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COMMENTS

GOOD AND BAD BIAS: A COMMENT ON FEMINIST THEORY AND JUDGING

PATRICIA A. CAIN*

Professor Judith Resnik has provided us with an elegant juxtaposition of two superficially competing theories.¹ One cannot help but be reminded of the traditional Cartesian dualism of mind and body. Theories of judging fall on the objective (mind) side of the suggested dichotomy while feminist theory falls on the subjective (body) side. Recognizing this potential dichotomy,² Professor Resnik presses ahead, encouraging us to rethink our notions of judging informed by our burgeoning understanding of feminist theory. Her approach to the question she poses (what aspirations do we hold for our judges?) is feminist theory at its best. She transcends the Cartesian-rooted dichotomy and proposes the beginning of a dialogue.

I welcome this dialogue and the reconsideration of the judicial role that is its focus. My task as commentator is to move the dialogue forward.

What sorts of traits do we want our judges to have? What can feminist theory teach us about theories of judging? Specifically, what does feminist theory tell us about the aspirations we currently have for our judges—that they be disinterested, disengaged, impartial, and independent?

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1. Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1881 (1988).

2. *Id.* at 1921 ("The language of the law of judges and the language of feminism have virtually no convergences.").

I take it that “bias”—in addition to being “a line diagonal to the grain of a fabric”³—can be both good and bad. To the extent a bias is a personal preference, something a person has affection for, it is something we want to acknowledge and celebrate about human personality. Can you imagine a person with no preferences? On the other hand, to the extent a person’s bias constitutes bigotry, prejudice, or intolerance, we certainly do not want to celebrate it. Thus, we might say that whereas we want judges who have affection for things, we do not want judges who are prejudiced. We want the good bias, but not the bad one.

Professor Resnik calls upon feminist theory to critique our notions of judges as disinterested, disengaged, impartial, and independent.⁴ She suggests that there is a sense in which we want our judges to be interested, engaged, partial, and interdependent. In her terms, we want our judges to be compassionate, caring, and connected. Again, we want the good bias, but not the bad one. The trick, of course, is to be able to say which is which.

There is an additional trick in the task before us. I can think of no human act more likely to separate one person from another than the act of judging. I cannot say with any confidence whether the act of judging requires separation to give it meaning and validity or whether we, as human beings, require the separation as a psychological aid to reduce our own pain and conflict. My guess is that both explanations possess some merit. I also think that feminist theory offers us valuable insight regarding this problem of how to judge while being connected.⁵

The point of my comments will be to focus on the two difficulties that I have identified: (1) the difficulty of distinguishing good bias from bad; and (2) the difficulty of maintaining the good bias (good connection) in the process of judging.

To be more specific about good and bad bias, I will tell some stories. Telling stories is good feminist methodology. Concrete examples ensure that we begin at the same particular point before we jump to abstract principles. Because I have lived my life differently than you have, you are not likely to catch my full meaning if I make all my comments at the abstract theoretical level.

3. See *id.* at 1881 (quoting WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 82 (1963)).

4. I do not understand this critique to include the notion that the judiciary ought to be “independent” from the executive and legislative branches of government. This “independence” is one which Professor Resnik correctly praises. See *id.* at 1884.

5. See, e.g., *id.* at 1928 (“A great gulf lies between mothering and judging but judging may well have much to learn from maternal thinking.”).

Before telling my stories, however, I have a disclaimer to make. Perhaps it is a confession. I assume that commentators are chosen because they know something about the topic upon which they are asked to comment. As to feminist theory, I may be as well versed as Professor Resnik is; but, when it comes to what it is that judges do, my knowledge is much more limited. Apart from feminist theory, the thing that I know best is tax law. Of course, I do have some sense of what judges do in tax cases. My confession is that my first story will be about a tax case. The themes of the story are connectedness and community, two themes that run through much of modern feminist theory.

