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Angela L. Bergman

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Angry Judges

Terry A. Maroney

65 Vand. L. Rev. 1207 (2012)

Judges get angry. Law, however, is of two minds as to whether they should; more importantly, it is of two minds as to whether judges' anger should influence their behavior and decisionmaking. On the one hand, anger is the quintessentially judicial emotion. It involves appraisal of wrongdoing, attribution of blame, and assignment of punishment—precisely what we ask of judges. On the other, anger is associated with aggression, impulsivity, and irrationality. Aristotle, through his concept of virtue, proposed reconciling this conflict by asking whether a person is angry at the right people, for the right reasons, and in the right way. Modern affective psychology, for its part, offers empirical tools with which to determine whether and when anger conforms to Aristotelian virtue.

This Article weaves these strands together to propose a new model of judicial anger: that of the righteously angry judge. The righteously angry judge is angry for good reasons; experiences and expresses that anger in a well-regulated manner; and uses her anger to motivate and carry out the tasks within her delegated authority. Offering not only the first comprehensive descriptive account of judicial anger but also the first theoretical model for how such anger ought to be evaluated, the Article demonstrates how judicial behavior and decisionmaking can benefit by harnessing anger—the most common and potent judicial emotion—in service of righteousness.

Angry Judges

Terry A. Maroney*

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INTRODUCTION

Judges get angry. They get angry at lawyers. A federal district judge, for example, gained notoriety by publicly inviting lawyers to a “kindergarten party” where, he proposed, they would learn how “to practice law at the level of a first year law student.”¹ They also get angry at litigants. An “angry” California judge revoked Lindsay Lohan’s probation for failure to take her community service obligations seriously;² a week later, Lohan’s father was denied bail by a “very angry judge” who “read him the riot act” for violating an order of protection.³ They even get angry at each other. Chief Judge Edith Jones of the Fifth Circuit, during an oral argument, slammed her hand on the bench, told a fellow judge to “shut up,” and suggested he leave the courtroom.⁴ Judicial anger is a persistent reality, a regular feature of judges’ emotional diet. The popular website *Above the Law* has even given a catchy name to judges’ public expressions of anger: “benchslaps.”⁵

Legal culture, however, is of two minds about judicial anger. On the one hand, anger could be called the quintessentially judicial

1. *Morris v. Coker*, Nos. A-11-MC-712-SS, A-11-MC-713-SS, A-11-MC-714-SS, A-11-MC-715-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

2. Bob Tourtellotte, *Angry Judge Revokes Lindsay Lohan Probation*, REUTERS (Oct. 19, 2011), <http://blogs.reuters.com/bob-tourtellotte/>.

3. Kathleen Perricone, *Michael Lohan Denied Bail by Angry Judge*, N.Y. DAILY NEWS, Oct. 29, 2011, http://articles.nydailynews.com/2011-10-29/news/30337909_1_kate-major-michael-lohan-angry-judge.

4. Debra Cassens Weiss, *5th Circuit Oral Arguments Turn Contentious When Chief Judge Tells Colleague to Shut Up*, A.B.A. J., Sept. 26, 2011, http://www.abajournal.com/news/article/5th_circuit_oral_arguments_turn_contentious_when_chief_judge_tells_colleague/. Jones later apologized for her “intemperate language.” *Id.*

5. See ABOVE THE LAW, <http://abovethelaw.com> (last visited Feb. 5, 2011).

emotion. Humans (including judges) feel anger when we perceive that a rational agent has committed an unwarranted wrongdoing; that experience of anger generates a desire to affix blame and assign punishment, and facilitates actions necessary to carry out that desire.⁶ This coupling of judgment and action rather precisely describes one core function of the judge. Indeed, we may expect judges to act as society's anger surrogates, so as to avoid vigilante action. We often rely on them to assign blame, frequently task them with assigning consequences, and always hope they will be motivated to perform these functions.

On the other hand, anger seems to pose a danger to the neutral, careful decisionmaking we also expect of judges. Anger is powerful, and its effects sometimes regrettable; consider the actions of a Florida judge who, "red faced and yelling," left the bench to "physically intimidate" an assistant state attorney.⁷ Anger is the prototype for the traditional view of emotion—a view strongly reflected in legal theory—as a savage force that unseats rationality, distorts judgment, manifests in impulsive aggression, and imperils social bonds.⁸ Indeed, fear of such irrationality led Judge Richard A. Posner to declare that we ought to "beware . . . the angry judge!"⁹

Law's split attitude on judicial anger, then, reflects an inability to reconcile our valuation of what anger offers with our fear of what it threatens to take away.

