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The Persistent Cultural Script of Judicial Dispassion

Terry A. Maroney*

In contemporary Western jurisprudence it is never appropriate for emotion—anger, love, hatred, sadness, disgust, fear, joy—to affect judicial decision making. A good judge should feel no emotion; if she does, she puts it aside. To call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.

Insistence on judicial dispassion is a cultural script of unusual longevity and potency. But not only is the script wrong as a matter of human nature—emotion does not, in fact, invariably tend toward sloppiness, bias, and irrationality—it is also not quite so monolithic as it appears. Legal theorists, and judges themselves, sometimes have asserted that judicial emotion is inevitable and, perhaps, to be welcomed. But these dissents have neither eroded the script's power nor blossomed into a robust theory of how emotion might coexist with, or even contribute to, judicial decision making. Close examination of this hidden intellectual history reveals why. Scholars and judges consistently have stumbled over foundational questions of emotion's nature and value. Fortunately, the history reveals cures as well as causes. We can move forward by way of disciplined, sustained recourse to a newly vibrant emotional epistemology, a project that will create a distinct space for the story of judicial emotion.

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INTRODUCTION

Is it ever appropriate for emotions—anger, love, hatred, sadness, disgust, fear, joy¹—to affect judicial decision making? In contemporary Western jurisprudence, there is only one accepted answer: no. A good judge should feel no emotions; if she does, she should put them aside and insulate the decision-making process from their influence.²

Insistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency. Thomas Hobbes declared in the mid-1600s that the ideal judge is divested “of all fear[], anger, hatred, love,

1. For purposes of this Essay, “judicial emotion” refers to a judge’s experience of a discrete, identifiable emotional state (such as fear, anger, happiness, sadness, surprise, or disgust) while performing her professional role. Emotions are (to choose one definition representing a relative scientific consensus) “episodic, relatively short-term, biologically-based patterns of perception, experience, physiology, action, and communication that occur in response to specific physical and social challenges and opportunities.” PAULA M. NIEDENTHAL ET AL., *PSYCHOLOGY OF EMOTION* 5–6 (2006); *see also* THE NATURE OF EMOTION 7–55 (Paul Ekman & Richard J. Davidson eds., 1994). *See* discussion in Part II, *infra*.

2. *See, e.g., Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 121 (2009), [hereinafter *Sotomayor Confirmation Hearing*] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_senate_hearings&docid=f:56940.pdf (statement of J. Sonia Sotomayor) (explaining that though judges are “not robots [who] listen to evidence and don’t have feelings,” the only acceptable response is “to recognize those feelings and put them aside”).

and compassion.”³ In 2009, more than three centuries later, then-Judge Sonia Sotomayor testified at her Supreme Court confirmation hearing that judges “apply law to facts. We don’t apply feelings to facts.”⁴ The idea that emotion might influence judging has been characterized as “radioactive.”⁵ Then and now, to call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.⁶

Not only is the script wrong as a matter of human nature—emotion does not, in fact, invariably tend toward sloppiness, bias, and irrationality—but it is not quite so monolithic as it appears. It has been met with periodic dissent,⁷ clustered primarily at two discrete moments in the early and late twentieth century. At these moments legal theorists (and judges) have asserted that judicial emotion is inevitable and even sometimes welcome.⁸ But none of these dissents has meaningfully eroded the script’s power. Nor has any blossomed into a robust theory of how emotion might coexist with, or even contribute to, competent judicial decision making.

An exploration of this hidden intellectual history of dissent reveals the fundamental cause of this stunted evolution: scholars and judges consistently have stumbled over foundational questions about emotion’s nature and value. The history also reveals a promising opportunity to create a new script. The historically impoverished emotional epistemology from which these errors flow is now flourishing, and its vibrancy has opened a rich space to accommodate such creation.

This Essay first demonstrates the extraordinary persistence of the cultural script of judicial dispassion. It traces the script’s origins and, through analysis of debates catalyzed by the Sotomayor confirmation hearings, shows its current vitality. Curiously, though, the script appears more persistent than accurate. Judges often feel emotions when hearing and deciding cases, and they sometimes express those emotions despite strong cultural incentives not to do so.

3. THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) (emphasis omitted).

4. *Sotomayor Confirmation Hearing*, *supra* note 2, at 121 (statement of J. Sonia Sotomayor).

5. Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES (Apr. 26, 2010), <http://www.nytimes.com/2010/04/26/us/politics/26memo.html>.

6. Jeffrey Rosen, *Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun*, NEW REPUBLIC, May 2, 1994, at 13–14, available at <http://www.tnr.com/article/politics/sentimental-journey> (criticizing Blackmun’s “jurisprudence of sentiment” and comparing him to Justice Murphy, “who wrote emotional dissents . . . but whose tendency to let his heart get the better of his head deprived him of lasting influence”).

7. *Unites States v. Ballard*, 322 U.S. 78, 93–94 (1944) (Jackson, J., dissenting) (pointing out that “dispassionate judges” are “mythical beings” like “Santa Claus or Uncle Sam or Easter bunnies”).

8. Irving R. Kaufman, *The Anatomy of Decisionmaking*, 53 FORDHAM L. REV. 1, 16 (1984) (“[O]ur intuition, emotion and conscience are appropriate factors in the jurisprudential calculus.”).

The script has retained power despite its tension with reality because it is anchored to an entrenched view of emotion. This traditional view holds that emotion is by its nature irrational, undisciplined, and idiosyncratic.⁹ But as Part II reveals, this view has shifted dramatically over the last century. Part II synthesizes the core tenets of contemporary emotion research, which has undermined the theory of emotion on which the script of judicial dispassion depends. Emotion reflects reasons, motivates action, enables reason, and is educable. This evolved view of human emotion provides a new baseline from which evaluation of judicial emotion may proceed.

The quickly shifting tides of emotion research outside of law have not yet dislodged the cultural script of judicial dispassion. They have, however, unsettled it intermittently. In a faint echo of these shifts, dissenting voices have struggled to be heard within law. Part III excavates the history of these dissents. It shows how many of the early twentieth-century legal realists sought recognition of emotion's role, though they were vague on the concept and divided on its utility. The realists' efforts were partially revived toward the end of the century by the emerging law-and-emotion movement.¹⁰ This revival has not, however, moved the dialogue forward nearly as much as one might hope.

Part III diagnoses why. Both the realists and their intellectual heirs, who might be called the "new emotional realists," have stumbled over three recurrent difficulties. First, their concept of judicial emotion has been seriously undertheorized. They consistently have assigned it membership in an undifferentiated "arational" family, one including concepts as diverse as intuition, politics, and the Freudian unconscious. This taxonomical imprecision reflects confusion over both what emotion is and what it does. That confusion, in turn, feeds a normative problem—that is, uncertainty over what emotion is worth. Theorists consistently have been split over whether judicial emotion should be regarded as an inconvenient truth, an indispensable guide, or normatively variable. As contemporary emotion theory strongly suggests, normative variability is the only perspective adequately reflecting emotion's complexity. But even the small group of judges, scholars, and commentators embracing that view have issued calls with a distinctly Goldilocks quality: a plea for just enough judicial emotion, of just the right sort, in just the right circumstances. "Just right"-appeals to balance are easy to issue, but hard to specify, and no adequate specification has yet been offered.

9. Gerald L. Clore, *For Love or Money: Some Emotional Foundations of Rationality*, 80 CHI.-KENT L. REV. 1151, 1151 (2005) ("A long tradition, stretching from classical philosophy to the present, views passion as the enemy of reason.").

10. Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006); see also Laura E. Little, *Adjudication and Emotion*, 3 FLA. COASTAL L.J. 205, 207 (2002) (explaining that judicial emotion has been "largely ignored" in legal doctrine and scholarship).

That critical specification has eluded us because of a failure of emotional epistemology. As Part IV demonstrates, efforts to acknowledge and explain judicial emotion always have roughly mirrored the state of emotion research outside of law. But that mirroring has been unsatisfactory, for two reasons. First, the relative neglect of emotion within other disciplines has bounded it. Though this external constraint was tight in the realist period, it has now loosened significantly. However, theorists have not yet taken full advantage of the loosening. Second, the mirroring has been undisciplined, reflecting selective adoption of snippets of interdisciplinary insight. This internal bound, once understandable, has remained entrenched despite the availability of a new emotional epistemology. If mined thoughtfully, that epistemological space holds great promise. Interdisciplinary mirroring must remain only rough—for the law, like the heart, has reasons of its own¹¹—but even a partial reflection promises to provide a far richer account of judicial emotion than any that has come before.

The Essay concludes that the time is right to forge a robust theory of judicial emotion. Not only is the script of judicial dispassion unrealistic, it is counterproductive. It undervalues what judicial emotion might bring to the table and enfeebles our ability deliberately to channel emotion in service of good judging. By moving beyond the half-steps of the past we can rewrite that stifling cultural script.

I.

THE CULTURAL SCRIPT OF JUDICIAL DISPASSION: ITS ORIGINS AND PERSISTENCE (AND APPARENT FUTILITY)

The script of judicial dispassion is so entrenched in Western jurisprudence as to seem beyond dispute.¹² This is surprising, for on a moment's reflection it is obvious that litigation is "an intensely emotional process" for jurors, parties, witnesses, and lawyers;¹³ further reflection suggests the same likely holds true for judges. And yet the script persists. It draws much of its power from its deep roots in Enlightenment ideals. Indeed, judicial dispassion has come to be regarded as a core requirement of the rule of law, a key to moving beyond the perceived irrationality and partiality of our collective past. The strength of that belief is still apparent: it was vividly displayed during the Sotomayor hearings and the debates they sparked, debates that continue to this day. This Part traces that history. It then shows that the script is in tension with reality. Despite

11. BLAISE PASCAL, PASCAL'S PENSÉES 342–43 (H.F. Stewart trans., 1950) (No. 626, "Le cœur a ses raisons que la raison ne connoist point; on le sait en mille choses," translated as "The heart has its own reasons which Reason does not know; a thousand things declare it.").

12. See *Pub. Util. Comm'n v. Pollak*, 343 U.S. 451, 466 (1952) (Frankfurter, J., mem.) (asserting that a judge must "submerge private feeling on every aspect of a case").

13. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 226 (2001).

rhetorical devotion to the contrary, the legal system does not (and likely cannot) suppress all (or even most) of judges' emotions.

A. Judicial Dispassion: An Origin Story

The script of judicial dispassion reflects Western jurisprudence's long-standing insistence on a dichotomy between emotion and reason, and therefore between emotion and law.¹⁴ Devotion to the dichotomy is traceable to the influence of European Enlightenment ideals, which—sharply simplified—centered on rational inquiry, science, secularization, and intellectual and political equality. In this era, emotion came to be associated with those forces from which Enlightenment figures sought to be freed—religious fervor, ignorance, prejudice, and reliance on epistemological sources such as tradition and revelation.¹⁵

This negative conception of emotion was in no small tension with the Enlightenment's commitment to individual worth. "Reason," once the exclusive province of elites, was thought to be the natural faculty of all, a belief that justified a move away from monarchy and other nonmerit-based forms of hierarchy. To the extent that emotion already was associated with the natural faculty of ordinary persons, it might have come to be regarded as an element of, or as not in necessary conflict with, their rational faculty. Instead, the natural state was conceptually subdivided. Within it, emotion was thought to be both more primitive and at war with rationality, which—though within the reach of all persons—needed active cultivation. Common people could achieve the reason formerly reserved for elites, but only by conquering emotion, and this they often failed to do. Emotion thus came to be associated with anti-Enlightenment views and continued to be associated with the irrational beliefs and unrestrained impulses of common people.¹⁶

Indeed, the very tripartite structure of American government was conceptualized as a mechanism for ensuring the triumph of reason over emotion.¹⁷ As Madison famously declared in *The Federalist No. 49*, "It is the reason, alone, of the public, that ought to control and regulate the government.

14. Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1602 (2002) (explaining that the "dichotomy between reason and emotion . . . casts a long shadow" over legal thought).

15. HENRY F. MAY, *THE ENLIGHTENMENT IN AMERICA* xiv, 42 (1976) ("[T]he war between reason and emotion has never really ended . . . in American culture."); cf. Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 456, 466 (1996) (presenting traditional view of Enlightenment "reason" but suggesting that emotions need not be entirely excluded).

16. MAY, *supra* note 15, at 337 (explaining that in the "semi-official intellectual culture of nineteenth-century America . . . science, progress, freedom, intellectual freedom, [and] republicanism were good" while "religious skepticism, frantic innovation, undisciplined emotions, [and] the French Revolution were bad").

17. *Id.* at 97 (quoting participant in Constitutional Convention as saying delegates "should be governed as much by our reason, and as little by our feelings as possible").

The passions ought to be controlled and regulated by the government.”¹⁸ Law too, not just the structure of government, was thought to be a bulwark against popular emotion.¹⁹ The judge came to be seen as the primary figure guarding this realm of rationality, by taming the emotions of litigants, ignoring the emotions of the public, and divesting herself of her own.²⁰ The emotional judge was derided as an heir to “Cadi justice,” a caricatured notion of non-Western legal systems—particularly those of the Near East—thought to be ruled according to the whims of judges guided only by their personal inclinations and fancies.²¹ Encapsulating this emerging Enlightenment ideal, Hobbes imagined the ideal judge to be divest “of all fear[], anger, hatred, love, and compassion.”²²

The growth of legal scientism cemented the script. Exemplified by Christopher Langdell’s concept of “law as science,”²³ legal scientism encouraged a view of judges as clinically detached, objective, and unmoved by irrelevant particularities. Drawing on those concepts, Karl Wurzel classified “dispassionateness of the judge” as a fundamental tenet of Western jurisprudence.²⁴ Indeed, he wrote, lawyers were “the first and the most emphatic in insisting on the absence of emotional bias,” because “absence of emotion is a prerequisite of all scientific thinking,” and judges, more so than other scientific thinkers, regularly are “exposed . . . to emotional influences.”²⁵

Thus, in pre-twentieth-century American legal theory the perceived need for judicial dispassion was well-established. By protecting the judiciary from

18. THE FEDERALIST NO. 49, at 317 (James Madison) (Clinton Rossiter, ed., 1961); see also JED RUBENFELD, FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF GOVERNMENT 116 n.26 (2001) (“[T]he reason/emotion trope is a strong theme in the Federalist Papers.”); Doni Gewirtzman, *Our Founding Feelings*, 43 U. RICH. L. REV. 623, 637–40 (2009) (reiterating the Framers’ consistent preference for reason over passion and emotion); cf. Peter N. Stearns & Jan Lewis, *Introduction*, in AN EMOTIONAL HISTORY OF THE UNITED STATES 1, 7 (Peter N. Stearns & Jan Lewis eds., 1998).

19. POSNER, *supra* note 13, at 226 (“The law’s function is understood to be to neutralize the emotionality that legal disputes arouse in the participants and lay observers.”).

20. William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988); Gewirtzman, *supra* note 18, at 679 (arguing that in debate over “interpretive supremacy, a trained judiciary has always had predictability and stability on its side, particularly when contrasted with an emotional public”).

21. Jerome M. Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption that Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 24–25 (1931) (noting how if one asserts that judges are human and that “personality” affects their judging, critics will accuse him of “seeking a reversion to Cadi or oriental justice”); see also Anver M. Emon, *Toward a Natural Law Theory in Islamic Law: Muslim Juristic Debates on Reason as a Source of Obligation*, 3 UCLA J. ISLAMIC & NEAR E.L. 1, 2–3 & n.5 (2004) (citing *Terminiello v. City of Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) (“We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”)).

22. HOBBS, *supra* note 3, at 203 (emphasis omitted).

23. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS vi (1871).

24. KARL GEORG WURZEL, METHODS OF JURIDICAL THINKING (1904), in SCIENCE OF LEGAL METHOD: SELECT ESSAYS 298 (Ernest Bruncken & Layton B. Register trans., 1971).

25. WURZEL, *supra* note 24, at 298–99.

direct political control (at least in the federal system), government freed judges to prevent popular emotion from affecting the rational development of law. Partiality, in this theory, was the essence of politics, but the antithesis of judging. Some quantum of emotion therefore was to be expected from legislative and executive officials. Their political commitments to issues and constituencies naturally would give rise to emotions of their own; further, they were expected to be at least somewhat responsive to popular emotion, even while checking its excesses.²⁶ The expected quantum of judicial emotion, in contrast, was zero, because the judge was to bring to bear no commitments or loyalties of his own. Moreover, because emotion was thought to be an undisciplined and idiosyncratic force, it threatened the judge's ability to maintain his scientific stance. By walling off his own emotions, not just those of the people and their political proxies, the judge freed himself to correctly discern the law using reason alone. Thus, the judge in a democratic system was commanded to reflect the twin meanings of dispassion: he was to be both *emotionless* and *impartial*, qualities seen as necessarily linked.²⁷

B. The Sotomayor Confirmation Hearings: Evidence of the Script's Persistence

If there were any doubts as to the script's contemporary potency, debates over judicial "empathy" in the context of the 2009 Sotomayor confirmation laid them to rest. Those debates demonstrated just how alive the script is and just how flat the dialogue remains.

President Obama sparked the controversy by declaring that he would nominate a candidate with empathy, and by listing among Sotomayor's qualifications her "sense of compassion."²⁸ Though the reaction played out largely as

26. This is equally true today. Just months after President Obama was lambasted for prioritizing "empathy" and "compassion" in his Supreme Court nominee, he was criticized for "leading with his head, not his heart," and failing to "lead the nation emotionally as well as rationally." Jon Meacham, *The Trouble with Barack*, NEWSWEEK, Feb. 1, 2010, at 20–22, available at <http://www.newsweek.com/2010/01/21/the-trouble-with-barack.html>. Other political leaders have met similar criticism. See DREW WESTEN, *THE POLITICAL BRAIN: THE ROLE OF EMOTION IN DECIDING THE FATE OF THE NATION* (2007); Roger Simon, *Questions That Kill Candidates' Careers*, POLITICO (Apr. 20, 2007, 6:09 PM), <http://www.politico.com/news/stories/0407/3617.html> (describing how Michael Dukakis "was savaged for giving a sincere and unemotional answer instead of giving an insincere and emotional one," in response to a hypothetical question about his wife being raped and murdered); see also *Sotomayor Confirmation Hearing*, *supra* note 2, at 7 (statement of Sen. Jeff Sessions) ("Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth it is more akin to politics.").

27. *Dispassionate Definition*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/netdict/dispassionate> ("[N]ot influenced by strong feeling" or "emotional involvement"; synonymous with "impartial") (last visited Mar. 2, 2011).

28. John Hasnas, *The 'Unseen' Deserve Empathy Too*, WALL ST. J., May 29, 2009, at A15, available at <http://online.wsj.com/article/SB124355502499664627.html>; Barack Obama, Remarks before the Planned Parenthood Action Fund (July 17, 2007), <http://lauraetch.googlepages.com/barackobamabeforeplannedparenthoodaction> ("[W]e need somebody who's got the heart—the empathy—to recognize what it's like to be a young teenage mom. . . . to be poor or African-American or gay or disabled or old—and that's the criteria by which I'll be selecting my

a political story, in which Obama's Republican political opponents assailed the "empathy standard" and his Democratic allies defended it, there was in fact a common enemy against which virtually all rallied—judicial emotion.

This convergence is visible in competing constructs of empathy, the concept around which the controversy swirled.²⁹ Empathy is an inherently ambiguous term. Empathy can be defined not as an emotion but rather a capacity to imagine the world from the perspective of another. However, it sometimes is defined to include both that perspective-taking element and a subjective experience of emotion, usually (though not necessarily) the same emotion one perceives the other to be feeling.³⁰ Those who criticized the empathy standard adopted the latter view, which contemplates an emotional component, and invoked the ostensibly pernicious effects of emotion as evidence of empathy's flaws. Those who praised the empathy standard adopted the former view and argued that empathy's severability from emotion demonstrated its value.

