option is to negotiate with adversaries who they may reasonably believe are trying to gain an advantage of over them. Another option is to seek court adjudication by judges who are admittedly fallible but who operate within a structure and culture intended to minimize errors. Under these circumstances, it might be surprising that people do not adjudicate more often.⁴² When negotiating with an unreasonable adversary, seeking court adjudication may be a rational choice of the lesser of the evils.

So far, this discussion has generally assumed that in choosing dispute resolution processes, disputants are most interested in obtaining accurate results as

³⁶ *Id.* at 63.

³⁷ Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 *UCLA L. REV.* 1935, 1944 (1997).

³⁸ Although Guthrie does not present data about decisionmaking errors of groups of disputants, one might infer from research on jurors that disputants from the general public make errors in decisionmaking like judges. *See supra* text accompanying note 19.

³⁹ Guthrie et al., *supra* note 7, at 812-13.

⁴⁰ *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 *OHIO ST. J. ON DISP. RESOL.* 235, 246-47 (1993).

⁴¹ *See generally id.*; ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 17-25 (2000).

⁴² Presumably more disputants would seek adjudication if the costs and risks were reduced. Disputants certainly face risks of misjudging, though adjudication entails many other risks (such as the vagaries of witnesses’ and lawyers’ performances in court) that may dwarf the risks of misjudging.

provided by law.⁴³ Guthrie properly notes that “disputants might decide to place a primacy on other values in disputing, like self-determination, creativity, improved relationships, speedier and cheaper resolutions, and so forth.”⁴⁴ For example, Christopher Honeyman and his colleagues argue that many disputants especially value connectedness and authority in selecting mediators.⁴⁵ They define these terms as follows:

⁴³ Guthrie’s work is part of the school of behavioral law and economics, which attempts to improve rational choice models of decisionmaking by analyzing people’s systematic errors. See generally BEHAVIORAL LAW & ECONOMICS (Cass R. Sunstein ed., 2000). Professor Mark Suchman argues that both the rational choice and behavioral schools assume that people use a general four-step model of decisionmaking involving the following questions and decision: “(1) What are my goals/preferences?, (2) What are my alternatives?, (3) What are the consequences of my alternatives for achieving my goals?, (4) Choose the alternative that maximizes goal attainment.” Mark C. Suchman, *On Beyond Interest: Rational, Normative and Cognitive Perspectives in the Social Scientific Study of Law*, 1997 WIS. L. REV. 475, 477 (crediting this analysis to Stanford organizational theorist James March). He describes this as a model of “consequential action” referring to the process of “calculated evaluation of the consequences of various strategies.” *Id.* Although behavioral theory focuses on systematic errors in such calculations, it is a model of consequential action as much as rational choice theory. Suchman contrasts this with “obligatory action” models, involving the following questions and decision: “(1) What kind of situation is this?, (2) What kind of person am I?, (3) What is appropriate for person like me in a situation like this?, (4) Do it.” *Id.* at 479. This model

downplays people’s interests, preferences, and cost-benefit calculations. Instead, it emphasizes how people form their identities, how people define and categorize the situations in which they find themselves, and how people learn their parts in the social drama. This is not how we, as Americans, like to think of ourselves. Steeped in the consequentialist ethic, we prefer to see our behaviors as fully rational, well informed, thoughtful and even calculating – and the “bigger” the decision, the stronger our allegiance to the rational paradigm. In many cultures throughout history, however, people would feel that something was profoundly wrong with anyone who engaged in self-interested calculations over such issues as whom to marry and when; what kind of work to do and how diligently to do it; and whether to obey one’s parents, one’s priest, one’s king. And even in America today, there is reason to suspect that we, too, base many of our behaviors on cultural roles and scripts – either because we feel that society’s roles are morally right, or because deviation from society’s scripts would threaten the stability and meaningfulness of our social world.

Id. at 479-80.