Aristotle counseled that we might reconcile these opposing impulses by recognizing that anger "may be felt both too much and too little, and in both cases not well."¹⁰ Rather than categorically condemning or lauding anger, he urged that we judge anger through the lens of virtue. Virtue consists of feeling anger "at the right times, with reference to the right objects, towards the right people, with the

6. JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* 248–49 (1982); *INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES* (Michael Potegal et al. eds., 2010); see *infra* Parts I.B., III.

7. Rene Stutzman, *Judge Shea to Be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, *ORLANDO SENTINEL*, June 1, 2011.

8. Michael Potegal & Raymond W. Novaco, *A Brief History of Anger*, in *INTERNATIONAL HANDBOOK OF ANGER*, *supra* note 6, at 9, 15 ("Anger is the prototype for the classical view of emotions as 'passions' that seize the personality, disturb judgment, alter bodily conditions, and imperil social interaction."); see also Kathryn Abrams, *The Progress of Passion*, 100 *MICH. L. REV.* 1602, 1602 (2002) (describing stark dichotomy between reason and emotion in legal thought); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 *LAW & HUM. BEHAV.* 119, 119 (2006) (same).

9. RICHARD A. POSNER, *HOW JUDGES THINK* 110 (2008).

10. ARISTOTLE, *NICOMACHEAN ETHICS* 1106B20, in *THE BASIC WORKS OF ARISTOTLE* 958 (R. McKeon ed., 1941).

right motive, and in the right way.”¹¹ To be sure, Aristotle’s counsel was directed to human beings generally and not to judges specifically. One of the most enduring lessons of the early-twentieth-century legal realists, though, is that judges are human first.¹² Judges’ humanity properly is regarded as the starting point, and the fact of also being a judge frames a second-order inquiry as to whether and how the human phenomena of interest should be molded to suit the judicial role.¹³ At the most basic level, then, the Aristotelian tradition challenges the traditional legal supposition that anger is a suspect feature of judicial experience, and a suspect basis for judicial action, merely because it is an emotion.¹⁴ Rather, it suggests, judicial anger sometimes is appropriate and sometimes not; the difference resides in reasons—what the emotion is about—and action—how the emotion is experienced and expressed.

Modern affective science—that is, the psychological and neuroscientific study of human emotion¹⁵—proceeds from the same theoretical basis and adds empirical substance. Affective science confirms that emotions are rooted in thoughts, reflect judgments, and are directed toward objects.¹⁶ Emotions, including anger, can be evaluated by interrogating the accuracy of, and values behind, those thoughts and judgments as they relate to those objects. The science also provides concrete tools with which to discern anger’s impact on thought, behavior, and decisionmaking.¹⁷ Those impacts then can be judged as normatively desirable or not. This inquiry cannot be undertaken in the abstract; such judgments are highly dependent on context. Judging is one such context.¹⁸ The second-order inquiry, then, is to evaluate anger’s impact on behavior and decisionmaking as good or bad in light of the judicial role. And to do this, we must have an

11. *Id.*

12. Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 656 (2011) (citing Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931)).

13. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1489 & n.44 (2011).

14. See Maroney, *supra* note 12, at 634–42 (the ideal of emotionless judging has both a long pedigree and contemporary traction).

15. See HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009).

16. ANDREW ORTONY ET AL., *THE COGNITIVE STRUCTURE OF EMOTIONS* (1988); Maroney, *supra* note 12, at 643–45 (citing, *inter alia*, MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT* (2001)).

17. Maroney, *supra* note 12, at 644–48.

18. Maroney, *supra* note 13, at 1514.

idea of what we want that behavior and decisionmaking to look like—and why.

This Article weaves together these philosophical, psychological, and jurisprudential strands to create an account of judicial anger—one that can break the present stalemate in which we simultaneously, but without an explanatory theory, welcome and reject such anger. Interdisciplinary analysis reveals tools by which we may evaluate specific iterations of judicial anger as justified or not, and its behavioral and decisional impacts as desirable (or tolerable) or not. This Article proposes that those who are angry for the right reasons, and in the right way, be thought of as *righteously angry judges*.