Those attacking empathy repeatedly linked it to emotion's purportedly undisciplined nature and anti-democratic impact. Senator Graham derided empathy as "touchy-feely stuff."³¹ Senator Grassley insisted that "the most critical qualification of a Supreme Court Justice" is "the capacity to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all."³² Senator Sessions asserted that creating a space for empathy invited a judge to rule on the basis not of law but of her "personal . . . feelings."³³ Thus, as Senator Hatch insisted, encouragement of judicial empathy

judges."); see Press Briefing by Press Secretary Robert Gibbs (May 1, 2009), http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09/; cf. Remarks of Senator Barack Obama, Confirmation of Judge John Roberts, <http://obamaspeeches.com/031-Confirmation-of-Judge-John-Roberts-Obama-Speech.htm> (voting against Roberts's confirmation because of his lack of empathy, and stating that in the "5 percent of cases that are truly difficult" the "critical ingredient is supplied by what is in the judge's heart"). I do not here replicate a robust blogosphere debate over this aspect of the nomination. See, e.g., Susan A. Bandes, *Empathetic Judging and the Rule of Law*, 2009 CARDOZO L. REV. DE NOVO 133.

29. Just as Obama also had characterized "compassion" as a desirable judicial trait, see *supra* notes 26 and 28, participants in the debate sometimes also mentioned compassion, see, e.g., *Sotomayor Confirmation Hearing*, *supra* note 2 (statement of Sen. Herb Kohl). However, the "empathy standard" became the central point of contention.

30. Jean Decety, *Empathy (Neuroscience Perspectives)*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES 151–53 (David Sander & Klaus R. Scherer eds., 2009); Justin D'Arms, *Empathy (Philosophical Perspectives)*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES *supra*, at 153–54.

31. *Sotomayor Confirmation Hearing*, *supra* note 2, at 135 (statement of Sen. Lindsay Graham).

32. *Sotomayor Confirmation Hearing*, *supra* note 2, at 17 (statement of Sen. Charles Grassley).

33. Jeff Sessions, *Guest Commentary: "Empathy" No Basis for Judicial Rulings*, GRAND RAPIDS PRESS (July 13, 2009), available at http://www.mlive.com/opinion/grand-rapids/index.ssf/2009/07/guest_commentary_empathy_no_ba.html; see *Sotomayor Confirmation Hearing*, *supra* note 2, at 6 (statement of Sen. Jeff Sessions).

put “nothing less than our liberty” at stake.³⁴ These statements were strongly seconded by a chorus of commentators, who similarly declared that “emotive judges” are inclined to partiality,³⁵ led astray by “passion” that, unlike rational argument, is “inscrutable, idiosyncratic, and justified in and of itself.”³⁶

In contrast, those defending the empathy standard stressed empathy’s nonemotional attributes. They cast empathy as an essential tool through which accurately to perceive and value the human realities at stake. Senator Schumer, for example, redefined it as “the opposite of indifference.”³⁷ Similarly, Senator Kohl asserted that “[c]ompassion does not mean bias or lack of impartiality,” but instead reminds “us that the law is more than an intellectual game.”³⁸ By pursuing this approach, they tacitly accepted the premise that emotion is a pernicious force. That point was taken up even more explicitly by commentators.³⁹ Capturing a common theme, a writer for *The New Republic* opined that Obama had made a “big mistake” in “using the word ‘heart,’” as it “made empathy sound mainly emotional and therefore suspect.”⁴⁰ Another commentator challenged “Democrats . . . to rally behind empathy—real empathy, not empathy reframed as emotion and personal feeling.”⁴¹ Rally they

34. *Sotomayor Confirmation Hearing*, *supra* note 2, at 13 (statement of Sen. Orrin Hatch) (stating that judges must “set aside . . . their personal feelings”).

35. John Yoo, *Closing Arguments: Obama Needs a Neutral Justice*, PHILA. INQUIRER, May 10, 2009, at C3, available at <http://www.aei.org/article/100476>; see also Hasnas, *supra* note 28 (“[T]he compassionate, empathetic judge is very likely to be a bad judge.”).

36. Mark Goldblatt, *Against Judicial Empathy: Why the Supreme Court Must Be the Most Dispassionate of the Three Branches of Government*, NAT’L REV. (June 10, 2009), <http://www.nationalreview.com/articles/227677/against-judicial-empathy/mark-goldblatt>; see Robert Burton, *A Judge Without Empathy Is Inhuman: The Anti-Obama Rallying Cry That a Supreme Court Justice Must Rule by Reason Alone Is Ignorant of How Our Minds and Bodies Work*, SALON.COM (May 12, 2009), http://www.salon.com/news/environment/mind_reader/2009/05/12/obama_empathy (quoting Republican National Committee Chairman Michael Steele as saying, “I don’t need some justice up there feeling bad for my opponent . . . I’ll give you empathy. Empathize right on your behind.”).

37. Robin Abcarian, *Sotomayor Hearings: Schumer Defines “Empathy,”* TOP OF THE TICKET (July 14, 2009, 1:20 PM), <http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-charles-schumer-empathy-supreme-court.html>.

38. *Sotomayor Confirmation Hearing*, *supra* note 2, at 10 (statement of Sen. Herb Kohl).

39. See Neal Gabler, Op-Ed, *Judging from the Heart-or the Head*, BOSTON GLOBE, June 24, 2009, at A11 (explaining that Rawls thought empathy the “very source of political community”); Abraham Verghese, *Empathy: Good for Doctors and Bad for Judges?*, ATLANTIC (May 27, 2009), <http://www.theatlantic.com/technology/archive/2009/05/empathy-good-for-doctors-and-bad-for-judges/18375/>; cf. Frans de Waal, *Sotomayor’s Empathy: Not for the Birds*, HUFFINGTON POST (July 11, 2009, 9:58 PM), http://www.huffingtonpost.com/frans-de-waal/sotomayers-empathy-not-fo_b_230102.html.

40. Richard Just, *The Empathy War*, NEW REPUBLIC (July 15, 2009), <http://www.tnr.com/blog/the-plank/the-empathy-war>.

41. George Lakoff, *Empathy, Sotomayor, and Democracy: The Conservative Stealth Strategy*, HUFFINGTON POST (May 30, 2009, 11:25 PM), http://www.huffingtonpost.com/george-lakoff/empathy-sotomayor-and-dem_b_209406.html (“The argument goes like this: Empathy is a matter of personal feelings. Personal feelings should not be the basis of a judicial decision of the Supreme Court. Therefore, ‘justice is not about empathy.’”); see Gabler, *supra* note 39 (“[E]mpathy is . . . a mushy and inexact concept. . . . It emphasizes emotion rather than reason,

did, emphasizing that empathy ought to be understood as the critical capacity to assess the experience of dissimilar others.⁴² “Intellectual empathy,” commentators argued, is important not because of “how it makes judges feel but how it makes judges think.”⁴³

Thus, while it may have appeared that warring political forces were adopting sharply dichotomous views, they were largely in agreement on one critical assertion: judicial emotion is negative.⁴⁴ Sotomayor dealt the final stroke herself. “Judges can’t rely on what’s in their heart[s],” she testified before the Senate Judiciary Committee, because “[i]t’s not the heart that compels conclusions in cases, it’s the law.” Though judges are “not robots [who] listen to evidence and don’t have feelings,” the only acceptable response is “to recognize those feelings and put them aside.”⁴⁵ Sotomayor clearly understood precisely what script was required of her, and she delivered it.⁴⁶

which means that it is subject to all sorts of impurities.”).

42. Orin Kerr, *VOLOKH CONSPIRACY* (May 28, 2009, 7:07 PM), http://volokh.com/posts/chain_1243341765.shtml (asserting that “[e]veryone agrees” that “doctrinally relevant empathy” is “not just good, but absolutely necessary”); Erwin Chemerinsky, *Do Race and Gender Matter for the Supreme Court?*, L.A. TIMES (May 27, 2009), <http://www.latimes.com/news/opinion/opinionla/la-oev-chemerinsky-somin27-2009may27,0,4134639.story> (offering, as an example, the Justices’ ability to evaluate the level of embarrassment experienced by a girl strip-searched at school).

43. Kent Greenfield, *The Supreme Court, Empathy and the Science of Decision Making*, HUFFINGTON POST (May 25, 2009, 11:16 PM), http://www.huffingtonpost.com/kent-greenfield/the-supreme-court-empathy_b_206604.html; see Dahlia Lithwick, *Once More, Without Feeling: The GOP’s Misguided and Confused Campaign Against Judicial Empathy*, SLATE (May 11, 2009, 7:15 PM), <http://www.slate.com/id/2218103/> (asserting that empathy is not “sloppy sentiment,” not “goopy judicial sentimentalism,” and does not entail “stopping midtrial to tenderly clutch the defendant to your heart and weep,” but is instead an “intellectual” and “ethical process”). Because empathy for similar others may come most easily, commentators endorsed judicial diversity to encouraging empathy’s fair distribution. Greenfield, *supra* (“Empathy will have to suffice until diversity arrives.”).

44. Just, for example, criticized Schumer for having conflated empathy and sympathy (and seeking to distance Sotomayor from both), but this criticism was designed to elevate empathy—“a principled tool for analyzing the world around us”—at the direct expense of sympathy, which Just dismissed as “a narrow personal emotion.” See Just, *supra* note 40. A few commentators mounted a partial defense of emotion, drawing on the mind sciences to assert that it forms part of rational capacity. However, they muddled the message by simultaneously characterizing emotion as an inexplicable and potentially havoc-producing force. See *infra* notes 246, 249.

45. Amanda Terkel, *Sotomayor: “We’re Not Robots.”* THINK PROGRESS (July 14, 2009, 11:28 AM), <http://thinkprogress.org/2009/07/14/sotomayor-robots> (quoting *Sotomayor Confirmation Hearing, supra* note 2, at 71, 120 (statement of J. Sonia Sotomayor)) (“[T]he system is strengthened when judges . . . test themselves to identify when their emotions are driving a result . . . and the law is not.”).

46. Dahlia Lithwick, *What a Waste: The Sotomayor Hearings Were a Mass of Missed Opportunities for Republicans and Democrats Alike*, SLATE (July 15, 2009, 6:54 PM), <http://www.slate.com/id/2222936/> (“[T]he empathy standard set Sotomayor up . . . she’s too emotional, too prejudiced to be fair. No wonder she torched it. Her only job here was to get confirmed.”); James Taranto, *The “Empathy” Paradox: Sotomayor Rejects Obama’s Judicial Philosophy*, WALL ST. J. (July 15, 2009), <http://online.wsj.com/article/SB124767724285246273.html> (“It would be politically unwise . . . to say, ‘When deciding a case, I follow my heart.’”).

To be sure, the Sotomayor hearings are an imperfect source for drawing lessons other than those about partisan politics, and a great many other issues were at play.⁴⁷ But the empathy aspect of the debate went far beyond politics. A year later, a commentator observed that of all the issues raised by the Sotomayor hearings, the empathy standard is the one that went “radioactive,”⁴⁸ and it still is being debated.⁴⁹ Further, Sotomayor is far from the only modern-day target. Some of the harshest public criticism of a Supreme Court Justice in our time was leveled against Justice Blackmun, whom Jeffrey Rosen accused of pursuing a “legally unsophisticated and overly emotional . . . jurisprudence of sentiment.”⁵⁰

C. *The Apparent Futility of the Script of Judicial Dispassion*

The cultural script of judicial dispassion thus has both a long pedigree and considerable contemporary purchase. But despite the promise suggested by its credentials, the script has not actually eliminated judicial emotion. Indeed, from time to time judges admit as much. Chief Justice Hughes, for example, reportedly told Justice Douglas that, at “the constitutional level where we work, ninety percent of any decision is emotional.”⁵¹ Justice Scalia frequently displays anger, even contempt.⁵² Justice Souter reportedly cried during the process of deciding *Bush v. Gore*.⁵³ Legion are the sentencing judges who voice disgust with a defendant’s actions and the trial judges who express sadness at feeling bound to rule in a particular way.⁵⁴ In a recent survey, Australian

47. Chief among these was the “wise Latina” controversy. Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 87–92 (2002). It is noteworthy that in his confirmation hearings, Justice Alito’s Republican allies prompted him to demonstrate his empathy. Glenn Greenwald, *Justice Sam Alito on Empathy and Judging*, SALON (May 27, 2009, 12:28 PM), <http://www.salon.com/opinion/greenwald/2009/05/27/sotomayor/index.html> (responding to a request by Senator Tom Coburn that he “let us see a little bit of [his] heart” and draw on his life experiences, Alito testified to his special concern for the struggles of immigrants and the disabled, and for children).

48. Baker, *supra* note 5.

49. Geoffrey R. Stone, Op-Ed, *Our Fill-in-the-Blank Constitution*, N.Y. TIMES, Apr. 14, 2010, <http://www.nytimes.com/2010/04/14/opinion/14stone.html> (asserting that empathy “helps judges understand the aspirations of the framers” and “the effects of the law on the real world”).

50. Rosen, *supra* note 6, at 13. Rosen complained that Blackmun’s opinions were characterized by “over-ripe, self-dramatizing” and “purple” prose—pointing, in particular, to his cry of “Poor Joshua!” in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 212–13 (1989) (Blackmun, J., dissenting). Rosen, *supra* note 6, at 18. Blackmun failed as a Justice because “feeling deeply is not a substitute for arguing rigorously,” and because “a big heart and the capacity to feel pain are not enough for success on the Supreme Court.” *Id.*

51. LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 47 (1999).

52. *Id.* at 20–21.

53. Douglas W. Kmiec, *The Case for Empathy: Why a Much-Maligned Value Is a Crucial Qualification for the Supreme Court*, AMERICA (May 11, 2009), http://www.americamagazine.org/content/article.cfm?article_id=11649.

54. See, e.g., *United States v. Beckham*, Nos. H-05-484, H-08-3426, 2009 WL 2615817, at *8–9 (S.D. Tex. Aug. 24, 2009) (reporting that sentencing judge, addressing defendant’s parents,

magistrate judges identified managing their emotional responses to cases as a key element of their work; these judges reported a range of emotions including sympathy, revulsion, disgust, and sadness, the experience of which can be “emotionally . . . wearing.”⁵⁵

The script’s adherents, of course, would regard the persistence of judicial emotion as a sign of failure on the part of individual judges.⁵⁶ This being the dominant cultural view, the “emotional judge” label carries a sting. Judges who are confronted with evidence of their emotions, then, are likely to feel compelled to distance themselves from those feelings. Consider the judge who revoked bail for disgraced former New York City Police Commissioner Bernard Kerik, who the judge determined had repeatedly violated court orders in order to manipulate public opinion. In a lengthy and “at times angry discourse” in open court, the judge “blasted” Kerik’s arrogance.⁵⁷ After reading media reports to that effect, the judge insisted he had not *actually* been angry.⁵⁸ The only other option would have been for the judge to acknowledge the emotion but insist that he was able fully to set it aside.⁵⁹ Whichever path is

said “it breaks my heart that their son is in this situation,” and telling defendant “my heart goes out to you”); *see also* Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) (“[S]ometimes [the judge] has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn’t know what to do about it, and it makes him feel sad. . . . Sometimes he even gets angry about it.” (quoting GERRY H. SPENCE, OF MURDER AND MADNESS: A TRUE STORY 490 (1983))).

55. Sharyn Roach Anleu & Kathy Mack, *Magistrates’ Everyday Work and Emotional Labour*, 32 J. L. & SOCIETY 590 (2005) (contrasting magistrates’ experience with conventional notion denying judicial emotion).

56. A somewhat softer view would acknowledge that the demand for judicial dispassion is unrealistic, but defend its value as a norm toward which to strive. David Brooks, for example, has stated that the emotionless judge is a “useful falsehood.” David Brooks, Op-Ed, *The Empathy Issue*, N.Y. TIMES, May 28, 2009, at A25, available at <http://www.nytimes.com/2009/05/29/opinion/29brooks.html>. He does not, however, describe why it is “useful”; he seems, rather, to infer utility from longevity. *Id.* (“Most people know” it to be “untrue” that judges can “put emotion aside.”). Others have described similar phenomena with the language of “myth.” *See, e.g.*, Todd E. Pettys, *The Myth of the Written Constitution*, 84 NOTRE DAME L. REV. 991 (2009). A legal “myth” is a story that is not literally true but serves a social or cultural function within law, for example, by “encapsulat[ing] a community’s ideas of its origin, identity, and commitments.” *Id.* at 993. Functional value may justify indulging a myth if that value is not replicable with a true belief. As the following Parts make clear, however, this Essay maintains that the script of judicial dispassion is not defensible on these terms, for its falsity has come to overshadow its utility.

57. Alice McQuillan & Hasani Gittens, *Judge Revokes Kerik’s Bail, Sends Former Commish to Jail*, NBC N.Y. (Oct. 20, 2009, 7:14 PM), <http://www.nbcnewyork.com/news/local-beat/Judge-Revokes-Keriks-Bail-Sends-Former-Commish-to-Jail-65005027.html>.

58. Sam Dolnick, *After Delay, Kerik’s Trial to Start on Nov. 9*, N.Y. TIMES, Oct. 26, 2009, at A26, available at <http://www.nytimes.com/2009/10/27/nyregion/27kerik.html> (reporting that the judge stated that “I know it makes for good press and interoffice banter, but I wasn’t really angry”).

59. This is a common tactic in the post-realist era. *See, e.g.*, State v. Hutchinson, 271 A.2d 641, 644 (Md. 1970) (acknowledging that “judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the specie[s],” but insisting that a trained judge can set those factors aside in evaluating evidence). This was, of course, the tactic endorsed

selected by any given judge, judicial image maintenance requires ritual homage to dispassion.

Thus, the script of judicial dispassion not only fails to reflect a recurrent aspect of judges' reality, it also encourages judges to distance themselves from—and even deny—that reality when it surfaces.⁶⁰

As this Part has shown, then, the cultural script of judicial dispassion is alive and well. It stands in tension, however, with the everyday reality of judging. In evaluating whether the script nonetheless embodies something of sufficient value as to justify its maintenance, it is critical to determine whether emotion actually poses the contemplated danger to judging. Under the entrenched view of emotion historically underlying law, the answer appeared obvious. However, as the next Part shows, this view has been seriously undermined by contemporary emotion research. As the new view applies to all human emotion, it provides a baseline from which to reevaluate judicial emotion.

II.

EMOTION AND LEGAL REASON

That the script of judicial dispassion is deeply ingrained does not make it correct, either as an account of human nature or as an ideal toward which judges should aspire. This has become increasingly clear through two recent developments: the greater receptivity of law to insights from other disciplines, and the enormous growth of research on emotion in those other disciplines, particularly psychology.⁶¹ A vibrant literature on law and emotion has begun to flourish at that intersection.⁶² This Part demonstrates how these recent developments have begun to erode the stark division between reason and emotion in law, the division on which the script depends. Two critical insights of the literature on law and emotion are relevant here. First, emotions are ubiquitous in law. Second, and more importantly, emotion is not necessarily—or even usually—a pernicious influence. Emotion reveals reasons, motivates action in service of reasons, enables reason, and is educable.⁶³

by Justice Sotomayor. See *Sotomayor Confirmation Hearing*, *supra* note 2, at 71.

60. In the next installment of this project, I argue that the script of judicial dispassion, even as slightly modified by realist and post-realist theories, thus encourages judges to suppress both the experience and expression of emotion. Drawing on psychological research on emotion regulation strategies, I demonstrate the costs of that approach for judicial decision making. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. (forthcoming Dec. 2011).

61. Maroney, *supra* note 10, at 119, 121.

62. Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

63. This account reflects points of relative consensus in a diverse and dynamic field. See generally COGNITIVE NEUROSCIENCE OF EMOTION (Richard D. Lane & Lynn Nadel eds., 2000); HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); HANDBOOK OF EMOTIONS (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000).