Every good tax lawyer knows that if you have a client with a technical problem you argue your case in tax court. If you have a client with a case that is all facts and no law, however, you go to federal district court, sometimes to ask for a jury, but sometimes merely because the district judge is likely to share your client's point of view. They share the same community.⁶ The case I use in class to demonstrate this point comes from Mobile, Alabama.⁷ The taxpayer was a community-organized arts and sports association, formed for the specific purpose of acquiring all rights to host the "Senior Bowl" football game. The main backers of this venture were the local merchants and members of the business community who viewed the hosting of this annual event as "good business" for the community, whether or not the bowl game itself produced any profits.⁸ The association claimed tax exempt status and the IRS complained. Athletic events and merchants who support such events are not, in the ordinary sense of the words, charitable, educational, artistic, or literary as required by the taxing statute.⁹ Nonetheless, the federal district judge ruled in favor of the taxpayer. In a most telling opinion, the judge wrote: "The halftime shows put on by the famed Rangerettes of Kilgore College . . . and the Dixie Darlings of Mississippi Southern College . . . provide entertainment with a flavoring of art, dancing, and music, and undoubtedly have some educational . . . value."¹⁰

6. We purportedly desire our judges to be unbiased and disengaged, and to be impartial. And yet our judges do not step into the courtroom unconnected from their lives or from their communities.

7. *Mobile Arts and Sports Ass'n v. United States*, 148 F. Supp. 311 (S.D. Ala. 1957).

8. It had been run for two years by a Tennessee organization at a cumulative loss of \$29,000. *Id.* at 312.

9. See I.R.C. § 501(c)(3). The statute does not list "artistic" as a separate category. Artistic purposes are generally viewed as a subset of educational purposes. See Treas. Reg. § 1.501(c)(3)-1(d)(3)(ii) example (4).

10. *Mobile Arts and Sports*, 148 F. Supp. at 316.

I will not venture to say whether this was a good or bad decision.¹¹ Certainly it was good from the community's perspective in that it allowed the community to keep more tax dollars. The lawyer, seeking empathy on behalf of the client, certainly chose the right forum. This happens often in tax cases. The taxpayer is part of the community and the IRS is a stranger to the community.

This judge had a bias of sorts. How did he know how artistic the Kilgore Rangerettes were at halftime? I suggest that he brought his experience with him into the courtroom. He did not leave it at the door, nor did he make this decision unconnected from his community. In some ways this is a trivial example, but I think it raises the point nicely. Is this an example of good bias or bad bias? Which experiences should a judge leave outside the courtroom? Not too many, I should think, else there would be no real person there to do the judging.

My next story also hails from Alabama. (I have another confession to make: I practiced law in Montgomery before I began teaching law.) There is a restaurant in Montgomery, or at least there was, called the Elite. I always thought the name symbolic, although it was pronounced, "éé-light" by the locals. The Elite was a favorite hang-out for the lawyers, judges, and business folk of the community. I was introduced to the restaurant by my senior partner who took me there for lunch one day. When we arrived, he looked over to one side of the room and said, "Too bad, he's not here." "Who's not here?" I replied. "See that table over there?" he answered, "The district judge eats here pretty regularly, usually sits over there. Sits there by himself. Even when this place is crowded, no one sits there with him. They used to, but no longer."

The district judge, you may have guessed, was Frank Johnson, the judge who desegregated Montgomery¹² and much of the rest of

11. In point of fact, I may agree with the judge's determination that the organization was tax-exempt because it engaged in other clearly exempt activities such as sponsoring symphony concerts. The extent of these other activities, however, is not sufficiently delineated in the opinion. I am more troubled by the judge's rejection of the IRS's alternative claim that the bowl game produced unrelated business taxable income. See I.R.C. § 512. It was with respect to this claim that the judge felt compelled to demonstrate the exempt nature of the game itself by relying on the artistic and educational value of the halftime shows.