Arguing that scholars have “metatheoretical biases” about these models, Suchman advocates a pluralistic approach that recognizes the merits of both models. See *id.* at 500-01. Applying these insights to a dispute resolution context, analysts should recognize that people do not necessarily use a consequentialist model in choosing dispute resolution processes and that it is not necessarily superior to an obligatory action model. Instead, analysts and practitioners should recognize that disputants presumably have different preferences about these models of decisionmaking.

⁴⁴ Guthrie, *Misjudging*, *supra* note 3, at 448. He makes this observation “recognizing that accuracy is often elusive in court.” *Id.* Even if judges were infallible or made only few or unsystematic errors, some people would value certain things more than decision accuracy. For systems to help disputants choose between dispute resolution processes, which list multiple criteria for process selection, see John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004); Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEG. J. 49 (1994).

⁴⁵ See generally Christopher Honeyman, Bee Chen Goh & Loretta Kelly, *Skill Is Not Enough: Seeking Connectedness and Authority in Mediation*, 20 NEG. J. 489 (2004).

By connectedness, we mean a sense on the parties' part that the mediator is, in some way, "one of us." By authority, we mean a sense on the parties' part that, even while being "one of us," the mediator is a person of more than average seriousness of purpose, experience, and gravitas.⁴⁶

Connected and authoritative mediators provide a great value for some disputants who want legitimacy or reassurance for themselves and/or their constituents. For many such disputants, risks associated with some degree of mediators' fallibility are far outweighed by the benefits of connection and authority. Honeyman and his colleagues note that disputants selecting mediators seem relatively indifferent to the technical virtues of interest-based and facilitative mediation, despite the fact that most mediation teachers and trainers have espoused this as the preferred approaches. For example, they found that the Mediation Center in St. Paul has "trained more than 2,000 Minnesota lawyers and judges in the 'elicitive' [commonly known as facilitative] model of mediation only to discover, years later, that the practice had shifted to one primarily focused on monetary evaluation."⁴⁷ They argue that disputants (or, more commonly, their lawyers) prefer retired judges as mediators (who often use evaluative approaches in mediation) because they provide connectedness and authority, which are valued more than the technical skill of facilitative mediation:

After all, a reputable former judge embodies a host of signifiers of authority, of a kind to which the parties' lawyers who generally select the mediators are particularly sensitive. At the same time, the connectedness factor also plays a part in the selection of judge-mediators by lawyers, in the sense that, not only may they know the judge personally, but what they will get from a judge-mediator bears a strong resemblance to processes they understand and with which they have grown comfortable.⁴⁸

Although the disputants do not have the direct connectedness with judge-mediators that their lawyers are likely to have, the parties may appreciate this value vicariously through their lawyers. In any case, both disputants and lawyers are likely to appreciate judge-mediators' authority.⁴⁹ By the same token, some disputants may legitimately value the connection and authoritativeness that judges provide in court adjudication.

Professor Guthrie's suggestion that disputants consider arbitration instead of court adjudication illustrates the variety of values that may outweigh technical decisionmaking. Recognizing that individual arbitrators are likely to make the same kinds of errors as judges, he focuses on potential benefits of arbitration by *panels* of arbitrators, arguing that "group decision makers might be better able to avoid the cognitive blinders that can undermine individual decision making."⁵⁰ Guthrie makes this as a tentative suggestion, noting that the evidence is "decidedly mixed" but there is "at least a hint in the literature, though, that group decision makers might be better equipped to combat some of

⁴⁶ *Id.* at 501.

⁴⁷ *Id.* at 491.

⁴⁸ *Id.* at 503.

⁴⁹ Disputants may especially value evaluative mediation because it offers a neutral authoritative opinion with the freedom not to be bound by it.