First, law is infused with emotion and ideas about emotion. Examples range from the excited utterance exception to the hearsay rule (reflecting the idea that statements made while in an intense emotional state are likely to be truthful), to heightened protection of homes (because of presumed emotional attachment to them), to awards of damages for emotional suffering (which assumes pain can be monetized), to victim impact statements (thought to provide emotional “closure”).⁶⁴ Judges therefore regularly encounter emotion in their work. They must construe legal rules that implicate emotion; they must manage the emotions of litigants and attorneys; and—as the prior Part demonstrated—they experience emotional reactions of their own.⁶⁵

Of course, just as the persistence of judicial emotion could signify individual failure, the reality that emotion runs through law could signify not its value but, rather, our failure adequately to root it out. But this is not the case. Though emotion does not invariably deserve legal respect, the following core tenets of contemporary emotion research teach that its destructiveness ought not be presumed and that its value ought be considered. These tenets rightly guide our evaluation of judges’ emotions, not just the emotions of other legal actors, for judges are—like them—human.⁶⁶ Judges’ emotions must be differently engaged and trained so as to respond to their unique professional demands, but such training builds on core human capacities rather than supplanting them.⁶⁷

Consider, first, the assertion that *emotion reveals reasons*. This is so because emotion relies on thoughts and on evaluation of thoughts. This critical point is often called the “cognitive theory” of emotion. If the traditional legal view is that emotions are “unthinking, opposed to reason in some very strong and primitive way,” just “mindless surges of affect,” the cognitive theory

64. Susan A. Bandes, *Introduction*, in *THE PASSIONS OF LAW* 1–2 (Susan A. Bandes ed., 1999) [hereinafter Bandes, *Introduction*]; Susan A. Bandes, *Victims*, “*Closure*,” and the *Sociology of Emotion*, 72 *LAW & CONTEMP. PROBS.* 1, 9–13 (2009); Maroney, *supra* note 10, at 120, 130; Stephanie Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 *MICH. L. REV.* 1093 (2009).

65. See *supra* notes 9–16 and accompanying text; see also Anleu & Mack, *supra* note 55, at 606–12 (reporting that magistrate judges expend considerable energy responding to and managing the emotions of litigants, attorneys, jurors, and witnesses).

66. Much contemporary research on the psychology of judging similarly takes as its “starting point the fact that judges are human beings,” and asks “‘Knowing what we do about people generally, what should we expect of people put in the position that judges are and asked to do what they do?’” David Klein, *Introduction*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* xi–xv, xiii (David Klein & Gregory Mitchell eds., 2010). From that baseline, it is possible to theorize the ways in which psychological phenomena may be shaped by the demands of judging. Cf. Frederick Schauer, *Is There a Psychology of Judging?*, in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, *supra* at 104 (questioning whether evidence of general psychological phenomena can be “applied to predict and explain judicial behavior”).

67. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* 52–53, 237 tbl.2 (1983) (including judges among professionals required to perform “emotional labor” to comply with workplace goals and norms). I discuss the unique emotion-regulation demands of judging in Maroney, *supra* note 60.

responds that emotions embody beliefs about its objects.⁶⁸ Fundamentally Aristotelian,⁶⁹ this is the dominant theory—one might call it a bedrock theory—within modern affective psychology and philosophy.⁷⁰ To illustrate, an angry person is angry for a reason: she perceives that an intentional wrong has been committed, of which she disapproves.⁷¹ Every emotion contains such an underlying belief structure.⁷² For example, fear reflects perception of “an immediate, concrete, and overwhelming physical danger”; guilt attends self-evaluation of having “transgressed a moral imperative”; sadness indicates a belief that one has “experienced an irrevocable loss”; and so on for every emotion.⁷³ Thus, emotion embodies thought, often complex thought, and those thoughts can be evaluated just like any others.⁷⁴ The appropriateness of the angry person’s emotion can be evaluated by reference to the accuracy of the perception of the triggering event, as well as by a social judgment of her evaluation. That is, we may judge both whether the event really occurred as she believes it did, and whether it constitutes a wrong of which one rightfully should disapprove.⁷⁵

Consider, too, the assertion that *emotion motivates action in service of reasons*. Emotions do not simply reflect passive assessment of stimuli; they

68. Martha C. Nussbaum, *Emotion in the Language of Judging*, 70 ST. JOHN’S L. REV. 23, 24–25 (1996) [hereinafter Nussbaum, *Emotion in Language*]; see also MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT 20–45 (2001); MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 19–88 (2004).

69. Cheshire Calhoun & Robert C. Solomon, *Introduction*, in WHAT IS AN EMOTION? 3, 3–40 (Cheshire Calhoun & Robert C. Solomon eds., 1984) (“Aristotle, in his *Rhetoric*, developed a strikingly modern theory of emotion that stands up to the most contemporary criticism . . .”).

70. The precise role of cognition—or cognitive “appraisal”—is a point of differentiation within affective psychology. While no theory holds that emotions are *merely* cognitions, all viable theories contemplate a non-negligible cognitive element. See THE NATURE OF EMOTION, *supra* note 1, at 179–234; ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS (1988); Keith Oatley & P.N. Johnson-Laird, *Towards a Cognitive Theory of Emotions*, 1 COGNITION & EMOTION 29 (1987); see also JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12, 142 (2008) (reflecting modern philosophical consensus that thought is “an essential element of an emotion”).

71. Richard S. Lazarus, *Universal Antecedents of the Emotions*, in THE NATURE OF EMOTION, *supra* note 1, at 163, 164–65 & tbl.1 (explaining that anger signifies perception of “a demeaning offense against me and mine”); Maria Gendron & Lisa Feldman Barrett, *Reconstructing the Past: A Century of Ideas About Emotion in Psychology*, 1 EMOTION REV. 316, 317 & Box 1, 325–26 (2009) (describing the long scientific pedigree for concept of emotions as “intentional states” that reference objects in the world). Feeling states that lack objects are generally classified not as emotions but as *moods*. Thus, a person may be in an irritable or anxious mood for no identifiable reason, but to be angry there must be an object for the anger. See Nico H. Frijda, *Mood*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 30, at 258–59.

72. Lazarus, *supra* note 71, at 163, 164.

73. *Id.* at 163, 164–65 & tbl.1.

74. Nussbaum, *Emotion in Language*, *supra* note 68, at 25.

75. DEIGH, *supra* note 70, at 12 (asserting that emotions “are on a par with beliefs and judgments, decisions and resolutions,” for they are “states that one can regard as rationally warranted or unwarranted, justified or unjustified by the circumstances in which they occur or the beliefs on which they are based”).

prompt us to respond. This, too, is a point of relative consensus, rooted in the theory that emotions are evolved mechanisms for maximizing survival chances.⁷⁶ To illustrate, if a human perceives that a bear is approaching, her perceptions and resulting thoughts will spur fear.⁷⁷ Fear will both focus her attention on the dangerous stimulus and prompt her to evaluate its relevance to her goals—for example, the desire not to be mauled or killed. Fear then motivates and enables appropriate responsive action. This includes particular patterns of bodily response, like sweating, designed to facilitate the bodily reaction most likely to serve the goal, such as fleeing; it also includes a propensity toward typified expressions that signal the emotional state, such as grimacing or screaming.⁷⁸ Thus, emotion not only reflects thoughts, but also serves as an adaptive signal that something of import to one's flourishing is at stake and activates a program of responsive action, including actions that alert others to one's situation.⁷⁹ Just as every emotion involves a particular thought pattern, every motivated response attaches to both that thought pattern and to one's particular goals.

Next, consider the assertion that *emotion enables reason*. This point does not flow inevitably from the two prior assertions. The fact that emotion requires rational thought does not signify that reason requires emotion. Rather, rational thought could be necessary to both emotion and reason, though neither is necessary to the other. Nor does the fact that emotion motivates action prove the point, because emotion could systematically motivate irrational actions.⁸⁰

76. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 37–72 (1996); Leda Cosmides & John Tooby, *Evolutionary Psychology and the Emotions*, in *HANDBOOK OF EMOTIONS*, *supra* note 63, at 91, 93.

77. The approaching-bear scenario, one commonly invoked in emotion theory and research, is drawn from James, whose work (along with that of Darwin) is regarded as the starting point of modern affective science. William James, *What Is an Emotion?*, 9 *MIND* 188, 190 (1884).

78. These propensities toward typified responses are called “action readiness” and “action tendencies.” See Nico H. Frijda, *Action Readiness*, in *THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 30, at 1; Nico H. Frijda, *Action Tendencies*, in *THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 30, at 1–2. Affective theorists differ over the causes and temporal ordering of these aspects of emotion—specifically, whether emotions *cause* or *result from* vasomotor responses in the body. Tim Dalgleish, *James-Lange Theory*, in *THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES*, *supra* note 30, at 229 (debate over James-Lange theory). This long-standing debate (which some have concluded is one of vocabulary rather than substance) is likely of little import in law, as all agree that emotion does consist of these components and that they are highly time-compressed.

79. See Craig A. Smith et al., *Emotion-Eliciting Appraisals of Social Situations*, in *AFFECT IN SOCIAL THINKING AND BEHAVIOR* 85, 85 (Joseph P. Forgas ed., 2006) (noting that one basic function of the expressive states attending appraisal-based emotion is social communication).

80. This particular conclusion is reflected in many traditional accounts of emotion, but is difficult to square with evolutionary accounts. Alice M. Isen & Aparna A. Labroo, *Some Ways in Which Positive Affect Facilitates Decision Making and Judgment*, in *EMERGING PERSPECTIVES ON JUDGMENT AND DECISION RESEARCH* 365, 382 (Sandra L. Schenider & James Shanteau eds., 2003) (defending adaptive nature of emotion despite frequent assumption that emotion “causes people to make errors, take inappropriate actions, or fail to speak and think clearly”); Martie G.

The tenet that emotion enables reason, then, requires a more complex defense. That defense is actively evolving, and ties together scientific findings—particularly from cognitive neuroscience⁸¹—and moral-philosophical accounts.⁸²

Contemporary scientific research is moving strongly in the direction of concluding that emotion is necessary to rationality. Such investigations typically involve the study of persons with known impairments to emotional function—for example, because of focal brain abnormalities or injury.⁸³ In such persons, the research demonstrates that emotional capacity and substantive rationality experience a mutual decline.⁸⁴ Persons without access to minimally normal emotional reactions generally cannot engage in vital forms of practical reasoning.⁸⁵ Further, in such persons “social and emotional competence” can be devastated while more purely cognitive capacities—say, for logic—remain intact.⁸⁶ While capable of “reasoning” in some literal fashion, these emotionally incompetent persons generally are unable to act rationally—for example, becoming unable to suppress inappropriate actions, to understand and respond to social cues,⁸⁷ and to advance their own interests and preferences in high-stakes situations.⁸⁸ Severe emotional dysfunction—like depression—also can

Haselton & Timothy Ketelaar, *Irrational Emotions or Emotional Wisdom? The Evolutionary Psychology of Affect and Social Behavior*, in *AFFECT IN SOCIAL THINKING AND BEHAVIOR*, *supra* note 79, at 21, 21 (Joseph P. Forgas ed., 2006) (“[I]t is hard to believe that emotions emerged through evolution only to disrupt judgment and decision-making.”).

81. Cognitive neuroscience integrates psychology and neuroscience. *THE COGNITIVE NEUROSCIENCES III* (Michael S. Gazzaniga ed. 2004).

82. See, e.g., JESSE J. PRINZ, *THE EMOTIONAL CONSTRUCTION OF MORALS* (2007).

83. See MICHAEL S. GAZZANIGA ET AL., *Emotion*, in *COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND* 537, 548–55, 559–70 (2d ed. 2002) (describing numerous such lesion studies).

84. The best known of these studies (which continue to proliferate) are by Antonio Damasio, Antoine Bechara, and their collaborators. See generally ANTONIO R. DAMASIO, *DESCARTES’ ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (1994) (examining the connection between impaired rationality and brain damage, through analysis of neuropsychological research in humans and animals); ANTONIO R. DAMASIO, *THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS* (1999) (exploring interrelationships between consciousness and understanding, knowledge, and emotions); Antoine Bechara et al., *Characterization of the Decision-Making Deficits of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 *BRAIN* 2189 (2000).

85. The classical demonstration of such failure is impaired ability (relative to normal subjects) to make rational, wealth-maximizing choices in a gambling task. See Bechara et al., *supra* note 84. Studies also demonstrate impairment in a number of “real-world competencies” such as judgment and planning. Steven W. Anderson et al., *Impairments of Emotion and Real-World Complex Behavior Following Childhood- or Adult-Onset Damage to Ventromedial Prefrontal Cortex*, 12 *J. INT’L NEUROPSYCHOLOGICAL SOC’Y* 224, 224 (2006).

86. Todd F. Heatherton et al., *Introduction: Emotion and Social Neuroscience*, in *THE COGNITIVE NEUROSCIENCES III*, *supra* note 81, at 973, 974.

87. GAZZANIGA ET AL., *supra* note 83, at 548–50 (describing range of social decision-making impairments in persons with emotional processing impairments attending frontal lobe damage).

88. Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 *AM. CRIM. L. REV.* 1375, 1392–97 (2006).

rob persons of their motivation to engage in self-benefitting action.⁸⁹ The extent to which their fates are intertwined suggests, at a minimum, a high degree of interdependence between emotion and reason. It further suggests that emotional competence is necessary to substantive rationality, particularly in making social judgments and choices regarding one's own welfare.

Scientific research also lends strong support to the conclusion that emotion plays a critical role in moral judgment.⁹⁰ Much as the cognitive view of emotion represents a modern take on Aristotelean thought, this view reflects a modern take on the moral sentimentalist school of philosophical thought.⁹¹ To illustrate, psychopathy, including the antisocial behavior typifying serial murderers, correlates at the neural level with a lack of normal emotional responsivity.⁹² Thus, psychopaths' moral indifference mirrors their emotional indifference. Emotion also is differently engaged when nonpsychopathic persons choose between options in the well-known "trolley problem." Choosing to flip a switch to divert a trolley, killing one person but saving five, has far less emotional salience than does pushing a human in front of the trolley to achieve the same result, and that emotional differential accounts for an overwhelming preference for the former option.⁹³ On the basis of such

89. *Id.* at 1410–16.

90. Dacher Keltner et al., *Emotions as Moral Intuitions*, in *AFFECT IN SOCIAL THINKING AND BEHAVIOR*, *supra* note 79, at 162–75; Jesse Prinz, *The Emotional Basis of Moral Judgments*, 9 *PHIL. EXPLORATIONS* 29 (2006). Significant empirical research is currently underway exploring the role of emotion in moral judgment. *See, e.g.*, Liane Young et al., *Damage to Ventromedial Prefrontal Cortex Impairs Judgment of Harmful Intent*, 65 *NEURON* 845 (2010); MORAL COGNITION LAB, <https://mcl.wjh.harvard.edu/index.html> (last visited Jan. 23, 2011) (website of Joshua Greene's Moral Cognition Lab).

91. *See* Calhoun & Solomon, *supra* note 69, at 17–20, 33 (surveying moral sentimentalist theories, which essentially "insisted that moral motivation could only be understood in terms of certain crucial emotions, in particular such empathetic emotions as 'sympathy' and 'compassion'").

Though moral sentimentalism is a common starting point for contemporary philosophical accounts in light of our advanced understanding of emotion, it is far from the only end point. Just as the prior discussion of emotion's cognitive and motivational aspects relies on points of relative consensus, *see supra* notes 68–79, this discussion captures points of relative commonality in an evolving debate. *See, e.g.*, 3 *MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT* (Walter Sinnott-Armstrong ed., 2008) (collecting such debates). A point of true commonality is that emotion and moral judgment are intertwined in ways that compel more sophisticated analysis than that which has come before. Beyond that, accounts necessarily diverge; philosophical consensus is both less likely than scientific consensus (by several orders of magnitude) and less desirable an aspiration. My own moral-philosophical account of emotion tends in the direction of what Joshua Greene might call anthropocentric sentimentalist deontology. *See* Joshua D. Greene, *The Secret Joke of Kant's Soul*, in 3 *MORAL PSYCHOLOGY*, *supra*, at 35, 74–75.

92. *See* Kent A. Kiehl, *Without Morals: The Cognitive Neuroscience of Criminal Psychopaths*, in 3 *MORAL PSYCHOLOGY*, *supra* note 91, at 120–49; KENT A. KIEHL, DEPARTMENT OF PSYCHOLOGY, UNIVERSITY OF NEW MEXICO, http://www.unm.edu/~psych/faculty/lg_kiehl.html (last visited Jan. 23, 2011) (Kent Kiehl laboratory).

93. Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 *SCI.* 2105, 2105–07 (2001); Greene, *supra* note 91, at 41–58 (marshaling evidence

evidence, modern theorists increasingly assert that emotion, at least sometimes, is integral to moral judgment, not merely incidental to it.⁹⁴

This evidence, taken together, represents a dramatic shift in how emotion and reason are thought to interact.⁹⁵ In contrast to the Enlightenment view that emotion and reason are at war, contemporary theorists are forging a new consensus that emotion is a necessary element of much of the practical and moral reasoning on which law depends.

Carrying the analysis one step further, these three intertwined assertions—emotion reveals reasons, motivates action in service of reason, and enables reason—illustrate that, absent pathology, *emotion is educable*. As emotions rest on thoughts and are shaped by one's goals, emotions can be altered by changing one's thoughts and goals.⁹⁶ This flexibility also accounts for emotional diversity. Humans display significant cross-cultural convergence around a core set of emotions (like fear and joy) with similar physical manifestations; that is, when humans are afraid or happy, they tend to embody those emotions in strikingly similar ways.⁹⁷ But what makes any given person afraid or happy varies enormously.⁹⁸ Implicit and explicit social and cultural learning supplies many of the critical goals and beliefs, meaning that emotional response is extraordinarily diverse.⁹⁹ For example, in the case of anger, what constitutes a “demeaning offense” will vary; who counts as being part of the

from studies involving the trolley, footbridge, and crying-baby problems, as well as other moral-judgment scenarios strongly evidencing emotional involvement).

94. Keltner et al., *supra* note 90, at 166–67 (distinguishing between integral and incidental emotions in moral judgment).

95. JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 35 (1996) (“[C]ognition is not as logical as it was once thought and emotions are not always so illogical.”); *see also* Clore, *supra* note 9, at 1152 (arguing that emotions are operational tools that contribute to rationality and are feedback mechanisms that “tell us whether we have chosen rationally”).

96. James J. Gross & Ross A. Thompson, *Emotional Regulation: Conceptual Foundations*, in *HANDBOOK OF EMOTION REGULATION* 3, 13–15 (James J. Gross ed., 2007) (overview of “cognitive change” strategy for altering emotion).

97. Nico H. Frijda, *Universal Antecedents Exist, and Are Interesting*, in *THE NATURE OF EMOTION*, *supra* note 1, at 155, 155–57; Dacher Keltner & Paul Ekman, *Facial Expression of Emotion*, in *HANDBOOK OF EMOTIONS*, *supra* note 63, at 236, 239, 241–42; *see generally* ROBERT PLUTCHIK, *EMOTION: A PSYCHOEVOLUTIONARY THESIS* (1980).

98. The exception is a small group of evolutionarily salient “prepared stimuli” (like snakes, or an object moving rapidly and unexpectedly toward one’s face) and stimuli to which prepared reactions are culturally trained (like perception of racial difference). Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 *SCI.* 785 (2005).

99. Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in *THE NATURE OF EMOTION*, *supra* note 1, at 172, 175; *see also* Phoebe C. Ellsworth, *Some Reasons to Expect Universal Antecedents of Emotion*, in *THE NATURE OF EMOTION*, *supra* note 1, at 150, 151 (asserting that though there “are universal antecedents of emotion insofar as there are universal human needs and goals,” in “humans, the potential for diversity is as universal as anything”).

group “me and mine” will vary; even the proper goal to be advanced—for example, vindicating honor or restoring community harmony—will vary.¹⁰⁰

Further, such flexibility exists not just between groups of persons with a shared social or cultural heritage but also within individuals. People generally are motivated to regulate their emotions, as well as those emotions’ overt expression, in service of cultural, social, and professional norms.¹⁰¹ We learn to suppress behaviors (like laughing) in service of superseding goals (such as observing etiquette or not hurting someone’s feelings).¹⁰² We also can train ourselves to think differently about stimuli.¹⁰³ For example, a trauma surgeon cannot afford to feel disgust when cutting into human flesh or handling bodily fluids, nor can she afford constantly to expend energy suppressing disgust.¹⁰⁴ Her professional goals require her to think differently about those stimuli than she did before—for example, conceptualizing them as diagnostically relevant, or as opportunities to demonstrate skill—and that cognitive recasting creates a different emotional response.¹⁰⁵

Thus, the traditional legal story casting emotion as stubbornly irrational is simply not true. Emotion’s critical role in reflecting and enabling reason coexists with an ability to shape our experience and expression of it in accordance with a hierarchy of reasons.

It is critical here to note that nothing in the above account suggests that emotion is not sometimes associated with irrationality and disadvantageous action.¹⁰⁶ As the above account demonstrates, emotion can rest on factually wrong or morally reprehensible beliefs—for example, hatred fueled by racism.¹⁰⁷ But in the case of emotions based on problematic beliefs, those beliefs, not the emotions, are the proper targets, for changing the former is the most direct route by which to change the latter.¹⁰⁸ Further, this account accepts

100. Though evolved “biological universals link the *if* with the *then*,” individual and cultural factors “affect the *if*” by determining what circumstances are thought to constitute, for example, “a demeaning offense” or an “irrevocable loss.” Lazarus, *supra* note 71, at 167–68.

101. Gross & Thompson, *supra* note 96, at 3, 3–26; NIEDENTHAL ET AL., *supra* note 1, at 169–75 (emotion shaped by work-related norms); HOCHSCHILD, *supra* note 67.

102. NIEDENTHAL ET AL., *supra* note 1, at 157–59 (elaborating motives for such emotion regulation).

103. *Id.* at 169–70.

104. Allen C. Smith III & Sheryll Kleinman, *Managing Emotions in Medical School: Students’ Contacts with the Living and the Dead*, 52 SOC. PSYCHOL. Q. 56 (1989).

105. *Id.* at 60, 62. For further elaboration of the parallels between judges and medical professionals for purposes of emotion regulation, see Maroney, *supra* note 60.

106. See, e.g., George Loewenstein, *Insufficient Emotion: Soul-Searching by a Former Indicter of Strong Emotions*, 2 EMOTION REV. 234, 234 (2010) (asserting that there is “no contradiction” between the positions that emotions can “cause people to lose control of their behavior” and that emotion generally contributes to rational decision making).

107. NUSSBAUM, *HIDING FROM HUMANITY*, *supra* note 68, at 11 (declaring that “racism is irrational” because it is based on “false and ungrounded” beliefs).

108. Seeking directly to alter a disturbing emotion by changing its underlying belief structure is integral to most Western therapeutic interventions. See, e.g., Laura Campbell-Sills & David H. Barlow, *Incorporating Emotion Regulation Into Conceptualizations and Treatments of*

that emotion—even if *not* based on undesirable beliefs—can feel uncontrollable, distorting, and resistant to change. Indeed, these attributes form an important part of our folk-psychological concepts of emotion.¹⁰⁹ But to the extent that non-pathological emotion *sometimes* is associated with error, as law presumes it *usually* to be,¹¹⁰ that relationship is the same as between cognition and its associated heuristics and biases. Errors result from processes that are adaptive when taken as a whole but maladaptive in particular situations.¹¹¹

The approaching-bear scenario provides an example. One function of emotion is to quickly narrow attention to sources of threat and opportunity—in this instance, the bear and possible escape routes, respectively—to the exclusion of other stimuli. That narrowing is vital, but it has costs: the person is less able to perceive and remember less emotionally vivid aspects of the situation.¹¹² The intensity of the attentional funnel might cause her to not notice indications that the “bear” is actually someone in a bear suit, not see the ditch standing between her and the escape route, or not remember important information she was told immediately before seeing the “bear.”¹¹³

Similarly, different emotionally infused mood states tend to dispose one to different decisional styles, which might be disadvantageous in particular situations.¹¹⁴ For example, persons in sad moods tend to scrutinize evidence more carefully than do happy or angry persons, meaning that those emotional

Anxiety and Mood Disorders, in HANDBOOK OF EMOTION REGULATION, *supra* note 96, at 542, 552–53.

109. W. Gerrod Parrott, *The Heart and the Head: Everyday Conceptions of Being Emotional*, in EVERYDAY CONCEPTIONS OF EMOTION 73, 80 (J.A. Russell et al. eds., 1995).

110. See, e.g., Roy F. Baumeister et al., *Emotional Influences on Decision Making*, in AFFECT IN SOCIAL THINKING AND BEHAVIOR, *supra* note 79, at 143, 143 (“A long tradition of folk wisdom assumes that emotions make for bad decisions. . . . The legal system has accepted this view as valid[.]”); Wurzel, *supra* note 24, at 298–99.

111. Stephanie H.M. van Goozen et al., *Preface*, EMOTIONS: ESSAYS ON EMOTION THEORY x (Stephanie H.M. van Goozen et al. eds., 1994) (noting that emotions are on the whole “adaptive and rational”); Gerald C. Clore, *Why Emotions Are Felt*, in THE NATURE OF EMOTION, *supra* note 1, at 103, 105–06 (explaining that the emotional processing system is “generally adaptive but it is also subject to certain errors,” such errors being “problematic side effects” of its functional aspects); Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397, 397–420 (Thomas Gilovich et al. eds., 2002); Bruce E. Kaufman, *Emotional Arousal as a Source of Bounded Rationality*, 38 J. ECON. BEHAV. & ORG. 135, 138–139 (1999).

112. Patrik Vuilleumier, *Attention and Emotion*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 30, at 54–58.

113. See RICHARD S. LAZARUS, EMOTION AND ADAPTATION 17 (1991) (“When a person is in a traumatic situation, perception and thought may be impaired, blocked, distracted, even paralyzed.”); Clore, *supra* note 111, at 105–06 (“[G]iving exclusive priority to emotionally relevant concerns means that one can quite literally lose perspective.”).

114. Clore, *supra* note 111, at 109–110; Daniel C. Molden & E. Tory Higgins, *Motivated Thinking*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING 295, 311 (Keith J. Holyoak & Robert G. Morrison eds., 2005).

states sometimes contribute to blind spots.¹¹⁵ Emotion, therefore, does not invariably lead to normatively positive processes and outcomes.

But such a concession is necessary for every other core human capacity, each of which entails the possibility of disadvantageous outcomes. Eyewitness testimony is far less reliable than we once thought,¹¹⁶ but we do not, on that basis, dismiss the importance of eyesight. Thought patterns go terribly awry in persons with schizophrenia,¹¹⁷ but we do not, on that basis, perceive thought to be inherently irrational. Only with emotion are the necessary costs of functionality thought to evidence the irrationality of the entire function, and only with emotion are its pathological manifestations thought to characterize the entire enterprise. The correct attitude, instead, is parallel to that of behavioral law and economics, which seeks to isolate the decisional contexts in which critical cognitive tools lead to suboptimal outcomes.¹¹⁸ Such an approach—which might be dubbed “emotional law and economics”¹¹⁹—would seek to isolate and control the decisional contexts in which emotion, too, predictably leads to suboptimal outcomes, knowing that those outcomes are the exception rather than the rule.

* * *

As this Part has shown, the theoretical foundation from which the script of judicial dispassion derives has been meaningfully eroded. Emotion is not antithetical to legal reason. Legal scholars can no longer rely upon the traditional supposition to the contrary to conclude that emotion is antithetical to judicial reason. The role of emotion in judges’ professional lives clearly will differ from its role in judges’ personal lives, for the professional and democratic demands of judging require unique beliefs, goals, and hierarchies of reasons.¹²⁰ But under no plausible theory could those demands be met by literal absence of emotion.

115. For a review, see Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker*, 19 J. BEHAV. DECISION MAKING 115 (2006).

116. Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, 3 CRIME & JUST. 105, 107–08 (1981) (“The problem can be stated rather simply: eyewitness testimony is not always reliable.”).

117. AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 313–14 (4th ed. 2000); Peter Bachman & Tyrone D. Cannon, *Cognitive and Neuroscience Aspects of Thought Disorder*, in THE CAMBRIDGE HANDBOOK OF THINKING AND REASONING, *supra* note 114, at 493, 494.

118. See generally BEHAVIORAL LAW AND ECONOMICS (Jeffrey J. Rachlinski ed., 2009) (bringing together key articles in the emerging field).

119. Thanks to Chris Guthrie for this only partly tongue-in-cheek suggestion for an appropriate nomenclature.

120. Cf. Schauer, *supra* note 66, at 103–05 (arguing that psychology’s lessons are likely different in the judging context).

III.

A HIDDEN INTELLECTUAL HISTORY OF DISSENT

As the previous Part demonstrated, the script of judicial dispassion is out of step with what we now know about emotion; as this Part shows, the script has drawn occasional dissenters. These dissents, clustered at two discrete moments in the early and late twentieth century, have largely escaped academic attention and have had virtually no impact on legal or popular culture. This Part first traces the previously hidden intellectual history of such dissents, and then articulates the recurring theoretical difficulties that have sharply cabined their influence.

A. Emotional Realism, Then and Now

Efforts to draw attention to the existence and potential value of judicial emotion first reached non-negligible levels during the legal realist period that peaked in the 1920s and 1930s. After falling dormant for half a century, these efforts were revived in the late 1980s.

1. Emotion in Early Legal Realism

That the early twentieth-century legal realists sought generally to shatter what they saw as “illusions” about law’s objectivity is not a new story.¹²¹ That they saw frank recognition of judicial emotion as a necessary part of that project, however, is. This is a new story largely because the realists themselves deeply buried the emotional element of their message.

The excavation necessary to unearth that element proceeds thus: first, the realists challenged the idea that law is certain, governed by rules whose provenance owes little to the messy, imperfect, human world.¹²² Central to this myth of certainty was a concept of judges as persons capable of logically and

121. It is difficult to say anything about legal realism without wading into significant disputes beyond the scope of this Essay. See generally BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007) (reflecting assessment that legal realism was a major intellectual event in twentieth-century legal theory and practice); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009) (disputing Leiter’s assessment). For present purposes, a sufficient account of legal realism is that it was an intellectually significant movement; it was, and remained, perceived as breaking with dominant, contrary positions; and it contained a core of unifying ideas. Cf. Karl Llewellyn, *Some Realism about Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223–34, 1250–51 (1931) (describing legal realism as a movement in legal work and scholarship, composed of individual men many of whom would “scorn ascription to its banner” yet who shared a “common core” of thought). Of course, just as “there were brave men before Agamemnon,” there were realist ideas before there were realists. Benjamin N. Cardozo, *Jurisprudence, Lecture before the Association of the Bar of the City of New York*, in *SELECTED WRITINGS OF BENJAMIN CARDOZO* 7, 10 (1941); see also Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931) (noting that the so-called new realists were “carrying on the best tradition of the last generation” by likewise demanding a “jurisprudence of actualities”).

122. Arthur L. Corbin, *The Law and the Judges*, 3 YALE REV. 234 (1914).

objectively discerning those rules, and thus establishing “a government of laws and not of men.”¹²³ The realists instead insisted that law is amenable to flexible interpretation, responsive to changing social norms and realities. Further, judges’ exercise of discretion enables such flexibility; that is, the government “is one of laws through men.”¹²⁴ This discretion allows for the influence of a human element.¹²⁵ The human element embraces all the influences that make the judge who he is—sociological, political, ideological, and psychological.¹²⁶ Finally, emotion forms part of the psychological aspect of the human element. Thus, as Cardozo proposed, to engage fully with “what judges really do” requires dialogue on the contrast between “reason versus emotion.”¹²⁷

Deeply nested as it was within so many other ideas, judicial emotion was one of the least developed concepts in the realist program. Consequently, it also has largely escaped modern academic notice, despite the attention lavished on other aspects of realism.¹²⁸ But it was unquestionably there. The realist take on judicial emotion, though thin, revolved around two core ideas: it exists, and it exerts greater influence over the processes and products of judging than previously had been acknowledged.

123. See John Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833, 833 (1931) (criticizing “Montesquieu’s classic stereotype” in which the judge “is an automaton”); Charles Grove Haines, *General Observations on the Effects of Personal, Political, and Economic Influences in the Decisions of Judges*, 17 U. ILL. L. REV. 96, 96–99, 108 (1922).

124. Llewellyn, *supra* note 121, at 1243; see also *id.* at 1222 (“Behind decisions stand judges; judges are men; as men they have human backgrounds.”); Dickinson, *supra* note 123, at 835 (asserting that “insufficient attention has been paid to the discretionary aspect of the judicial process”).

125. See LEITER, *supra* note 121, at 19 & n.20, 61 (explaining that coming to a theory of the human element was the realists’ central jurisprudential concern); Cardozo, *supra* note 121, at 10 (“[F]idelity to the realities of the judicial process . . . is supposed to be, in a degree peculiarly their own, the end and aim of [the realists’] endeavor.”); see also Kaufman, *supra* note 8, at 15 (urging judges to recognize the “human element” in their decision making process); Glendon Schubert, *Jurisprudence and Judicial Behavior: Introductory Note*, in JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH 9, 9–13, (Glendon Schubert ed., 1964) (emphasizing that realists “shifted the focus of attention away from law as an impersonal ideological entity to the human judges”).

126. Dickinson, *supra* note 123, at 839; see also Haines, *supra* note 123, at 104 (quoting Eugen Ehrlich, *Judicial Freedom of Decision: Its Principles and Object*, in THE SCIENCE OF LEGAL METHOD 48 (Joseph H. Drake et al. eds., 1917)).

127. Cardozo, *supra* note 121, at 19.

128. For example, Laura Kalman nowhere mentions the realists’ theories of emotion in her historical analysis of realism’s impact on legal education, though she does discuss the role of Freudian theory and the idea of judicial “idiosyncrasy.” LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* 6–10 (1986); see also LEITER, *supra* note 121, at 1–58 (2007) (discussing emotion nowhere in a careful essay on “Rethinking Legal Realism”). Among contemporary scholars, Charles Barzun is notable for including emotional concepts in his analysis of Frank’s *Law and the Modern Mind*; however, he does not set out to explore emotion in depth. Charles L. Barzun, *Jerome Frank and the Modern Mind* 11–12, 20, 26–27, 30–33, 38–42 (Virginia Public Law and Legal Theory Research Paper No. 2009-01, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1460697.

a. Judicial Emotion Exists

This fundamental realist point is encapsulated in Arthur Corbin's then-heretical assertion that judge-made law "grows up in the semi-darkness of ignorance and emotion," rather than "in the strong light of pure reason."¹²⁹ John Dickinson, offering an example, suggested that a judge's "known animosity" toward a lawyer might affect the legal rule he privileges in a case brought by that lawyer.¹³⁰ In the same vein, Charles Grove Haines noted that judges were influenced by "sympathies they could not but feel," based on their life experiences.¹³¹ Others suggested that the concepts of judicial "personality" and "temperament" included an emotional element.¹³² As these comments suggest, the realist dialogue on emotion tended not to be particularly deep. But it was notable that such a dialogue was taking place at all. Cardozo observed in 1931 that judges had been "talking about ourselves and looking into ourselves, subjecting our minds and our souls to a process of analysis and introspection with a freedom and to a measure that to the thought of our predecessors would have been futile and meaningless or even down-right unbecoming."¹³³

If focused introspection on emotion was shallow, it was shedding its stigma. And it did find one significant outlet: that segment of realist thought that drew on psychological theory, particularly the work of Jerome Frank.¹³⁴

No realist figure is more strongly identified with a theory of judicial emotion than Frank, and no realist work is more explicit in its treatment of the subject than *Law and the Modern Mind*.¹³⁵ Frank's work drew heavily on Piaget's theory of child development,¹³⁶ and it is often assumed that Frank's views were influenced by his own experience of undergoing psychoanalysis.¹³⁷ Eclectic and often maligned, *Law and the Modern Mind* outlined a bold theory that continues to throw a long shadow over legal thought.¹³⁸ Frank argued that

129. Corbin, *supra* note 122, at 250.

130. Dickinson, *supra* note 123, at 838.

131. Haines, *supra* note 123, at 115 (quoting George P. Costigan, Jr., *The Supreme Court of the U.S.*, 16 YALE L.J. 266 n.69 (1907)) (asserting that judges are affected by the "prejudices and passions of common humanity").

132. JEROME FRANK, *LAW AND THE MODERN MIND* 143 (1930).

133. Cardozo, *supra* note 121, at 8.

134. LEITER, *supra* note 121, at 28–30 (contrasting legal realism's "idiosyncratic psychological" wing, including Frank and Hutcheson, with its "sociological" wing, including Llewelyn and Cohen); *see also* JULIUS PAUL, *THE LEGAL REALISM OF JEROME N. FRANK* xix, 25 (1959) (including in the "psychological legal realists" Frank, Lasswell, Schroeder, Robinson, West, and Oliphant).

135. Barzun, *supra* note 128, at 2 & nn. 1–2; *see also* K.N. Llewellyn, *Legal Illusion, in Law and the Modern Mind: A Symposium*, 31 COLUM. L. REV. 82, 82 (1931) (characterizing Frank's work as "well-nigh unique" in exploring "emotional drives").

136. FRANK, *supra* note 132, at 75 n.1, 355. As Frank noted, the aspect of Piaget's theory on which he relied was grounded in Freudian psychoanalytic theory, itself still relatively new. *See id.* at 355 (notes on Ch. II).

137. Barzun, *supra* note 128, at 5, 33.

138. KALMAN, *supra* note 128, at 8 (claiming that *Law and the Modern Mind* "was an

lawyers and judges approached law with the “emotional attitudes of childhood,” characterized by longings for a stable, authoritarian caretaker, or for father-authority.¹³⁹ This emotional drive fed a fantasy that certainty was possible and fueled a concomitant need to insist on law’s objectivity, with the result that law was treated as a father-substitute.¹⁴⁰ Frank’s contemporaries described him as arguing that “[o]nly an emotional *need*, a desperately strong emotional need, to continue in illusion can explain” devotion to the myth of legal certainty.¹⁴¹ Frank, like the other realists, sought to debunk that myth by insisting that the “personality of the judge” inevitably influenced his decisions.¹⁴² Where he went further was to posit a particular sort of emotional immaturity that could distort that personality and, thus, judging. Indeed, he warned that the judges who most insisted on their own “mechanical logic” were the ones most “swayed by the perverting influences of their emotional natures.”¹⁴³ Instead, Frank urged, judges should throw off “childish emotional drags” in order to embody the “modern mind” to which law should adapt.¹⁴⁴

While singular in its focus on judicial emotion, *Law and the Modern Mind* was frustratingly opaque. The emotionally “adult” judge that Frank imagined was free of a particular emotional influence, that is, the childish need to indulge a fantasy of certainty.¹⁴⁵ He did not contemplate that the ideal modern-minded judge would be literally emotionless,¹⁴⁶ but rather that the judge would be both emotionally and intellectual “mature.”¹⁴⁷ But he did not specify on what emotions—other than the “courage” required to reject the fantasy—the judge might continue to draw.¹⁴⁸ Further, Frank’s explicitly psychoanalytic approach

intellectual atomic bomb” by whose fallout “few were untouched”); Barzun, *supra* note 128, at 2–7 (emphasizing that though Frank now is frequently treated as erratic and peripheral, he also is recognized as a leading realist and *Law and the Modern Mind* is considered a classic).

139. FRANK, *supra* note 132, at 89. These aspects of Frank’s theory are clustered primarily at *id.* 75–90, 259–69; *see also* Barzun, *supra* note 128, at 26–28.

140. FRANK, *supra* note 132, at 89.

141. *See* Llewellyn, *supra* note 135, at 84.