12. See *Gilmore v. City of Montgomery*, 176 F. Supp. 776 (M.D. Ala. 1959), (city policy of operating segregated parks held unconstitutional), *aff'd and modified*, 227 F.2d 364 (5th Cir. 1960) (modified to give Judge Johnson continuing jurisdiction of the cause because the city had closed all its parks and the court of appeals felt time was needed to work out a satisfactory alternative use for the property that would comply with the Constitution). In a subsequent ruling in the same case, Judge Johnson prohibited the city from allowing private segregated groups to use the parks. *Gilmore v. City of Montgomery*, 337 F. Supp. 22 (M.D. Ala. 1972), *rev'd in part*, 473 F.2d 832 (5th Cir. 1973), *rev'd in part*, 417 U.S. 556 (1975) (affirmed as to certain use by private segregated schools, but

Alabama.¹³ In the eyes of his community, that is, the community of the Elite, he was not connected. Like good and bad bias, there is good and bad connection.

Professor Resnik's paper suggests that we honestly recognize the fact that our judges are human and that they enter the courtroom with their life experiences. She asks us to heed Justice Shirley Abrahamson's observation that "[e]ach of us brings to the bench experiences that affect our view of law and life"¹⁴ Presumably when we speak of the qualities of impartiality and disengagement as aspirations for our judges, we do not mean that our judges should separate themselves from their life experiences during the entire process of judging. Presumably we do not mean that they should judge as robots, with no particular human point of view. If we are honest, we must admit that everyone has a point of view, a bias. Indeed, to the extent that our rhetoric of impartiality buries the realities of bias, it contributes to the corruption of power. As Martha Minow has observed, "Court judgments endow some perspectives, rather than others, with power. Judicial power is least accountable when judges leave unstated—and treat as a given—the perspective they select."¹⁵

If we are willing to admit that our judges naturally bring a point of view with them into the courtroom, then what sort of language should we use to talk about judicial bias? Are we prepared to discuss the good and bad biases of our judges? If we are, does this entail the surrender of all objective notions of the Rule of Law? How can we determine who is competent to judge?

One partial solution to these problems is to transform the practice of judging so that the "power" to validate one perspective over another is never left in the hands of one judge.¹⁶ Another approach to the problem

remanded with instructions to apply more restrictive state action test in determining constitutionality of other use by segregated groups).

13. See, e.g., *Marable v. Alabama Mental Health Board*, 297 F. Supp. 291 (M.D. Ala. 1969) (Johnson, J.) (desegregating Alabama's mental institutions); *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966) (Johnson, J.) (desegregating the state penal system); *Franklin v. Parker*, 223 F. Supp. 724 (M.D. Ala. 1963) (Johnson, J.) (ordering Auburn University to admit a black graduate student over the governor's objection); see also *Lee v. Macon County Bd. of Educ.*, 317 F. Supp. 103 (M.D. Ala. 1970) (per curiam) (desegregating trade schools and junior colleges); *Lee v. Macon County Bd. of Educ.*, 317 F. Supp. 95 (M.D. Ala. 1970) (per curiam) (desegregating seventy-six county and city school systems).

14. Resnik, *supra* note 1, at 1878 (quoting Abrahamson, *The Woman Has Robes: Four Questions*, 14 GOLDEN GATE L. REV. 489, 494 (1984)).

15. Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 94 (1987).

16. See Resnik, *supra* note 1, at 1942-43 ("A single-judge approach is indicative of a way of working that many women do not embrace.").

would be to seek judges with varied life experiences, judges with the potential for a better understanding of the multitude of perspectives that are likely to be placed before them in the courtroom. We should value judges who seek to broaden their experiences; judges who, in addition to going to the Senior Bowl in Mobile, seek to mingle with persons who are unlike them.

In Sacramento, the local judges have begun a project in which they speak informally at neighborhood gatherings. The purported purpose of this project is to remove some of the mystique surrounding what judges actually do. I would hope that the judges in such projects would not only talk about what it is they do, but also listen to the experiences and stories of the members of their audiences.