⁵⁰ See Guthrie, *Misjudging*, *supra* note 3, at 455.

the more pernicious cognitive blinders.”⁵¹ For the purpose of argument, this Article assumes substantial confidence that group decisionmaking is significantly less prone to error than individual decisionmaking. Using a panel of arbitrators has major effects on the dispute resolution process, notably by substantially increasing the arbitrators’ fees and logistical constraints involved by involving additional professionals in the process. Thus using of a panel of arbitrators would make economic sense only in cases where there is a sufficiently large amount at stake to justify the additional costs. As a practical matter, most disputants presumably know that there is no perfect dispute resolution process and that they need to decide how much accuracy and justice they can afford.⁵² In balancing multiple possible goals and values, disputants are likely to differ about the relative importance of accuracy of decisionmaking. Those who have higher priorities than accuracy or who feel that they cannot afford to use panels of arbitrators would obviously seek other dispute resolution processes.

IV. CONCLUSION

Professor Chris Guthrie offers an intriguing analysis of risks caused by judges’ psychological blinders. Although disputants may have a general sense that judges are fallible, most probably do not have a good understanding of the types of errors that judges make. Disputants seeking to select an optimal dispute resolution process in their cases might reasonably consider judges’ potential blinders in choosing a process that best satisfies their top-priority interests. As a careful analyst, Guthrie provides a balanced argument that frankly recognizes the limitations of the available evidence. Thus his argument is appropriately tentative and qualified. His argument would be far stronger if researchers could demonstrate the following general facts: (1) the psychological blinders that Guthrie describes actually cause a substantial proportion of judges to make significant decision-making errors in the real world (not merely in laboratory experiments); (2) in choosing dispute resolution processes, a substantial proportion of disputants significantly underestimate the frequency and/or seriousness of such judicial errors; and (3) a substantial proportion of disputants highly value decisional accuracy, especially compared to other characteristics of dispute resolution processes (such as connectedness and authority). Without convincing evidence establishing these facts (or, more importantly, knowledge of particular disputants’ priority for decisional accuracy as a criterion of dispute resolution process selection), it would not be rational to advise disputants generally to use facilitative mediation or avoid trial. Indeed, depending on disputants’ values and preferences, there are good reasons to choose facilitative

⁵¹ *Id.*

⁵² See John Lande, *How Much Justice Can We Afford?: Defining the Courts’ Roles and Deciding the Appropriate Number of Trials, Settlement Signals, and Other Elements Needed to Administer Justice*, 2006 J. DISP. RESOL. 213, 213-14 (“Lawyers provide a valuable service to such clients by discussing whether the advantages of extensive litigation are likely to outweigh the disadvantages, whether the clients can realistically afford the likely costs, and whether this would be the best strategy for achieving their goals.”).

mediation,⁵³ or evaluative mediation,⁵⁴ or trial, among other dispute resolution processes.⁵⁵

Although it is interesting to consider empirical research findings about disputants' perceptions and preferences in general, lawyers are likely to find them to have limited value in actual cases given the numerous and complex range of factors and disputant preferences at play in most disputes. A threshold factor is the extent to which disputants have a consequentialist or obligatory action mindset⁵⁶ as the careful calculation of judges' degree of misjudgment would be largely irrelevant to disputants with a predominantly obligatory action perspective. Rational disputants and scholars with a predominantly consequentialist mindset might use findings like Guthrie's to develop tentative hypotheses about preferable dispute resolution processes in particular cases. To make concrete recommendations or decisions, however, they will need to rely primarily on individualized assessments of such factors as the disputants' mindsets, values, interests, resources, relationships, and constraints.

⁵³ See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 FLA. ST. U. L. REV. 839, 868-79 (1997) (proposing criteria for "high-quality consent" that are consistent with facilitative mediation); John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 325 n.25 (suggesting the term high-quality "decision-making" rather than "consent").

⁵⁴ See generally Marjorie Corman Aaron, *Evaluation in Mediation*, in *MEDIATING LEGAL DISPUTES* 267-305 (Dwight Golann ed., 1996).

⁵⁵ See Frank E. A. Sander & Lukasz Rozdeiczer, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 12 (2006) (suggesting that court adjudication is appropriate when parties seek public vindication, neutral opinion, establishment of legal precedent, maximizing or minimizing outcomes, shifting of responsibility for decision-making to a third party).

⁵⁶ See *supra* note 43.