142. FRANK, *supra* note 132, at 119–20, 158 n.27.

143. *Id.* at 148 (emphases and internal question marks omitted). *Cf.* Jerome N. Frank, *Judicial Fact-Finding and Psychology*, 14 OHIO ST. L.J. 183, 188 (1953) (proposing, as a mechanism for fostering judicial self-awareness, that courts provide a “judges’ psychiatrist whom a trial judge could visit periodically”).

144. FRANK, *supra* note 132, at 268.

145. *Id.* at 270 (characterizing Holmes as a “completely adult jurist”); *see also id.* at 260–69 (analogizing process of achieving a modern mind to that of “growing up”).

146. Jerome Frank, *What Courts Do in Fact*, 26 U. ILL. L. REV. 761, 764 n.55 (1932) (writing that “I have no naïve notion that” a judge without any “emotional attitudes” exists, and “I have no desire to live in a society in which such sub-human or super-human judges exercised the power of judging”).

147. FRANK, *supra* note 132, at 153, 177.

148. *Id.* at 106, 277; *see also* Frank, *supra* note 146, at 764 n.55 (suggesting that judges should have “what that society conceives to be the correct prejudices”).

limited his influence,¹⁴⁹ and this aspect of his argument became even more marginalized over time.¹⁵⁰

Nonetheless, the main idea—that judges *qua* judges have emotions—was largely accepted within the realist movement. Moreover, even realism’s detractors approved of the move toward candor about the human influences on judging.¹⁵¹ Roscoe Pound, for example, acknowledged that “there is a distinct advance in [the realists’] frank recognition of the alogical or non-rational element in judicial action which the legal science of the nineteenth century sought to ignore.”¹⁵²

b. Judicial Emotion Affects Judging

The realists also believed that judges’ emotions were operational, not incidental. Here, too, the claims of the psychological wing were stronger. Theodore Schroeder, a free-speech activist who dabbled in psychoanalytic legal scholarship, outlined the strongest causation story possible: *all* acts of judging—ranging from choice of language to the ultimate legal decision—were determined by emotional drives born of life experiences.¹⁵³ Frank himself stopped short of such a claim; though he believed the emotional pull of father-governance to be sufficiently strong as to explain the entire legal culture’s devotion to a myth, he also believed that a judge’s emotions were only one operative factor in any given case.¹⁵⁴ Frank failed, though, to specify the way or degree in which he thought emotion to be operational.¹⁵⁵

149. See LEITER, *supra* note 121, at 17 (“Even among Realists . . . Frank’s views represented a particular sort of extreme.”); Mortimer J. Adler, *Legal Certainty, in Law and the Modern Mind: A Symposium*, *supra* note 135, at 91, 96–97; Llewellyn, *supra* note 135, at 84, 86 (expressing concern that Frank would be disregarded because of “the intrusions of psychoanalytic borrowing”).

150. FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 130 (2009) (arguing that Frank’s theories displayed “occasional rhetorical excesses and psychological silliness”); Barzun *supra* note 128, at 5–6 & n.17 (explaining that even Frank’s enthusiasts distance themselves from his psychoanalytic focus).

151. See, e.g., Adler, *supra* note 149, at 105 (conceding that a judge’s “psychological prejudices and his hunches . . . are undoubtedly large factors in determining his disposition of the case”).

152. Pound, *supra* note 121, at 706.

153. PAUL, *supra* note 134, at 25 n.2 (criticizing Schroeder for “succumbing” to the “blatant assertion that the exposure of the unconscious drives of the individual judge will tell us everything we had failed to learn from jurisprudence before the birth of Sigmund Freud”); Theodore Schroeder, *The Psychological Study of Judicial Opinions*, 6 CALIF. L. REV. 89, 93 (1918) (seeking to detect “the hidden impulses determining judicial decisions,” such as painful or shameful emotional associations).

154. FRANK, *supra* note 132, at 14 (noting that child development theory was only a “partial explanation” of judging); see also *id.* at 122–23 (characterizing Schroeder as “having fallen into the error of assuming that a blending of law and psychology will promptly produce remarkable results”); PAUL, *supra* note 134, at 29 n.3, 35 (noting Frank’s recognition of the psychological theory’s limits, and his critique of the perceived excesses of other psychological realists). Pound, in remarks engaging with the “psychological” theories with which Frank was primarily identified, appeared to understand his causation claim to be a stronger one, a

Other realist thinkers similarly declined to say how much of an influence they thought judicial emotion wielded, other than to concede it was nonnegligible.¹⁵⁶ Cardozo declared that “legal scholars have been unable to agree over how much of the judicial decision-making process is reasoning, and how much is mere emotion.”¹⁵⁷ The realists’ sole consensus, then, was that emotion had a greater impact on judging than previously had been thought, or thought acceptable to acknowledge.

Thus, the realists’ treatment of judicial emotion was—despite its novelty—haphazard. They failed to offer a sufficiently specific theory as to sustain meaningful scholarly development or cultural salience.¹⁵⁸ The realist focus on judicial emotion, consequently, was an “insight that flashes and is forgotten,” a fate Llewellyn hoped all realist theory would avoid.¹⁵⁹

And so the situation remained for some decades. Psychology moved squarely into its behavioral period, in which researchers generally eschewed study of emotion.¹⁶⁰ Scholarship on judicial decision making took on a decidedly political science flavor.¹⁶¹ Yet the dormant dialogue would, when awakened in the mid-1980s, progress somewhat in both penetration and sophistication.

2. *The New Emotional Realism of the Late Twentieth Century*

Fittingly, the late-century revitalization found its inspiration in realism. In a 1987 lecture in honor of Justice Cardozo, Supreme Court Justice William J.

characterization with which Llewellyn disagreed. Compare Pound, *supra* note 121, at 705–06 (claiming that the “psychological approach” to jurisprudence has led theorists to “insist on the non-rational element in judicial action as reality and the rational as illusion”), with Llewellyn, *supra* note 135, at 87 (asserting that Frank deliberately over-emphasized this factor to drive it home to the reader).

155. Barzun, *supra* note 128, at 7 n.19 (noting Frank’s inconsistency in *Law and the Modern Mind* over the determinative power of “non-rational” factors); see also Jerome Frank, *Say It with Music*, 61 HARV. L. REV. 921, 932 (1948) (“A large component of a trial judge’s reaction is ‘emotion.’”).

156. Haines, *supra* note 123 at 105–06 (emphasizing that these issues “are as yet largely unexplored,” though “[s]ome time, no doubt, more facts regarding the personal element in the administration of justice will be rendered available”).

157. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 44–45 (1921).

158. Lynne Henderson, *The Dialogue of Heart and Head*, 10 CARDOZO L. REV. 123, 129 (1988) (explaining that “resistance to exploring emotional influences” continued despite *Law and the Modern Mind*).

159. Llewellyn et al., *supra* note 121, at 1238 (expressing hope that realist ideas would not be “hit-or-miss stuff, not the insight that flashes and then is forgotten,” but rather would mature into a “sustained effort to force an old insight into its full bearing”).

160. Gendron & Barrett, *supra* note 71, at 316 (explaining that the period is generally referred to as emotion’s “Dark Ages”).

161. Schubert, *supra* note 125, at 2–3. The focus on judges’ inner lives was never entirely extinguished. Cf. Andrew S. Watson, *Some Psychological Aspects of the Trial Judge’s Decision Process*, 39 MERCER L. REV. 937 (1988) (quoting mid-century statements by Lord Radcliffe that judicial “thinking is a function of the whole of one’s personality, with all the interplay of emotions and experiences that in time claim and receive recognition from one’s reason”).

Brennan praised him for having called attention to the “complex interplay of forces—rational and emotional, conscious and unconscious—by which no judge could remain unaffected,” and declared it was time to answer his forgotten call for the vital “dialogue of reason and passion” in judging.¹⁶²

Taking up the call himself, Brennan argued that though the idea of dispassionate judges once served a useful role in fostering early American democracy, in the modern era “the greatest threat to due process principles is formal reason severed from the insights of passion.”¹⁶³ Passion—which he defined as “the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason”—does not “taint the judicial process, but is in fact central to its vitality.”¹⁶⁴ When allowed to enrich reason, he argued, judicial passion animates due process jurisprudence and prevents law from devolving into an “alien” and sterile bureaucracy.¹⁶⁵

Brennan’s ideas caused a “tremendous stir”:¹⁶⁶ some commentators came strongly to the defense of dispassion;¹⁶⁷ others embraced Brennan’s vision insofar as it cohered with their notion of good outcomes.¹⁶⁸ Like Obama’s empathy standard, Brennan’s passion was frequently construed as having little to do with emotion *per se*.¹⁶⁹ Indeed, his sweeping concept served as a theoretical and political Rorschach, and his call quickly became so diffused as to rob it of impact.¹⁷⁰

162. Brennan, *supra* note 20, at 3.

163. *Id.* at 17.

164. *Id.* at 3, 9 (citing THOMAS JEFFERSON, WRITINGS 874 (M. Peterson ed. 1984))

165. *Id.* at 19 (quoting MAX WEBER, ECONOMY AND SOCIETY 975 (G. Roth & C. Wittich eds., 1978)) (asserting that bureaucracy “develops the more perfectly . . . the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements”). Brennan offered *Goldberg v. Kelly*, 397 U.S. 254 (1970), as the paradigmatic example, arguing that it took “passion” to understand that only pre-termination processes could safeguard human interests. In contrast, in *Lochner v. New York*, 198 U.S. 45 (1905), the Justices had aspired “to the perfection of pure reason” and “cut themselves off from other sources of inspiration that would have enriched their rational debate.” Brennan, *supra* note 20, at 11.

166. Owen Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 796–97 (1991).

167. *See id.*

168. *See, e.g.,* Martha L. Minow & Elizabeth V. Spelman, *Passion for Justice*, 10 CARDOZO L. REV. 37, 42 (1988).

169. *See* Julius Cohen, *Justice Brennan’s “Passion,”* 10 CARDOZO L. REV. 193, 194 (1988) (“[A] good deal of Brennan’s ‘passion’ is subsumable under Holmes’s broad use of the term ‘experience.’”); Fiss, *supra* note 166, at 801–02 (concluding that Brennan meant “a full and true appreciation of social reality”). To the limited degree commentators believed Brennan’s vision to be about emotion, they asserted that he meant to valorize only particular emotions, ones that appear “beneficent”—like love—but not those that seem to be the opposite—like hate. *See id.* at 800 (pointing out that judges are also capable of feeling “fear, contempt, and even hate,” emotions whose expression through law might be disadvantageous); Edward De Grazia, *Humane Law and Humanistic Justice*, 10 CARDOZO L. REV. 25, 33 (1988) (questioning whether Brennan’s concept of passion would approve of negative emotions such as the “barely concealed antipathy” to homosexuals like that expressed in *Bowers*); Minow & Spelman, *supra* note 168, at 42 (writing

But the call was, to some degree, taken up by others. Brennan's most notable intellectual successor in this project is Richard A. Posner, who more than any other contemporary scholar has attempted to integrate emotion into an account of judicial decision making. His ideas, like those of the realists, also require significant excavation, for, rather than propose a coherent theory, Posner weaves snippets about judicial emotion throughout his writings, primarily in *Frontiers of Legal Theory* and *How Judges Think*.¹⁷¹

Posner's central assertions may be gathered together and synopsized as follows. First, reflecting agreement with the fundamental realist observations, Posner believes that the main question is not whether emotion influences judging but, rather, how it should.¹⁷² In his main point of departure from the realists, he explicitly adopts the cognitive view, suggesting that emotions are "triggered by information," express "an evaluation of that information," and motivate action.¹⁷³ Having staked out that theoretical base, Posner undertakes to engage with the fundamental question of whether judges should "be emotionless, like computers," or—if not—how emotion ought to "enter into their judgments."¹⁷⁴

In attempting such an articulation,¹⁷⁵ Posner asserts that judicial emotion should be openly acknowledged, for the purpose not of eliminating it but of better understanding it.¹⁷⁶ More controversially, he suggests that good judging may require emotion.¹⁷⁷ Cases presenting a "zone of reasonableness," admitting

that, in addition to the positive emotions Brennan emphasizes, systems of bureaucratic rationality also embody emotions such as "contempt for or fear of litigants or clients").

170. See *infra* Part III.B.1.

171. POSNER, *supra* note 13; RICHARD A. POSNER, *HOW JUDGES THINK* (2008) [hereinafter POSNER, *HOW JUDGES THINK*]. The chapter "Emotion in Law" in *Frontiers of Legal Theory* is based on an earlier essay. See Richard A. Posner, *Emotion Versus Emotionalism in Law*, in *THE PASSIONS OF LAW*, *supra* note 64, at 309, 309–29. Posner expressed many of the ideas contained in *How Judges Think* in an earlier symposium contribution. See Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049 (2006). That Posner is commonly identified as a prominent conservative scholar detracts from the popular perception (reinforced in the Sotomayor confirmation debates) that accepting emotion's role in judging is by nature "liberal."

172. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 112, 118 (arguing that Frank's suggestion that judges need Freudian therapy was "ridiculous," but that his recognition of nonrational influences was not).

173. POSNER, *supra* note 13, at 226–28 ("Decision is a form of action, and there is no action without emotion."); see also POSNER, *HOW JUDGES THINK*, *supra* note 171, at 106 ("[Emotion] can be a form of thought . . . [it is] triggered by, and more often than not produces rational responses to, information.").

174. POSNER, *supra* note 13, at 226.

175. *Id.* at 241–51.

176. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 37 (criticizing economic theories for neglecting "cognitive limitations and emotional forces" that shape judicial behavior); *id.* at 121 ("Greater recognition of the role of the personal, the emotional, and the intuitive in judicial decisions would not weaken the force of these factors in judicial decision making, because there are no adequate alternatives.").

177. POSNER, *supra* note 13, at 241–42 ("Even in the easy cases, sound judicial

of multiple correct answers, in his view both entail and admit of more emotional engagement than others.¹⁷⁸ In such cases, he asserts, it is important for the judge to feel “empathy or fellow feeling,” particularly toward absent parties.¹⁷⁹ Different judges have different emotional propensities, some attributable to “personality” and “temperament,” and some to structural factors, such as being a trial or appellate judge.¹⁸⁰ Posner also views emotion as a factor that could influence professional competence. For example, transparent evaluation might spur judges to do a good job in order to avoid shame and guilt.¹⁸¹ Further, emotion and its expression might enter into the group dynamics of multi-judge courts, by signaling the intensity of preferences, creating dissent aversion, or motivating peace making.¹⁸² Finally, Posner asserts that emotion reveals legally relevant moral truths toward which judges cannot reason.¹⁸³

Posner’s work represents a step beyond the realist treatment of emotion, for he offers a more extensive and specified catalogue of how emotion might influence judging. It also moves beyond Brennan’s theory, for Posner contemplates emotion’s zone of influence extending beyond constitutional due process jurisprudence.

Important as these steps are, though, they are bounded by significant limitations of their own. Most critically, they have a meditational character;

decisionmaking is apt to require more emotions than just those that you need for performing any nonalgorithmic task”; further, in “rationally indeterminate” cases “a richer emotional palette would be appropriate, or at least inevitable.”).

178. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 86–87 (emphasizing that the “zone of reasonableness is widest in those constitutional cases in which the judges’ emotions are engaged, because the constitutional text provides so little guidance and because emotion can override the systemic factors that induce judges to curb their own exercise of discretion”); *id.* at 102 (noting that many “legalistically indeterminate cases” are “entangled with strong emotions”); *cf. id.* at 51 (“[T]he cases the [Supreme] Court hears tend to arouse very strong emotions.”).

179. POSNER, *supra* note 13, at 243, 245.

180. POSNER, *supra* note 13, at 228 (“[W]e might call a judge ‘emotional’ who was so affected by the ghastly injuries of a tort plaintiff that he was blinded to the other legally relevant features of the case. We expect appellate judges to be less emotional in this sense than trial judges because remote from the emotionally most salient features of the case.”); *id.* at 245 (discussing “temperament”); POSNER, *HOW JUDGES THINK*, *supra* note 171, at 73–76 (“[A] former trial judge promoted to the court of appeals . . . may be more likely to focus more on . . . the aspects that tug at the heartstrings.”).

181. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 39; *cf.* Suzanna Sherry, *Judges of Character*, in *VIRTUE JURISPRUDENCE* 88 (Colin Farrelly & Lawrence R. Solum eds., 2008) (suggesting that judges might be motivated by “fear of being wrong”).

182. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 132–35; *see also* WRIGHTSMAN, *supra* note 51, at 108–10 (observing that judges in groups “sometimes advocate a position for emotional rather than rational reasons” and may “use emotion and bargaining to get other justices to go along”).

183. POSNER, *supra* note 13, at 242–43 (“I thus take the cognitive significance of emotion so seriously as to be unwilling to constitute reason the tribunal that reviews the emotions and decides which the law should encourage The bedrock of many of our moral rules is emotion, not emotion-evaluating reason.”).

Posner has offered a series of studied reflections and hypotheses, but has not undertaken fully to test or defend them. Posner does not, for example, attempt to determine what “screens or filters” would encourage judges to be in the “correct emotional state,”¹⁸⁴ nor does he specify the content of either that state or the “suite of emotions that one should look for in a judge.”¹⁸⁵ Moreover, as explored in the following Part, when his various assertions are thus drawn together, they often fail to cohere. Posner, though providing valuable theoretical fodder, has not pretended to conclude the inquiry.

While Posner is the most prominent scholar to take on the issue, he is not the only one.¹⁸⁶ Judicial emotion was one of the earliest-identified issues to fall squarely within the bounds of the emerging law-and-emotion movement.¹⁸⁷ Oddly, though, it has received only sporadic attention within it.¹⁸⁸

184. *Id.* at 226 (“[W]hat screens or filters should be used to ensure that the law’s administrators are in the correct emotional state (whatever exactly that is) when carrying out their legal duties?”). To be sure, Posner does make some effort to answer his own question. However, his discussion of the example he chooses—the debate over the legality of victim impact statements—is directed toward the emotional state of jurors, not judges. *See id.* at 245–49.

185. POSNER, HOW JUDGES THINK, *supra* note 171, at 107. Posner acknowledges that his discussion of the “epistemic significance” of different emotions simply “suggests” the content of that “suite.” *Id.* at 106–07; *see also* POSNER, *supra* note 13, at 245 (“It would be misleading to say that good judges are less ‘emotional’ than other people. It is just that they deploy a different suite of emotions in their work.”).

186. *See, e.g.,* Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U. PA. J. CONST. L. 520, 521 (2003) (interpreting emotional subtext in the written opinion in *University of Alabama v. Garrett*); A. Morgan Cloud III, *Introduction: Compassion in Judging*, 22 ARIZ. ST. L.J. 13 (1990) (discussing various theories of the importance of judicial compassion); Little, *supra* note 10, at 208–09 (noting debate over “whether the competent judge is a ‘feeling’ judge”); Maroney, *supra* note 10, at 132–33 (offering overview of, and citations to, such work); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (critiquing the “myth of dispassion,” which “rests on two fictions: (1) that emotion necessarily leads to injustice, and (2) that a just decisionmaker is necessarily a dispassionate one”); Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193, 223, 231–33 (2002); Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1887–1903, 1922 (1988); Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DE PAUL L. REV. 605 (1996); Benjamin Zipursky, Note, *DeShaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101, 1101–02, 1121–37 (1990) (defending role of judicial empathy and compassion); *cf.* ALEXANDER NIKOLAEVICH SHYTOV, CONSCIENCE AND LOVE IN MAKING JUDICIAL DECISIONS (2001) (arguing that judges have a moral duty to “love,” but explicitly defining such love non-emotionally and by reference to concepts such as *agape* and *caritas*).