If what we want is judges with more varied experiences, are we better off with elected or appointed judges. Who is more cloistered and who is more connected? These are interesting questions. Remember the story of Judge Johnson—connection to whom, to which constituency?

My final story regarding good and bad bias, like my first story, comes from a case. Like my second story, it involves desegregation. It is a famous case, which began in state court, but was finally resolved by the United States Supreme Court. The case is *Shelley v. Kraemer*.¹⁷ The story of the *Shelley* case is familiar. A group of white homeowners signed a restrictive covenant agreement prohibiting any property in the neighborhood from being used or occupied by persons of the Negro or Mongolian race for fifty years after the signing of the covenant. The Shelleys, a black family, purchased a home without actual notice of the restriction and attempted to move in to the house. The neighbors sued to enforce the covenant in state court and won. The Supreme Court reversed, handing down what is generally regarded as its most infamous state action decision.¹⁸

That is the public story. That is what all of us who have read the case know. What is missing from the story, as told in the case, is detail

17. 334 U.S. 1 (1948).

18. The *Shelley* Court viewed the restrictive covenant as a valid private agreement, not covered by the equal protection clause of the fourteenth amendment. The Court held, however, that the state court's enforcement of the agreement was "state action" prohibited by the fourteenth amendment. Commentators have criticized the Court's reasoning in that, taken to its logical extreme, any court enforcement of private discrimination would amount to "state action" and presumably be subject to the equal protection clause. *Shelley* is generally regarded as a case that reached the right result, but for the wrong reasons. See, e.g., Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

and context. It is as though the Supreme Court handed down this decision disembodied and unconnected from the reality of the times. Consider these facts:¹⁹ (1) The *Shelley* case represented the culmination of fifty years of litigation on restrictive covenants, most of which had resulted in depriving black families of much needed housing. (2) The national situation had become so outrageous that the President's Committee on Civil Rights had roundly denounced enforcement of these covenants. (3) The courts were full of restrictive covenant cases and the newspapers were full of stories of the cases. In California alone over thirty cases were pending. The entire nation had its eye on the *Shelley* case. (4) Despite the existence of a severe national housing shortage, the FHA refused to finance new housing unless the property was subject to restrictive covenants banning blacks. Black families migrating to the cities after the war were forced into ghettos which were already overcrowded.

The public legal story, devoid of context, is silent as to the human story in the case. In a dispassionate voice, the Supreme Court explored the legal boundaries of the state action doctrine. There is no evidence in the *Shelley* opinion that the Court ever heard the story about the Shelley family, and all the families they represented, in their plight to find adequate housing. Nor is there any evidence that the Court ever heard the story of how a respectable black Missouri family felt when the Supreme Court of Missouri evicted them from their home.

Shelley is a case in which state court judges, connected to their communities, exhibited bias in a negative way. The biases of the judges become apparent when we look at their earlier decisions validating racially restrictive covenants. The Missouri Court originally found the covenants valid because they were no different from restrictions against noxious sights and odors.²⁰ In my opinion, when the Missouri courts compared race restrictions to restrictions on "slaughterhouses, soap factories, distilleries, livery tables, tanneries, and machine shops,"²¹ they were engaging in bias and prejudice of the worse kind.

Shelley should not have been a case about the state action doctrine. It should have been a case about the rightness or wrongness of property laws that ban a person from a neighborhood solely on the basis of that person's skin color. Rather than turn to neutral principles of law, the

19. These facts are taken from Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. CHI. L. REV. 203-04, 226-27 n.61 (1949).

20. *Koehler v. Rowland*, 202 S.W. 217 (Mo. 1918).

21. *Id.* at 220.

United States Supreme Court should have focused on the bias inherent in the state court decision—a bias that, pursuant to my reading of the fourteenth amendment, federal courts are empowered to reverse.

Professor Resnik's paper suggests that we be honest about the limited capacity of our judges to be impartial, unbiased, disengaged, and unconnected. She sets forth four examples "of the tensions between the theory of disengagement and practices of judges."²² A case such as *Shelley*, in which a federal court reverses a state law judgment influenced by the bad biases of state judges, strikes me as another example of this type of tension. The "rhetoric" of the federal court, usually the Supreme Court, does not admit the bias. Yet the "practice" of reversal might often be explained more satisfactorily if the bias were admitted.²³

The problem in admitting such bias is, as Professor Resnik suggests in her other examples, one of "public confidence."²⁴ Whereas Professor Resnik is ready to reject both "the myth of judge as Other"²⁵ that lies at the heart of the public confidence rationale and the accompanying "pretense of judicial infallibility,"²⁶ she does so because of the positive aspect

22. Resnik, *supra* note 1, at 1933. The examples were: (1) The practice of requiring litigants who seek a judge's recusal to ask the judge directly; (2) The "Rule of Necessity" under disqualification law; (3) Post-verdict attacks on the competency of judges or jurors; and (4) The legal distinction in *Tanner* between internal and external sources of prejudice. See *id.* at 1887-1903.

23. As I have suggested, *Shelley* is a case that might be explained more satisfactorily in this manner. *New York Times v. Sullivan*, 376 U.S. 254 (1964) (state libel law infringes first amendment), is another such case, in that it is likely that the Alabama jury making the award was influenced by the racial clashes of the era and by its own biases on the matter. Since the award was upheld by the Alabama Supreme Court, the judges' potential bias is brought into question as well. See Professor Richard Epstein's discussion of this point in his article, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782 (1986).

See also *Palmore v. Sidoti*, 466 U.S. 429 (1984) (Supreme Court reversed a state family law judge's decision on custody because he had impermissibly relied on racial prejudice in removing the child from her mother's custody when the mother, a white woman, had married a black man).

Evans v. Abney, 396 U.S. 435 (1970), is a case in which the Supreme Court declined to reverse the state court holding. In my opinion, however, it is a case, like the others I have cited, in which the Supreme Court should have reversed the state court on grounds of racial bias. The *Abney* Court held that the Georgia Supreme Court was not engaging in discrimination when it ruled that under state trust law a previously segregated public park should revert to the testator's heirs rather than be desegregated. Speaking for the majority, Justice Black noted, "In the case at bar there is not the slightest indication that any of the Georgia judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will." *Id.* at 445.

Given the absence of available precedent for the Georgia Court's decision and the racial tensions that existed in Georgia during this period of time, I hold a different view of the matter from that of Justice Black. And yet, given our existing rhetoric, it is not the least bit surprising that no one made a serious argument that the Georgia judges might be biased by their own racism.

24. Resnik, *supra* note 1, at 1938.

25. *Id.*

26. *Id.*

of "accept[ing] the judge as one of us."²⁷

When the bias or judicial fallibility is derived from racial prejudices, accepting the judge as one of us may raise the question for some as to who the "us" is. At what cost to public confidence are we willing to be honest about the possible racial biases of our judges? Is honesty about such things even possible?²⁸

With respect to the first difficulty I identified at the beginning of this paper, the difficulty of identifying good from bad bias, I have perhaps raised more questions than I have suggested answers. I do believe, however, that we are likely to formulate better answers once we have begun to speak with honesty about our judges as human beings, once we begin "to conceive of the judges as ourselves."²⁹

The second difficulty that I identified centers on the question of how judges can experience connectedness with those parties as to whom they must render judgment. With respect to this difficulty, I have a concrete suggestion to make. At the first level, the suggestion concerns what we, as lawyers and teachers, might do to help judges connect to the parties before them, and thereby understand the viewpoints of others. At the second level, my suggestion concerns how judges might best act on this experience of connectedness.

I think we, as lawyers and teachers, can help in the judging process by engaging in the same feminist practice that I have used in explaining my views in this paper. I think we can help through the expanded use of storytelling.