187. Bandes’s introduction to her groundbreaking *The Passions of Law* highlighted the major issues calling out for exploration within what came to be the law-and-emotion movement. *See* Bandes, *Introduction*, *supra* note 64, at 6. Among those issues, she included the following questions: “To what extent can or should judges factor emotion out of their legal decision making?” and “Do some emotions lead judges or juries to make bad decisions, or lead them into moral error?” *Id.* at 6, 13; *see also* Abrams & Keren, *supra* note 62, at 2005 (asserting that early law-and-emotion scholars focused primarily on “the judge,” whose “paradigmatic status required the separation of legal reason from emotion”).

188. Consider that in 2005 I compiled a bibliography of law-and-emotion work that included more than two hundred entries. Maroney, *supra* note 10, at 123 n.16. Such work has

For example, Martha Nussbaum, the philosopher whose work aggressively draws out the legal implications of the cognitive view,¹⁸⁹ has addressed judicial emotion only peripherally. Nussbaum's most focused treatment of judicial emotion appears in a 1996 lecture responding to the criticism of Blackmun as having been overly emotional.¹⁹⁰ After rejecting the idea that emotion is necessarily irrational,¹⁹¹ Nussbaum asked whether the traditional objection might instead reflect a concern that emotion, even if cognitively nondefective, might lead judges toward "an inappropriate[ly] gushy way of proceeding."¹⁹² This she characterized as a "really interesting worry."¹⁹³ Drawing on Adam Smith's *Theory of Moral Sentiments*, Nussbaum mused that perhaps a judge, like a reader of literature or a concerned friend, should vividly imagine the emotions of the participants but filter out "that portion of anger, fear, and even compassion that focuses on the self in its cherished projects."¹⁹⁴ Such a stance would allow the judge to share, for example, the participants' "grief, but not its disabling and blinding excesses."¹⁹⁵ Such a "judicious spectator" would ensure that her emotional identification with the participants is grounded in "a true view of what is going on."¹⁹⁶ That is, her emotional identification would accurately reflect both reality and normatively desirable evaluations; she would feel only such emotions as are "tethered to the evidence,"¹⁹⁷ eliminating extraneous considerations; and, most importantly, she would ensure that her emotional engagement is free from "reference to [her] personal goals and situation."¹⁹⁸ Such a judge, then, would display a rational and constrained form of other-regarding empathy. Recognizing that these implications of Smith "would have to be developed much further," Nussbaum offered them as a "promising suggestion."¹⁹⁹

continued to proliferate in the years since; indeed, most in the field perceive it to be growing rapidly. However, explicit treatments of judicial emotion remain relatively few, *see, e.g.*, sources cited *supra* note 186, and most are clustered around relatively narrow themes (e.g., empathy, compassion, and Brennan's defense of "passion"). *See also* Little, *supra* note 10, at 207 (arguing that judicial emotion has been "largely ignored").

189. *See, e.g.*, NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 68, at 355–56, 396–98; Martha C. Nussbaum & Dan M. Kahan, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996).

190. Nussbaum, *Emotion in Language*, *supra* note 68, at 25–30.

191. *Id.* at 25 ("[W]e cannot dismiss [emotions] from judicial reasoning and writing just by opposing them in an unreflective way to reasoning and thought").

192. *Id.*

193. *Id.*

194. *Id.* at 28.

195. *Id.*

196. *Id.*

197. *Id.* at 30.

198. *Id.* at 28–30 (citing ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (D.D. Raphael & A.L. Macfie eds., 1976)).

199. *Id.* at 29 (concluding that if these requirements are satisfied, "there is absolutely no reason why emotion shouldn't be an important part of judicial thought and writing").

Nussbaum does not, unfortunately, return to the judicious spectator conceit in her later work.²⁰⁰ She does offer a further defense of judicial empathy and compassion, one that is strikingly similar to Brennan's claim that such emotional engagement enables judges to perceive the human interests—such as equality and dignity—at stake.²⁰¹ However, the majority of her work is devoted to arguing that any given emotion's cognitive underpinnings are what renders it fit, or unfit, as a basis for legal reason; within that frame she offers some ideas as to what it means “to have judges that are properly emotional.”²⁰² Thus, as part of her argument that disgust and “primitive shame” should play no role in law—given what she sees as pernicious aspects of those emotions' cognitive structures—she implies that judges should not rely on those feelings.²⁰³ However, she suggests that judges might legitimately call on other emotions, such as anger and fear, because their cognitive structures are less inherently problematic.²⁰⁴ These suggestions, it must be noted, do not fully harmonize with the judicious spectator conceit, for Nussbaum appears to contemplate that judges legitimately may feel (and act on) emotions on their own behalf, not just at a narrative remove, so long as those emotions' cognitive basis is satisfactory. For example, she defends a court that justified its refusal to grant an offensive request by a convicted murderer by reference to the judges' “outrage.”²⁰⁵ Such outrage, Nussbaum argues, expresses “a reasoned judgment that can be publicly shared,” and is a moral sentiment “pertinent to legal judgment.”²⁰⁶ Thus, her accounts raise a critical ambiguity—may or may not the judge directly experience emotion, or must she only participate at a distance

200. Cf. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 68, at 445 (remarking that she had invoked the judicial spectator conceit previously).

201. NUSSBAUM, HIDING FROM HUMANITY, *supra* note 68, at 48–50 (discussing role of compassion in criminal sentencing by both judges and jurors); NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 68, at 441–54 (contending that judges must embrace both empathy and compassion).

202. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 68, at 446.

203. NUSSBAUM, HIDING FROM HUMANITY, *supra* note 68, at 13–15. Nussbaum's argument can be only briefly summarized here. Disgust, grounded in evolutionary notions of contagion, is legitimate insofar as it helps us identify actual contagions, but is illegitimate when directed at humans. Social shame can be helpful in motivating prosocial behavior, but primitive shame feeds self-loathing and is anti-social. See *id.* at 71–171 (disgust); *id.* at 172–221 (shame); *id.* at 321 (“[T]he dangers posed by disgust and shame are in many respects especially antithetical to the values of a liberal society.”).

204. NUSSBAUM, HIDING FROM HUMANITY, *supra* note 68, at 13–14 (arguing generally that anger and fear are potentially appropriate bases for legal decision making), 169–71 (endorsing judicial “outrage”); cf. NUSSBAUM, UPHEAVALS OF THOUGHT, *supra* note 68, at 453 (defending “appropriate anger”).

205. NUSSBAUM, HIDING FROM HUMANITY, *supra* note 68, at 169–70.

206. *Id.* at 170. The imprisoned person had asked the court to return to his personal representatives the sexual paraphernalia with which he had abused his victim. *Id.* at 168–70. The court reacted with “outrage, disgust, and incredulity,” and Nussbaum found only disgust objectionable. *Id.*

in the emotional lives of others? Like Posner, then, Nussbaum has set up important questions, but has not undertaken fully to answer them.

Such is the case with other contemporary treatments of judicial emotion. Scholars venturing into this thinly populated realm tend to acknowledge the exploratory nature of their work, endeavoring primarily to pose issues calling for greater attention.²⁰⁷ The majority take as their subject empathy and compassion, to the relative exclusion of other emotions.²⁰⁸ All appear to endorse the realist view that judicial emotion is inevitable.²⁰⁹ However, in the clearest sign that a new emotional realism is emerging, most assume that judicial emotion is desirable, at least sometimes and to some degree.²¹⁰

* * *

As this Part has revealed, just as the script of judicial dispassion has a long history, so too does the dissenting view. But it is not nearly as long, and it is far from—exceptionally far from—as consistent and influential. Nearly a century after the legal realists issued their challenge, we have moved only a few steps beyond the starting point.

But some important groundwork has been laid. The new emotional realists have largely stopped fighting over the premises that judges *qua* judges have emotions and that those emotions in some way influence their decision making. Yet even this relative agreement has failed to penetrate the larger cultural or legal environment. Furthermore, scholars have raised, by their own accounts, far more questions than they have answered. This corner of legal scholarship

207. Bandes, *Introduction*, *supra* note 64, at 6; Little, *supra* note 10, at 218; Samuel H. Pillsbury, *Harlan, Holmes, and the Passions of Justice*, in *THE PASSIONS OF LAW*, *supra* note 64, at 351–54 (noting that his “preliminary analysis raises a number of provocative questions”).

208. See, e.g., sources cited *supra* notes 166–170 (scholars responding to Brennan); Zipursky, *supra* note 186; Cloud *supra* note 186.

209. See, e.g., Bandes, *Introduction*, *supra* note 64, at 6–7 (asserting that the idea of “emotionless judging” overstates “the demarcation between reason and emotion, and the possibility of keeping reasoning processes free of emotion”); Little, *supra* note 10, at 205, 218 (finding that asking judges to “purge” emotion from adjudication imposes an “unreasonable burden,” that forces a “credibility-diminishing charade”); Shaman, *supra* note 186, at 605 (noting that judges “are human beings who come to the bench with feelings . . . that cannot be magically extirpated”).

210. E.g., Bandes, *Introduction*, *supra* note 64, at 6–7 (articulating view that “emotion in cognition with reason” may lead to better decisions); Little, *supra* note 10, at 205, 218 (noting that emotion may be both “salutary and inevitable”); Pillsbury, *supra* note 207, at 333, 350–51 (“To be a good judge may *require* certain emotional commitments,” and in judging there can be “no easy separation of emotion and rationality.”); Shaman, *supra* note 186, at 632 (concluding that making “decisions about other people’s lives is a serious responsibility that engages both intellect and emotion,” such that “passion enriches the judicial temperament and enhances the law”). Not all contemporary theorists assume emotion’s potentially positive role. See Ray, *supra* note 186, at 193, 223, 231–34 (2002) (contending that the Rehnquist Court trended away from reason and toward the “far shakier ground of judicial emotion,” and that Blackmun’s opinions showed “most clearly the risk of allowing emotion to overwhelm the constraints of the judicial role”).

has solidified around the view that judicial emotion is sometimes critically important. However, the entire enterprise depends on that *sometimes*.²¹¹ On this ultimate point, we remain at only the beginning stages.

B. Emotion's Nature and Value: Recurrent Stumbling Blocks

Why has evolution of a theory of judicial emotion been so stunted? A deeper look at the history reveals two primary causes: as explored in the previous Part, broader agendas and stories have buried ideas about judicial emotion; and, as explored by this Section, scholars and judges consistently have stumbled over foundational questions of emotion's nature and value. These stumbles are evidenced by three recurrent difficulties.

1. The Taxonomical Difficulty

The first of these difficulties is taxonomical. In almost all accounts, in whichever historical era, judicial emotion is insufficiently defined and then is grouped into a family of "arational" concepts that is itself large and ill-defined. This is not merely a matter of lacking labels or assigning the wrong labels. Rather, this difficulty reflects insufficient understanding of what emotion is and what it does, which then manifests in confusion over how it should be named and classified.

The taxonomical difficulty was most evident among the realists. Their most common approach to defining emotion was to not define it at all. Mainstream realists simply held emotion out as an unspecified counterweight to "reason," tending to assume that it was literally indescribable. In perhaps the clearest articulation of that view, Dickinson characterized emotion as part of a "protoplasmic incertitude," a "mass" of "imponderables."²¹² As might be expected, the psychological wing made more of an attempt at specification, and in so doing drew on concepts from developmental theory and psychoanalysis.

Thus, Frank primarily conceptualized emotion as a function of the Freudian id: a powerful subconscious force whose influence could be controlled only to the extent it could be hauled into consciousness, and even then only imperfectly.²¹³ Indeed, even those realists who were not psychoanalytically inclined regarded emotion as primarily nonconscious. Cardozo, for example, asserted: "Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of

211. Cohen, *supra* note 169, at 197 (asserting that what is most needed is a normative principle for judging which judicial emotions are worthy of respect, and when).

212. Dickinson, *supra* note 123, at 852.

213. Thus, Frank argued, judges must "come to grips with the human nature operative in themselves," and "become keenly aware" of their deep-seated "prejudices, biases, antipathies, and the like." FRANK, *supra* note 132, at 158 & n.27; see also Llewellyn, *supra* note 135, at 85; Schroeder, *supra* note 153; HAROLD D. LASSWELL, POWER AND PERSONALITY (1948), as reprinted in JUDICIAL BEHAVIOR, *supra* note 125, at 28–39.

instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”²¹⁴ This conflation of emotion with the subconscious was, of course, inaccurate. It reflected the frequency with which psychoanalytic theory discussed the concepts as if they were co-extensive.²¹⁵ However, many aspects of emotion are both affected by consciousness, insofar as they are triggered by thoughts, and are experienced consciously, insofar as they create physical sensations and subjective feelings of which we are aware.²¹⁶ Emotion, like cognition, contains both conscious and nonconscious aspects, and is not reducible to the latter.

The conflation is best understood, then, as a reflection of the realists’ lack of access to a sophisticated concept of emotion and a commensurately sophisticated vocabulary with which to describe it. They therefore grouped emotion with whatever other judicial influences felt similarly unknowable and uncontrollable. Thus, when realists referred to emotion they sometimes meant something else altogether. For example, when Joseph Hutcheson declared that judges “arrive at their verdicts by feeling,” he primarily was describing the mental process of “intuition” and “hunch.”²¹⁷ When Holmes said “the meaning of a sentence is to be felt rather than to be proved,”²¹⁸ it is unlikely that he meant that his emotions tell him what words mean. He more likely was referring to instinct—in the sense of implicit knowledge based on education and experience—or a Gestalt-like sense of equilibrium.²¹⁹ When realists did mean to refer to emotion per se, they did so in an undifferentiated fashion, simultaneously invoking the concepts of bias, prejudice, personality, temperament, will, and even “creative activity.”²²⁰

214. CARDOZO, *supra* note 157, at 167–68.

215. Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000); Peter Goodrich & David Gray Carlson, *Introduction*, in LAW AND THE POSTMODERN MIND 1–12 (Peter Goodrich & David Gray Carlson eds., 1998).

216. The cognitive appraisals underlying emotion can be nonconscious, but need not be. Klaus R. Scherer & Phoebe C. Ellsworth, *Appraisal Theories*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, *supra* note 30, at 48.

217. Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision*, 14 CORNELL L. REV. 274, 274, 277 (1929) (referring to a “sixth sense” consisting of a flash of insight following brooding). Frank, like Hutcheson, discussed emotion in terms of intuition. *Compare id.*, with Frank, *supra* note 155, at 932 (conflating “emotion” and “intuition”). Cardozo similarly clustered the concepts of emotion, intuition, and hunch, *see* Cardozo, *supra* note 121, at 27–28, though elsewhere he intimated that the concepts were separable—and, further, that emotion was a lower-level or less legitimate capacity, *see id.* at 26 (characterizing hunch as more than “mere feeling or emotion”).

218. *United States v. Johnson*, 221 U.S. 488, 496 (1911).

219. Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 47, 96–97 (1998).

220. Cohen, *supra* note 169, at 193–94; De Grazia, *supra* note 169, at 32; Edward Green, *Judicial Attitudes in Sentencing*, in JUDICIAL BEHAVIOR, *supra* note 125 at 369, 371 (listing “public hysteria,” “personality,” “the judge’s humour, his digestion, his unconscious fears and desires,” the “caprices of ‘judicial temperament’”).

The new emotional realists have, on balance, done better—but not by much. Though many openly define their operative concepts of emotion, the taxonomical difficulty persists.²²¹ For example, while Brennan did offer a definition of “passion,” it was an astonishingly expansive one, encompassing everything from being in touch with “concrete human realities,” to a “tug of sentiments” when hearing tragic facts, to the “sentimental” basis for moral judgment.²²² Given that breadth, commentators read Brennan’s “passion” to include a family at least as expansive as the realists’: creativity, intuition, “visceral temptation,” perspective taking, identifying with the poor, embracing “humanistic values,” professional pride, and even “consciousness.”²²³

A similar indeterminacy plagues Posner’s work. This is so even though, unlike Brennan, he purports to define and adopt a singular concept of emotion’s nature and function, one rooted in the cognitive view.²²⁴ Incongruously, however, he asserts that particular emotions—such as hate and sympathy—ought categorically to be off-limits to judges, even if their underlying cognitions are accurate and desirable.²²⁵ That he is less than fully committed to the cognitive view is further evidenced by his occasional borrowing of evolutionary theory, on the basis of which he asserts that emotion is a primitive, animalistic, and potentially dangerous force, one that can “take over,” “override,” “dominate,” and “short-circuit” rationality.²²⁶ Finally, Posner replicates the realists’ indiscriminate clustering, by entangling his concept of emotion with, *inter alia*, intuition, hunch, ideology, politics, temperament, and reflex.²²⁷

221. Pillsbury, *supra* note 207, at 353 (calling for greater refinement of an emotional vocabulary to aid analysis of judicial emotion).

222. Brennan, *supra* note 20, at 9, 11.

223. Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1005–06 (1988) (“I never thought of ‘passion’ quite that way.”); Minow & Spelman, *supra* note 168, at 39–40 (proposing that Brennan’s “passion is any mental faculty which is not reason, narrowly defined”); Charles A. Reich, *Law and Consciousness*, 10 CARDOZO L. REV. 77, 91 (1988).

224. POSNER, *supra* note 13, at 243.

225. *Id.* at 231. While Posner acknowledges that “hatred is morally neutral,” acquiring its moral valence “depend[ing] on its object,” he goes on to assert that it is wrong for “judges, when in the exercise of their office, to hate anyone.” See also POSNER, *HOW JUDGES THINK*, *supra* note 171, at 92, 106 (“Indignation at a wrong is consistent with corrective justice; sympathy for a litigant is not”; the “epistemic significance of emotion depends on which emotion is engaged.”). Confusingly, he earlier claimed that “indignation” should be off-limits. POSNER, *supra* note 13, at 241 (“[A] number of the strongest emotions, such as anger, disgust, indignation, and love, would be out of place.”).

226. POSNER, *supra* note 13, at 229; POSNER, *HOW JUDGES THINK*, *supra* note 171, at 105, 231, 272. For a similar assertion made in the context of the Sotomayor nomination, see Jonah Lehrer, *Judicial Empathy*, FRONTAL CERTEX (May 29, 2009, 8:05 AM), http://scienceblogs.com/cortex/2009/05/judicial_empathy.php (asserting that behind all “eloquent judicial opinions” is a “blinker limbic system, pumping out feelings for reasons we can’t begin to explain”).

227. POSNER, *HOW JUDGES THINK*, *supra* note 171, at 46, 75 (“temperament”), 103, 106 (describing as “emotional” the reflex of swerving one’s car away from a child running into the street), 117 (defining “good judgment” as “a compound of empathy, modesty, maturity, a sense of

At both historical moments, then, theorists have stumbled over the taxonomical difficulty of defining and categorizing emotion in a precise, accurate, and operationally useful way. They thus have significantly limited their communicative power and impact.

2. *The Normative Difficulty*

Because theorists have exhibited confusion over what emotion is and what it does, it is not surprising that they also have been divided over what it is worth. This normative difficulty is reflected in a recurring ambivalence over whether judicial emotion is an inconvenient truth, an indispensable guide, or normatively variable.

The realists tended strongly toward the *inconvenient truth* view. Just because judicial emotion exists does not mean it must be valued; it may be an unavoidable hindrance. Cardozo signaled such a negative attitude by often modifying *emotion* with the word *mere*.²²⁸ He also referred to it as a “human limitation,” and cautioned that judges ought not “yield to spasmodic sentiment, to vague and unregulated benevolence.”²²⁹ Frank signaled a similar attitude, given the frequency with which he called emotion a “childish drag,” defined maturity by its absence, and even branded it a “perverting influence.”²³⁰ Further, he appeared to believe the point of acknowledging emotion was to better minimize and control it, a perspective Llewellyn endorsed.²³¹ Nor is this view an historical artifact. Laura Krugman Ray, in her thought-provoking analysis of certain Justices’ rhetoric, proceeds from an unexamined assumption that judicial emotion is an inevitable but negative influence that ought to be contained.²³² And this view is, of course, the one Justice Sotomayor endorsed in her confirmation testimony.²³³

proportion, balance, a recognition of human limitations, sanity, prudence, a sense of reality, and common sense”), 236 (grouping “politics and emotion”), 376 (defining judicial decision making as “the result of a complicated interaction—mysterious, personal to every judge—of modes of reasoning (analysis, intuition, emotion, common sense, judgment), political and ideological inclinations, personality traits, other personal characteristics, personal and professional experiences”). These lists also reflect inconsistencies. For example, Posner states that emotion influences formation of ideology, POSNER, HOW JUDGES THINK, *supra* note 171, at 46, but later asserts that emotion might be in conflict with, and “dominate,” one’s ideology, *id.* at 103; *see also* Ray, *supra* note 186, at 196 (tending to conflate emotion with “experience”).