Professor Lynn Henderson has made this same point about storytelling more extensively in a recent article in the Michigan Law Review.³⁰ She does so by discussing a number of recent Supreme Court decisions, including *Roe v. Wade*³¹ and *Bowers v. Hardwick*.³² As to *Roe*, she criticizes Jane Roe's counsel for not telling the stories of women in need of abortion, the stories of unwanted pregnancies. Apparently, some of these stories were told in amicus briefs, but they were not sufficiently told in the brief of counsel for Jane Roe. Nor, in Professor Henderson's opinion, were these stories used effectively at oral argument. As a result,

27. *Id.*

28. See Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

29. Resnik, *supra* note 1, at 1944.

30. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987).

31. 410 U.S. 113 (1973).

32. 478 U.S. 186 (1986).

perhaps, it should not be surprising that the Roe opinion is painfully silent about women and instead focuses on the medical profession.

By contrast, the majority opinion in *Thornburgh v. American College of Obstetricians and Gynecologists*,³³ a more recent abortion case, does reflect some of these stories that center on women with unwanted pregnancies. In *Thornburgh*, the National Abortion Rights Action League (NARAL) made the decision to use its brief as an occasion to place the realities of abortion before the Court by presenting first-person stories of women. These included stories of the pain, the guilt, the humiliation, and the host of complications that occur when abortion is pushed into the back streets. The resulting Supreme Court opinion suggests that NARAL engaged in more effective storytelling than did counsel for Jane Roe.

In *Bowers v. Hardwick*, Michael Hardwick's story was never before the court. The facts of the case—that he was engaged in oral sex with another man in the privacy of his own bedroom when he was arrested—were before the court, but not the story. The story would have placed Michael Hardwick, the human being, before the Court. Michael Hardwick is a quiet, mild-mannered young man, who values his privacy. He has a mother who cares about him and fears for his life when she hears of instances of gay bashing.³⁴ Not only did we lose Michael's story in this case, but we also lost the stories of gay men and lesbians throughout the country—the stories of gay lawyers, doctors, students, parents—the painful stories of loving human beings cast in the role of criminals by states such as Georgia.

What we want, it seems to me, are lawyers who can tell their clients' stories, lawyers who can help judges to see the parties as human beings, and who can help remove the separation between judge and litigant. And, then, what we want from our judges is a special ability to listen with connection before engaging in the separation that accompanies judgment.

At the end of her paper, Professor Resnik makes a point when she quotes Judge Learned Hand on the process of judging:

You must have impartiality. What do I mean by impartiality? I mean you mustn't introduce yourself, your own preconceived notions about what is right. You must try, as far as you can, it is impossible for

33. 476 U.S. 747 (1986).

34. My portrayal of Michael Hardwick is based on his appearance on *Donahue* (NBC) after the Supreme Court handed down its opinion. It was his first public appearance with respect to the case.

human beings to do so absolutely, but just so far as you can, not to interject your own personal interests, even your own preconceived assumptions and beliefs.³⁵

Professor Resnik suggests that Judge Hand had it wrong, that he viewed the matter as a choice between not being there at all (being a blank slate) and being there too much (so that you impose yourself on others).³⁶

I view the Hand quote differently, because I interpret it informed by my feminism. I view it this way:

When you listen as a judge, you must transcend your sense of self, so that you can really listen. Listen to the story that is being told. Do not prejudge it. Do not say this is not part of my experience. But listen in such a way as to make it part of your experience. Find some small part of your own self that is like the Other's story. Identify with the Other. Do not contrast. Only when you have really listened, and only then, should you judge.

It is this feminist-inspired interpretation of Judge Hand that I find helpful in addressing the difficulty of maintaining connection in the act of judging, an act which seems to require at least momentary separation. A judge should transcend self to listen, and then a judge should decide with empathy and understanding—as a new self, if you will, for having experienced the story of the other.

35. Resnik, *supra* note 1, at 1943-44 (quoting L. HAND, *THE SPIRIT OF LIBERTY* 309-10 (I. Dillard ed. 1958)).

36. *Id.* at 1944.