228. Cardozo, *supra* note 121, at 26.

229. CARDOZO, *supra* note 157, at 141; *see also* Corbin, *supra* note 122, at 250 (pairing emotion with “the semi-darkness of ignorance”).

230. FRANK, *supra* note 132, at 268; *see also id.* at 148 (referring to judges who are “swayed by the perverting influences of their emotional natures”), 88–89 (describing “childish” emotional needs); *cf.* PAUL, *supra* note 134, at 43 (explaining that Frank believed the fight for a realist jurisprudence to be part of the “age-old struggle to free men’s minds from the shackles of past emotion and sentimentality”). Frank’s fundamentally negative view of emotion was not surprising, given his psychodynamic orientation; at that time, psychoanalysis “provided an influential vocabulary that entrenched the view of affect as primitive, uncontrollable, and incompatible with reason.” Joseph P. Forgas et al., *Hearts and Minds: An Introduction to the Role of Affect in Social Cognition and Behavior*, in AFFECT IN SOCIAL THINKING AND BEHAVIOR,

The *indispensable guide* view flows naturally from the theory that emotion is a necessary component of practical reason and moral judgment. It attracted few overt adherents during the realist period—with the exception of Hutcheson, who displayed a passionate devotion to judicial “feeling.”²³⁴ But, indicating the extent to which theorists have been conflicted, even those espousing an inconvenient-truth view left hints that they thought emotion indispensable. Cardozo, for one, suggested that sentiment could contribute to discursive rationality. In describing how judges fashioned a rule by which a legatee who murdered his benefactor was blocked from collecting the bequest, he wrote:

Justice reacted upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another. Reason in its turn reacted upon sentiment by purging it of what is arbitrary, by checking it when it might otherwise have become extravagant, by relating it to method and order and coherence and tradition.²³⁵

Similarly, Frank did not laud Holmes and Cardozo for being unemotional, but rather for being emotionally mature,²³⁶ and later declared he had no desire to be ruled by emotionless judges.²³⁷ It is far from clear what value these realists

supra note 79, at 3, 4.

231. FRANK, *supra* note 132, at 153 (“We cannot, if we would, get rid of emotions in the field of justice. The best we can hope for is that the emotions of the judge will become more sensitive, more nicely balanced, more subject to [the judge’s] own scrutiny, more capable of detailed articulation.”), 144 (arguing that if judges were more “enlightened” they would be better able to “detect and hold in check their own prejudices”), 148 (“Efforts to eliminate the personality of the judge are doomed to failure. The correct course is to recognize the necessary existence of this personal element and act accordingly.”); Llewellyn, *supra* note 121, at 1242.

232. Ray, *supra* note 186, at 195 (stressing that convention cannot “extinguish the spark of personality from the work of Justices who draw on emotion and experience”), 226 (criticizing Rhenquist for attempting to “substitute emotional response for intellectual argument”), 234 (warning of “risk of allowing emotion to overwhelm the constraints of the judicial role”).

233. Terkel, *supra* note 45.

234. Judge Hutcheson (a federal district court judge) was prepared to be “stoned in the street” for declaring that good judges, not just unavoidably human judges, rely on “feelings” and “hunch.” As a young lawyer he was so invested in a formalist view that if anyone had suggested that the judge had a right to feel, or hunch out a new category into which to place relations under his investigation, I should have repudiated the suggestion as unscientific and unsound, while as to the judge who dared to do it, I should have cried, “Away with him!”

Hutcheson, *supra* note 217, at 275, 278.

235. CARDOZO, *supra* note 157, at 45.

236. FRANK, *supra* note 132, at 177, 270–77; see also Barzun, *supra* note 128, at 33 (interpreting Frank to mean that judging was “emotional in the sense that it required a certain sensitivity to one’s own felt reactions to a set of legal facts,” but analytical because those felt reactions would then be scrutinized so as to distinguish prejudice from “appropriately stimulated emotions”), 11–12 (reading Frank to have implied that judges could “develop[] the emotional capacity to” distinguish prejudices and biases from “emotional responses that were properly stimulated in them by the facts of the case”).

237. Frank, *supra* note 146, at 764 n.55.

thought emotion might provide, but they appear to have contemplated some value.

The indispensable guide view has attracted more adherents in the contemporary period, Brennan being the most obvious one.²³⁸ One of the few defenders of judicial emotion during the Sotomayor debates also took this view, pointing to evidence that emotion is that which prevents one from being a psychopath.²³⁹ Posner, too, may be counted in this camp, as he believes that emotion alone enables moral reasoning.²⁴⁰ Thus, he claims, if a law sanctioning a moral violation with “no plausible social-functional justification” were “challenged before an emotionless judge,” he would be unable to muster a rational justification for upholding it. In contrast, a judge “with a normal emotional endowment would reject the challenge out of hand because his emotions told him to do so,” which would be “the correct response.”²⁴¹ But just as the realists revealed internal conflict on this point, so too do modern thinkers. Posner again provides the example. He asserts that “disapproval of a party’s religion or lifestyle,” a species of moral judgment generally imbued with great emotional weight,²⁴² “ha[s] no proper place” in judging and should be “set aside.”²⁴³ Posner does not explain how emotion-based moral judgments can be both indispensable guides and entirely improper bases for judging, or how one might distinguish between the former and the latter. His occasional references to evolutionary theory also call into question his commitment to the indispensable-guide view, as he suggests that “our emotional repertoire” was suited to prehistoric conditions but “may not be as well adapted to the conditions in which we live today.”²⁴⁴ Posner also signals a more negative view

238. Fiss, *supra* note 166, at 797 (“I do not believe Justice Brennan was . . . merely restating the obvious: Judges are people, and as much as they strive to be rational, emotion and passion inevitably creep into the judicial process. . . . [he instead] celebrated passion as a factor that *should* enter the decisional process.”). See also Kaufman, *supra* note 8, at 16 (“[O]ur intuition, emotion and conscience are appropriate factors in the jurisprudential calculus.”).

239. Brooks, *supra* note 56.

240. POSNER, *supra* note 13, at 228, 242 (identifying himself as holding “an essentially emotivist view of morality”).

241. *Id.* at 242–43 (“We ‘know’ that certain behaviors are ‘bad only because we have a revulsion against the idea of it.’ Such moral judgments ‘resist reflection or reexamination because they are embodied in tenacious, inarticulable emotions.’”).

242. See, e.g., NUSSBAUM, HIDING FROM HUMANITY, *supra* note 68, at 125–43 (critiquing disgust felt toward homosexual persons).

243. POSNER, HOW JUDGES THINK, *supra* note 171, at 70. Posner hints that “hate” and “dislike” of a litigant or lawyer is wrong because it is irrelevant as an evidentiary matter. *Id.* at 70, 92. This would be a legitimate point about the judge’s obligation to decide on the basis of proper evidence, as intimated by Nussbaum, *Emotion in Language*, *supra* note 68, at 29, though he does not develop the idea. Further, it is possible to imagine situations in which a judge feels emotions toward a party or lawyer based solely on evidence and conduct in the courtroom.

244. POSNER, HOW JUDGES THINK, *supra* note 171, at 229 (likening emotion to sex drive; also stating that today’s life is so complex that primitive emotion might lead us astray). This perspective ignores an important strand within the evolutionary theory of emotion, one that emphasizes emotion’s capacity for flexible adaptation to changing conditions. See, e.g., Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, in

by ratifying emotion's traditional representation as a lower faculty, as when he asserts that "jurors, like children, are more likely to make emotional judgments than judges."²⁴⁵

That theorists appear to be of two minds about the relative merits of the inconvenient truth view and the indispensable guide view leads directly to the popularity of the third view. If judicial emotion is inevitable, and at least sometimes a positive force, then its value for judging is *normatively variable*.²⁴⁶ This is the clearly correct choice in light of contemporary emotion scholarship. The normative-variability view does not take the inevitably negative stance that characterizes the inconvenient-truth perspective but that conflicts with all viable, extant theories of emotion. Nor does it take the inevitably positive view of emotion that characterizes the indispensable-guide view, which ignores the possibility of, for example, distorted factual premises or reprehensible goals. Emotion's normative variability means that it is no more capable of answering hard legal questions than is reason (traditionally defined), but it is not uniquely incapable, or less capable, of doing so.²⁴⁷ But accepting that judicial emotion is normatively variable creates significant pressure to specify the sources and impact of the variables, and those are multiple and complex. Such specification promises to be exceptionally difficult.

HANDBOOK OF EMOTION REGULATION, *supra* note 96, at 47, 47–68; Marie Vanderkerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, in REGULATING EMOTIONS 1, 1–12 (Marie Vanderkerckhove et al. eds., 2008).

245. POSNER, *supra* note 13, at 229.

246. This stance is evidenced even by some of those who do not recognize it to be the position they have staked out. *See, e.g.*, Pound, *supra* note 121, at 710 (approving of "recognition of the existence of an alogical, unrational, subjective element in judicial action, and attempt by study of concrete instances of its operation to reach valid general conclusions as to the kinds of cases in which it operates most frequently, and where it operates *most effectively* or most unhappily for the ends of the legal order") (emphasis added); Fiss, *supra* note 166, at 800–01 (arguing that to valorize emotion conveys a blanket value judgment of the emotions' objects and embedded evaluations, though both are variable). And though Cohen claimed that emotions are no more than "descriptive reports of psychological reactions to given situations," he then agreed that they are as reliable as are their underlying principles and assumptions of fact. Cohen, *supra* note 169, at 196–97 & n.20 (contending that the "'passion' of a white supremacist" is a faulty guide not because it is an emotion but because it is "anchored to an erroneous assumption of biological fact—that non-whites have inferior genes").

The small handful of commentators who offered a limited defense of emotion in the Sotomayor nomination context all staked out a normative-variability stance. Brooks, for example, asserted that it "is incoherent to say that a judge should base on opinion on reason and not emotion because emotions are an inherent part of decision-making"; however, he went on to imply that emotion might not be a good guide, describing it as "murky, flawed and semiprimitive." Brooks, *supra* note 56; *see also* Lakoff, *supra* note 41, (arguing, on the one hand, that "real reason . . . requires emotion," and on the other urging Democrats to dissociate empathy from emotion because of the pitfalls of the latter); Wendy Kaminer, *Sotomayor and Sisterhood*, ATLANTIC (May 27, 2009), <http://www.theatlantic.com/national/archive/2009/05/sotomayor-and-sisterhood/18386/> ("[E]motions can 'cause havoc in the processes of reasoning,'" though the "'absence of emotion and feeling is no less damaging.'").

247. Cohen, *supra* note 169, at 197.

3. *The Goldilocks Difficulty*

Unfortunately, the usual path when faced with that difficulty is to call for integration and balance. Such calls are easy to issue but difficult to specify. The final difficulty, then, and the most significant theoretical challenge, is that scholars' tendency to advocate balance between emotion and other facets of judicial reason too often devolves to a Goldilocks standard of "just right."²⁴⁸

The arguments tend to go as follows. Judges should openly acknowledge and make use of their emotions to the extent it is legitimate and helpful to do so, and set them aside when they are unhelpful or destructive.²⁴⁹ Emotion should be deployed in just the right combination with cognition, logic, and precedent, and that admixture will vary according to the particular case and its context.²⁵⁰ Judicial emotions may be embraced when they are "appropriately stimulated" by the case or are "professional" rather than personal emotions.²⁵¹ These propositions are certainly not wrong. But they are far—very far—from a helpful analytical guide. They differ from the script of judicial dispassion only by positing that the proper quantum of judicial emotion is something in excess

248. Oliver R. Goodenough, *Institutions, Emotions, and Law: A Goldilocks Problem for Mechanism Design*, 33 VT. L. REV. 395, 395, 402 (2009).

249. Such statements are legion. *E.g.*, JONATHAN SOEHARNO, *THE INTEGRITY OF THE JUDGE: A PHILOSOPHICAL INQUIRY* 67–68 (2009) (contending that judges' emotions may "serve as an apt guide to perceiving the essence of the case quickly," but "if necessary, [the judge] should be able to distance himself from emotions or intuitions"). POSNER, *supra* note 13, at 228 (stating that emotion is an "efficient method of cognition in some cases," but "an inefficient one in others"), 230–31 (claiming that emotion can "short-circuit" reasoning, which is good at times but at others can lead "to an inferior decision"), 245 (emphasizing that judges ought not cultivate a "weird pride in maintaining a complete, inhuman indifference," but should not be "blinded" by emotion); Brooks, *supra* note 56 (characterizing judicial emotion as "a wise guide in some circumstances and a dangerous deceiver in others"); Kaufman, *supra* note 8, at 16 ("[I]ntuition, emotion and conscience are appropriate factors in the jurisprudential calculus," though they "may cause us to make mistakes."); Little, *supra* note 10, at 211–12, 218; Pillsbury, *supra* note 207, at 350–51 (arguing that in "most instances rationality is inspired by, infused with, and affects emotions," but that passion "can inspire extraordinarily bad decisions that more dispassionate judges would avoid"); *see also* Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231, 249 (2005) ("[D]ecision-makers may be unduly swayed by inadequately considered emotional responses as often as their decisions may fail to take proper account of emotionally-informed wisdom."); Slovic, *supra* note 111, at 990 (explaining that emotion enables people "to be rational actors in many important situations. But not in all situations. It works beautifully in some circumstances and fails miserably in others. The law must learn to tell the difference.").

250. Cardozo, for example, insisted that emotion be embraced only as part of an integrated process, and only to the degree appropriate:

Belief in the efficacy of mere emotion is not essential to the faith whereby a sinful idolizer of precedent may be transported into the beatitude of a renegade lover of reality. . . . there has been no thought to preach a doctrine of undisciplined surrender to the cardiac prompting of the moment, the visceral reactions of one judge or another. . . . [Instead,] the subjective creations of the mind must be constantly checked and restrained and reconsidered in the light of the tests and standards of objective or external verity.

Cardozo, *supra* note 121, at 13; *see also id.* at 13–15, 26.

251. SOEHARNO, *supra* note 249, at 90.

of zero, and that said quantum will be, in some way, case-derived and role-congruent. The premise, while true, provides no tools by which to measure the poles in reference to which this advocated middle ground is to be located and operationalized. The entire enterprise of making of this general idea a genuine theory depends on delineating what it means for a judicial emotion to be (il)legitimate, (un)helpful, (un)tethered, (in)appropriate, or (un)professional. The idea represents a starting point for analysis, but may be perceived as a sufficient end point.

This juncture—at which the right sort of judicial emotion, in the right proportions, as to the right objects, expressed in the right manner, can be seen as a worthy goal—is far better than the one at which the realists stood in the early twentieth century.²⁵² But it is a juncture at which theory easily can stall out, and where, to date, it has.

IV.

A NEW EMOTIONAL EPISTEMOLOGY

We remain stalled at this juncture because of a failure of emotional epistemology. We have not known how to know what we need to know about emotion in order to theorize its role in judging. The epistemological failure derives in large part from the limited quantum of knowledge available for interdisciplinary mirroring, which until recently imposed a tight external bound. Limits stemming from a relative lack of interdisciplinary insight have been compounded by imperfect mirroring of those theories that have been available. This Part demonstrates that flawed historical parallelism and its consequences, an effort that illuminates the path forward.

The taxonomical void in realist scholarship reflects the relative dearth of scholarship on emotion in their time. Before the twentieth century, it generally had been assumed that emotion was not something about which organized knowledge could be acquired; it was thought to stand apart from the Enlightenment project of disciplined scientific inquiry.²⁵³ As Descartes once declared, as “every one has experience of the passions within himself, there is no necessity to borrow one’s observations from elsewhere in order to discover their nature.”²⁵⁴ It is far from surprising, then, that the realists’ early forays

252. See *supra* Part II.A (explaining that realists had to make an affirmative case that judicial emotion even exists).

253. The study of emotion had, of course, a long history pre-Enlightenment, comprising one of the core foci of philosophical inquiry (which came to be regarded as something other than “science”). See RENÉ DESCARTES, *THE PASSIONS OF THE SOUL* (1649), *excerpted in* WHAT IS AN EMOTION?, *supra* note 69, at 55.

254. DESCARTES, *supra* note 253. Perceiving emotions to be alien to the scientific process privileged folk-psychological concepts of their nature and value. Folk theories often are inaccurate, and common-sense ideas often reveal more about their holder’s beliefs and values than they do about external realities. Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851 (2009).

reflected a view of emotion as only somewhat knowable and, even then, only through the lens of one's own subjectivity.

But this profoundly limited perspective was not entirely justified, for the realists were not actually operating in a complete empirical void. Scientific study of emotion as we know it today got underway at approximately the same time.²⁵⁵ William James, in his landmark 1884 essay "What is an Emotion?," complained of the relative neglect of "the *aesthetic* sphere of the mind, its longings, its pleasures and pains, its emotions."²⁵⁶ Charles Darwin, too, challenged that neglect with his 1872 work on emotional expression in both humans and animals.²⁵⁷ These groundbreaking contributions catalyzed the first wave of emotion research within the sciences. By the 1920s, as realism neared its peak, the idea of empirical study of emotion was far from foreign to psychologists. It remained, however, largely foreign to most other persons. The academic move did not penetrate legal culture, which in any event was not yet oriented toward the idea of methodical interdisciplinarity. Nor had it meaningfully penetrated popular culture. This growing area of social science, then, shed virtually no light on the accounts of judicial emotion that were struggling to emerge.

Such was not the case, however, with psychoanalytic theory. Unlike the investigations quietly underway in academic psychology, psychoanalysis made an enormous impact almost immediately, including in popular culture.²⁵⁸ That impact quickly bubbled into legal theory. It is no accident, then, that the most targeted efforts to theorize judicial emotion drew on psychoanalysis.²⁵⁹

Unfortunately, though, the realists applied psychoanalytic thought to judging in a rather crude fashion. Frank, in the most prominent example, engaged in a sort of armchair analysis of judges' professional outputs,

255. Gendron & Barrett, *supra* note 71, at 316, 319–28 (explaining that the years 1855–1899 are considered the "Golden Years" of early emotion theory).

256. James, *supra* note 77, at 188–205, 188.

257. CHARLES DARWIN, THE EXPRESSION OF THE EMOTIONS IN MAN AND ANIMALS (1872); see also Calhoun & Solomon, *Introduction*, in WHAT IS AN EMOTION?, *supra* note 69, at 13–14 (noting that Darwin lacked a true theory of emotion and instead classified forms of emotional behavior).

258. Though "Freud did not develop a theory of emotion as such," his theories "radically changed the whole idea of emotions" and "recast our entire 'topography' of the mind." Cheshire Calhoun & Robert C. Solomon, *Sigmund Freud*, in WHAT IS AN EMOTION?, *supra* note 69, at 184. See generally WHOSE FREUD? THE PLACE OF PSYCHOANALYSIS IN CONTEMPORARY CULTURE (Peter Brooks & Alex Woloch eds., 2000) (collecting scholarship demonstrating the extent to which Freudian theory remains both "bitterly contested" and "a potent force" throughout contemporary culture).

259. Frank famously urged judges to undergo psychoanalysis to access their emotions, which he considered the "least discoverable" of unconscious motivations. FRANK, *supra* note 132, at 123–25; see also *id.* at 120–22; Frank, *Judicial Fact-Finding and Psychology*, *supra* note 143, at 188. That urging is one of the most frequently derided of Frank's arguments. See, e.g., POSNER, HOW JUDGES THINK, *supra* note 171, at 112, 118 (criticizing Frank's therapy suggestion as ridiculous).

including their courtroom behaviors, spoken words, and written opinions. On that basis, he personally diagnosed judges' emotional maturity, concluding that both Holmes and Cardozo were "completely adult" jurists.²⁶⁰ Though Frank's lack of psychoanalytic training does not foreclose insight, it does lend credibility to criticism that he was getting psychoanalytic theory wrong.²⁶¹

Further, Frank did not engage with the question of whether judges' professional outputs properly are regarded as psychoanalytically significant artifacts.²⁶² Schroeder clearly believed they were; in his view, judicial opinions were "confessions" from which, using "the laws of emotional behavior," one might tease out the skeletons in judges' emotional closets.²⁶³ But his overenthusiastic efforts call into question both the premise and the application. On the basis of a single ruling in a free-speech case, Schroeder diagnosed one judge as suffering from Puritanical sexual shame, concluding that he must have patronized prostitutes and therefore was over-invested in publicly displaying horror and disgust about sex.²⁶⁴ Even Frank recognized this conclusion to be simplistic and over-sanguine.²⁶⁵

This mode of inquiry also was exquisitely vulnerable to faddish theory, a vulnerability easier to see with the hindsight of many decades. Harold Lasswell, for example, scrutinized judges' family lives, vocal habits, physical attributes, and professional interactions in order to diagnose their "emotional personalities."²⁶⁶ He reached one such diagnosis by reference to a judge's "exhibitionist and homosexual trends," evidenced by his "florid" writing style, "conspicuous" clothes and "foppish" hats, and his habit of allowing "his hands to hang limp at the wrist."²⁶⁷

Thus, though the realists were operating within a concededly thin epistemological space, they failed to take full advantage of the knowledge that

260. FRANK, *supra* note 132, at 253, 270.

261. Adler, *supra* note 149, at 96–97 (criticizing Frank's application of psychoanalytic theory and asserting that such theory showed that "realists" were neurotic and "anal-erotic" types, not emotionally mature persons); PAUL, *supra* note 134, at 6 n.3 ("This is not to say that Frank as amateur has no right to employ psychological tools of analysis, but that the findings of amateur and professional should be clearly distinguished from each other.").

262. This question prompted spirited debate among participants when I posed it in a panel on psychoanalysis and law at the 2010 annual meeting of the Association for Law, Culture, and the Humanities.

263. Schroeder, *supra* note 153, at 96, 104, 107.

264. *Id.*

265. FRANK, *supra* note 132, at 123 (offering nonetheless to Schroeder "warm commendation" for his "pioneering effort").

266. LASSWELL, *supra* note 213, at 28–39. He declared one judge incapable of projecting "human warmth"; one a "dramatizer," able to sustain "emotionally significant contact" with, and "emotional responsiveness" to, others; and the last capable of "expressing every nuance of emotion" and imbuing courtroom with "levity" and "joy." *Id.*; see also PAUL, *supra* note 134, at 25 (contending that Lasswell regarded the "free-phantasy method" of psychoanalytic analysis to be "the elixir of the new jurisprudence").

267. LASSWELL, *supra* note 213, at 35–36.

was available, over-relied on theory that had achieved cultural salience, and did so in relatively amateur fashion.

The historical parallelism has continued in the modern period. As research on emotion fell largely out of the spotlight for most of the mid-twentieth century,²⁶⁸ so too did a focus on judges' emotions. The resurgence of such research in the 1970s and 1980s—a resurgence that was particularly pronounced in psychology—presaged Brennan's neo-realist revival.²⁶⁹ Because research on emotion has since expanded dramatically, the potential for interdisciplinary mirroring has as well. However, the new emotional realism has continued to make far less than full use of this potential, and the mirroring has remained imperfect.

Affective science²⁷⁰ has in the last two decades gone from being one of the least active corners of academic and forensic psychology to being one of the most vibrant.²⁷¹ Philosophy, sociology, history, and other disciplines also have enthusiastically embraced the scholarship of emotions.²⁷² Indeed, these various disciplines have begun actively to converse with one another. Psychologists and philosophers, in particular, have in recent years forged a shared scholarly space in which empirical and normative accounts of emotion are allowed to inform and enrich one another.²⁷³ It is no exaggeration to say that emotional epistemology is not only far richer than it ever has been, but also far richer than could have been imagined even a few decades ago.

268. Gendron & Barrett, *supra* note 71, at 328–34 (arguing, though, that emotion theory's "Dark Ages" were not completely dark).

269. *Id.* at 317, 335 (explaining that the last decades have been referred to as emotion research's "Renaissance").

270. This term, now widely used within psychology and neuroscience, see HANDBOOK OF AFFECTIVE SCIENCES, *supra* note 63, can strike those outside the field as odd, even oxymoronic. Cf. PAUL, *supra* note 134, at 32 (quoting John H. Hallowell, *Politics and Ethics*, 38 AM. POL. SCI. REV. 639, 651 (1944)) ("It is a curious twentieth-century phenomenon that so many intellectuals should be so actively engaged in the task of persuading other intellectuals by reason that men are essentially irrational."). Thanks to Anne Dailey for highlighting this apparent irony.

271. See INTERNATIONAL SOCIETY FOR RESEARCH ON EMOTIONS ("ISRE"), <http://www.isre.org> (last visited Jan. 23, 2011) (witnessing, as an organization founded in 1984, a "dramatic explosion of interest in emotions" in many disciplines in the last thirty years).

272. See 1 EMOTION REV. 291–368 (2009) (Special Issue on History of Emotion); 2 EMOTION REV. 203–73 (including analysis of new directions in psychology, neuroscience, linguistics, history, culture, and sociology in a Special Section on The Future of Emotion Research); Keith Oatley, *An Emotion's Emergence, Unfolding, and Potential for Empathy: A Study of Resentment by the "Psychologist of Avalon,"* 1 EMOTION REV. 24–30 (2009) (defending analysis of literature as a tool for understanding emotion).

273. See, e.g., sources cited *supra* notes 72–74; 2 MORAL PSYCHOLOGY: THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY (Walter Sinnott-Armstrong ed., 2008); 3 MORAL PSYCHOLOGY, *supra* note 91. This rejoining of psychology and philosophy, much of which revolves around study of emotion, might eventually bridge the late nineteenth-century great split between the two disciplines.

But the limited universe of judicial emotion scholarship has continued to reflect a narrow epistemology and a similarly narrow methodology. Consider that much of this scholarship follows an approach strikingly similar to the realists' armchair analysis. For example, Samuel Pillsbury, in a thoughtful (though concededly "preliminary") essay, undertook to explore "the complexities of emotive influence on appellate decision making."²⁷⁴ His chosen method was precisely that of Frank, Lasswell, and Schroeder before him: he proposed that judicial opinions be read for clues as to how a judge's "feelings about the parties or issues—or lack of such feeling—influence his opinion."²⁷⁵ Supplementing a close reading of cases with biographical information, Pillsbury thus constructed folk-psychological analyses of Justices Harlan and Holmes.²⁷⁶ Posner and Ray both have relied on similar sources to evaluate judges "emotional personalities,"²⁷⁷ and Susan Bandes has parsed Justices' language in a high-profile disability case to discern their underlying emotional motivations and commitments.²⁷⁸ These more recent efforts are less overtly psychoanalytic than those of the psychological realists; instead, they reflect the sort of light Freudianism that now permeates folk-psychological thinking.²⁷⁹ To be sure, this approach has value. Language is an important site of emotional expression, and these efforts have been particularly effective in bringing certain

274. Pillsbury, *supra* note 207, at 331.

275. *Id.* at 333, 339–40. While acknowledging his debt to the realists, *id.* at 357 n.4, Pillsbury believed this to constitute a "new" method, which he called "reading for emotion," *id.* at 339.

276. *Id.* (placing personalities of Holmes and Harlan at "at opposite ends of the emotional continuum," thus explaining the differences between their respective dissents in *Plessy* and *Lochner*); Stephen J. Morse, Book Review, *Review of S.A. Bandes, ed., The Passions of Law*, 114 ETHICS 601, 603 (2004) (arguing that work such as Pillsbury's seeks to explain how emotions cause a judge's behavior).

277. POSNER, HOW JUDGES THINK, *supra* note 171, at 75 ("Learned Hand was a skeptic with a 'hot' temper; Holmes a 'cool,' some think a rather glacial, skeptic."); Ray, *supra* note 186, at 223–33 (evaluating various Justices' "emotional personalities").

278. Bandes, *supra* note 186, at 521 (arguing that judicial language reveals emotion if it seems "overheated," is stated in "shocked tones," or reflects a rise in "emotional intensity" and "temperature"). Bandes parsed linguistic signals in *Garrett* to reveal "a veritable soap opera's worth of judicial emotion" embedded therein, ranging from hostility to disabled persons to empathy for states.

279. Much psychoanalytic theory—think of Freud's concept of castration anxiety, or Klein's distinction between the good and bad breast—now strikes many as bizarre and outdated. See Amy M. Adler, *Girls! Girls! Girls!: The Supreme Court Confronts The G-String*, 80 N.Y.U. L. REV. 1108 (2005) (Freudian theories of the penis); Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1260–65 (Kleinian theory); see also Forgas et al., *supra* note 230, at 9 (noting that in the mid-twentieth century "psychodynamic explanations declined in popularity"). However, structural concepts such as planes of consciousness, including the idea that experiences and emotions are embedded in the unconscious but nonetheless affect conscious thoughts and externalized behavior, have taken extraordinarily firm root in the culture. Dailey, *supra* note 215, at 1611. Such core psychoanalytic theories have continued strongly to influence legal thought. See Schubert, *supra* note 125, at 12 ("[T]he most enduring theoretical influence upon American jurisprudence during this century has come from Freudianism.").

easily identified manifestations of judicial emotion into plain view.²⁸⁰ However, the approach is profoundly limited—most notably by the persistence of the script, which by strongly discouraging judges from betraying “signs of personal feeling” in their work invariably distorts and disguises the relationship between emotion’s influence and its overt manifestation.²⁸¹

Further, scholars who have drawn on a broader emotional epistemology have done so without adequate attention to its complexity. This is most true of Posner’s work, in which he borrows isolated insights from cognitive, evolutionary, sociological, and other corners of emotion research²⁸²—a criticism similar to one leveled against Frank.²⁸³ Because Posner does not tie these various accounts into a coherent frame or attempt to harmonize their surface contradictions, his account appears at best unfocused and at worst inconsistent.

There is no longer any reason to remain stuck at this juncture. In a hopeful sign, very recent years have seen a small uptick in efforts to take fuller advantage of the new emotional epistemology. A trio of political scientists, for example, has experimented with using a linguistic coding tool to discern the emotional tenor of Supreme Court Justices’ questions to counsel during oral argument.²⁸⁴ Neuroscientists and law professors are conducting a preliminary

280. For example, “Poor Joshua!” has received such attention because it represents a relatively rare articulation of emotional engagement. *See, e.g.,* Zipursky, *supra* note 186. Certainly these rare moments deserve our attention. But just as theorists like Posner urge the extension of judicial empathy to absent parties, *see* POSNER, *supra* note 13, at 243, scholars must devise more nuanced methods of perceiving and analyzing the influence of emotion in the great universe of cases in which judges send out no such obvious signals. *See also* Bandes, *Introduction, supra* note 64, at 5 (“[The] lack of obviousness renders emotion in the civil context insidious, and all the more important to identify.”), 11 (arguing that certain expressions of emotion in law are “invisible” by virtue of being tacitly accepted). Ray’s work, *see supra* note 186, which makes use of her considerable literary-analysis skills, is perhaps the best extant example; however, its analysis is hampered by her undefended assumptions as to emotion’s negative normative status.

281. Posner, *The Role of the Judge in the Twenty-First Century, supra* note 171, at 1065 (2006) (arguing that “[t]he role of emotion and intuition as important but inarticulable grounds of a judicial decision is concealed” because a judge would be criticized for explaining his decision “in terms of an emotion”). Indeed, Pillsbury recognizes these limitations, which are a primary reason why he characterizes his own work as preliminary and cautions that it primarily raises ideas and suggestions worthy of fuller exploration. Pillsbury, *supra* note 207, at 339, 349, 351.

282. *See supra* notes 173, 176–183.

283. *See* Barzun, *supra* note 128, at 5 n.15 (explaining that Frank has been criticized for having built his theory “upon a mixture of psychoanalytic concepts and insights strung together rather haphazardly” (quoting Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 *J.L. & SOC’Y* 175, 182 (1991))).

284. Sarah Treul et. al, *Jekyll and Hyde Questions from the Bench: Does the Emotional Nature of Supreme Court Justices’ Questions Affect their Votes on the Merits?* (Working Paper, 2009), available at <http://ssrn.com/abstract=1407518> (using Cynthia Whissel, *The Dictionary of Affect in Language*, in 4 *EMOTION: THEORY, RESEARCH, AND EXPERIENCE: THE MEASUREMENT OF EMOTIONS* 113–31 (Robert Plutchik & Henry Kellerman eds., 1989)). One way in which such a study is distinguishable from the “armchair analysis” approach is by its methodical application to all arguments and questions, not only those appearing obviously “emotional.” *Cf.* Pillsbury, *supra* note 207, at 333 (acknowledging his limited sample size). Another distinction is its

study, using fMRI brain-scanning technology, that might shed light on whether judges differentially engage neural circuits implicated in emotion when making decisions as to *whether* to punish and *how much* to punish.²⁸⁵ Two Australian researchers have begun to interview magistrate judges about the influence of emotion in their work,²⁸⁶ and I have begun to explore the viability of such an approach by conducting a pilot interview with United States Circuit Court Chief Judge Alex Kozinski.²⁸⁷

These efforts, offered here as promising examples of the new directions toward which epistemological diversity may lead the study of judicial emotion, are fledgling and isolated. But if, as a judge once observed, the problem is no longer the “lack of candor” of which Cardozo complained, but rather a lack of “techniques and tools which are sensitive enough to explore the mind of a man and report accurately its conscious and subconscious operations,”²⁸⁸ we now

grounding in constructs whose empirical validity has been at least somewhat demonstrated. Using a simple *pleasant/unpleasant* measure, they concluded that greater unpleasant language directed at the Petitioner correlates with higher odds of finding in favor of the Respondent. Though the authors claim that emotionally salient language at oral argument “affects” Justices’ decisions, *see* Treul et al., *supra*, at 20, their data suggest only that this aspect of language correlates with dispositions toward reversal or affirmance of the case, and that unpleasant language is a useful signal from which to predict winners and losers. Further, Whissel’s tool organizes the “affective” aspect of language along measures of *pleasant/unpleasant* and *activation/passivity*. These capture two aspects of the emotionality of language, its valence and intensity, but fail to capture others, such as cognitive content. However, other instruments exist to code language (including verbal signals, such as pitch) for emotion. *See, e.g.*, MARGARET M. BRADLEY & PETER J. LANG, AFFECTIVE NORMS FOR ENGLISH WORDS (ANEW): INSTRUCTION MANUAL AND AFFECTIVE RATINGS (1999); Tom Johnstone & Klaus R. Scherer, *Vocal Communication of Emotion*, in HANDBOOK OF EMOTIONS, *supra* note 63, at 220, 223; DCYPHER, <http://www.dcyphergroup.com/index.html> (last visited Jan. 21, 2011) (describing *Dcypher* software, also based on Whissel’s work).

285. In Joshua W. Buckholtz et al., *The Neural Correlates of Third-Party Punishment*, 60 NEURON 930 (2008), the research team reported findings that they interpreted to show such differential neural engagement among lay subjects. They recently have begun a new phase of that same study using judges as subjects. Conversation with Owen Jones, New York Chancellor’s Chair in Law, Professor of Biological Sciences, Director, Law and Neurosciences Project, Vanderbilt University (April 14, 2010).

286. *See* Anleu & Mack, *supra* note 55, at 601 n.58.

287. Interview with Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit (Feb. 6, 2010). Over the course of that interview, Chief Judge Kozinski suggested a theory for distinguishing between legitimate and illegitimate manifestations of judicial emotion; discussed instances in which he believed his decisions to have been driven importantly by emotion; noticed that one of his examples contradicted his proposed theory; reflected on his comfort level with emotion and its expression and compared it to the comfort level he imagines his colleagues to have; explored what litigant behaviors reliably make him angry, and why; and articulated why he thinks judicial expression of emotion, including in a written opinion, sometimes is valuable. The richness of his responses in that one interview suggests the promise of the method.

288. Walter V. Schaefer, *Precedent and Policy Judicial Opinions and Decision Making*, in JUDGES ON JUDGING 115 (David M. O’Brien ed., 2d ed. 2004) (“I have tried to analyze my own reactions to particular cases [but] I have doubted somewhat the result, for the tendency is strong to reconstruct along lines of an assumed ideal process.”).

have a much wider array of such tools.²⁸⁹ Making liberal use of them would go a significant distance toward remedying what scholars recently have acknowledged to be the extreme neglect of emotion within the psychology of judging.²⁹⁰ Other disciplines, such as philosophy, history, anthropology, and literature—and, yes, psychoanalysis—have their own insights to bring. The point is not to privilege one lens, but rather to privilege disciplined thought and interdisciplinary dialogue within an appropriately rich epistemological context.

Thus, just as the realists' efforts were sharply limited, so too has been most contemporary scholarship, even as the bounds of available knowledge have loosened. And just as the realist vision was hobbled by imperfect mirroring of complex concepts, the new emotional realists face the same danger. But these failures of emotional epistemology now can be overcome. Changing the cultural script of judicial dispassion requires what Dan Simon calls "pedantic eclecticism"—open-mindedness to a range of useful and informative research, combined with commitment to methodological rigor.²⁹¹ And as we come to a fuller understanding of judicial emotion as it is, we must—if the promise of this new epistemological space is to be realized—simultaneously refine our concepts of judicial emotion as it ought to be.

CONCLUSION

We stand at a critical moment. The cultural script of judicial dispassion still wields extraordinary social power, but its foundation is fast being eroded. Our jurisprudence will not founder without the script, for we may replace it with direct advocacy of the qualities of impartiality and discipline for which dispassion is wrongly thought to act as a proxy. Liberating judicial emotion from the weight of that script will make it possible to examine it freely and shape it openly. We will do well, in this new enterprise, to take sustained recourse to contemporary scholarship on the emotions—not just those aspects that have percolated into popular discourse,²⁹² and not just those that have dominated in the past. Much as our intellectual fellows have done in behavioral law and economics, we must closely examine the precise costs and benefits of judicial emotion in discrete contexts.²⁹³ By marrying this sharp understanding

289. EMOTION: THEORY, RESEARCH, AND EXPERIENCE, *supra* note 284.

290. Klein, *supra* note 66, at xv.

291. Dan Simon, *In Praise of Pedantic Eclecticism: Pitfalls and Opportunities in the Psychology of Judging*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING, *supra* note 66, at 131–47.

292. A toned-down version of psychoanalysis is not the only source of emotional epistemology that has seeped its way into popular consciousness. Daniel Goleman's wildly successful books on "emotional intelligence," a concept that has spawned an industry, have popularized the idea that humans need emotional skills to survive and succeed, including professionally. DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (10th anniversary ed. 2005).

293. Resnik, *supra* note 186, at 1909–10 (arguing that we cannot "speak coherently about a single set of qualities demanded for the vast array of roles and responsibilities that people called judges have," but instead need "contextual particularity").

with a clear vision of what we want from judges, we finally may arrive at a coherent, achievable account of how judges should, and should not, draw on their emotions.

We now have, in sum, the tools to fulfill what Llewellyn believed to be the realists' great promise: we may now pick up an idea which has been "expressed and dropped, used for an hour and dropped, played with from time to time and dropped," and instead "set about consistently, persistently, and insistently to carry [it] through."²⁹⁴ This is the critical dialogue that the cultural script of judicial dispassion, in its stifling simplicity, frustrates. It is time, then, to put the script aside.

294. Llewellyn, *supra* note 121, at 1238.