By proposing this new model, this Article furthers important debates on judicial behavior. First, it builds on a growing scholarship examining judicial emotion. Such scholarship—spearheaded most recently by this author, but also encompassing work by the Hon. Richard A. Posner,¹⁹ the Hon. William J. Brennan,²⁰ and the early-twentieth-century legal realists²¹—seeks both to expose the reality that judges experience emotion and to interrogate how such emotion does, and should, influence their judging. In prior work, this author has sought to build a theoretical base for that project, to use cutting-edge empiricism to give it substance, and to articulate a normative frame within which to judge it.²² This Article is the third in that series. Such scholarship fills a gap in the psychological study of judging, which historically has left aside questions of emotion.²³ It similarly furthers the behavioral law and economics project, which explores the myriad of ways in which judges' human attributes influence their decisions.²⁴

Second, whereas prior scholarship has tended to treat judicial emotion as a general category, this Article focuses exclusively on one emotion: anger. It therefore brings the analysis to a new level of

19. POSNER, *supra* note 9; RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* (2001).

20. William J. Brennan, Jr., *Reason, Passion, and "The Progress of Law,"* 10 *CARDOZO L. REV.* 3 (1988).

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

22. Maroney, *supra* note 12; Maroney, *supra* note 13. Going forward, the series will include explorations of judicial temperament; emotion, gender, and the female judge; and the impact of the diverse settings in which judges work (e.g., appellate versus trial dockets, family versus criminal court). The project, currently devoted to constructing a theory of judicial emotion, eventually will include an empirical component.

23. David Klein, *Introduction to THE PSYCHOLOGY OF JUDICIAL DECISION MAKING*, at xv (David Klein & Gregory Mitchell eds., 2010) (stating that emotion is an important but understudied "area of inquiry for students of judges").

24. Maroney, *supra* note 13, at 1492 nn.36–38 (citing, *inter alia*, Klein, *supra* note 23, at xv; W. Kip Viscusi, *How Do Judges Think About Risk?*, 1 *AM. L. & ECON. REV.* 26, 36 (1999)).

particularity. Such a deliberately narrow focus has been productively applied to other questions of law and emotion; consider, for example, recent work on regret and abortion rights,²⁵ as well as the relevance of happiness to regulatory law.²⁶ The narrower focus allows for a sharper image.

Third, this Article promises to have real-world impact. Judging the propriety of instances of judicial anger is a regular feature of the case law, and thus is important doctrinally.²⁷ The model proposed herein demonstrates how a previously undertheorized—or, one might less charitably say, sloppy—area of law can be afforded greater rigor. Judges, too, stand to benefit. Just as medical professionals increasingly are taking note of the emotional aspects of their work, attending to which improves job satisfaction and performance, judges are poised to begin doing the same.²⁸ This author's prior work has sparked that development;²⁹ this Article will further it. Developing judicial awareness of anger and the ways in which it can be managed is particularly critical given the frequency with which angry judges are accused of bias and misconduct.³⁰

The Article proceeds as follows. Part I briefly encapsulates this author's prior work showing that judicial emotion is both inevitable

25. Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

26. John Bronsteen et al., *Welfare as Happiness*, 98 GEO. L.J. 1583 (2010); see also John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037 (2009).

27. See *infra* Part II (discussing doctrinal treatment of judicial anger episodes).

28. Maroney, *supra* note 13, at 1517–19 (drawing parallel to the medical profession's move toward emotional engagement); see also Leeat Granek, *When Doctors Grieve*, N.Y. TIMES, May 27, 2012, at SR12 (describing study showing that oncologists are inadequately prepared to cope with emotional demands of job, with concrete impacts on quality of care).

29. Since the publication of *Emotional Regulation*, this author has been approached with requests to work with judges to develop judicial training around issues of emotion, both in the United States and elsewhere. One such training is now being planned, for example, with the Ecole Nationale de la Magistrature in Paris.

30. See, e.g., Lynda Cohen, *Atlantic County Superior Court Judge—Accused of Screaming at a Woman During a Custody Hearing—Apologizes but Denies Ethics Violation*, PRESS OF ATLANTIC CITY, Sept. 4, 2010, http://www.pressofatlanticcity.com/news/breaking/article_b22e6be8-b755-11df-b0a1-001cc4c03286.html; Lise Olsen, *Secrecy May Help Misbehaving Judges*, HOUSTON CHRON., Dec. 14, 2009, <http://www.chron.com/news/houston-texas/article/Secrecy-may-help-protect-misbehaving-judges-1737681.php> (federal judge drew complaints about “bursts of temper” for years before “alcohol, emotional and judgment problems landed him behind bars”); Kerri Rempp, *Neb. Judge Reprimanded for Behavior in Custody Case*, RAPID CITY J., June 14, 2010, http://rapidcityjournal.com/news/article_57599ddc-77b3-11df-bec2-001cc4c03286.html (stating that a judge was censured for “angry and condescending tone and demeanor”); Robert H. Tembeckjian, Op-Ed., *How Judges Hide from Justice*, N.Y. TIMES, May 22, 2005, at 25(L) (stating that the New York Commission on Judicial Conduct “censured a Brooklyn Criminal Court judge for coming off the bench in unprovoked anger and grabbing and screaming at a defense lawyer”).

and not necessarily—or even usually—a bad thing. Judges are human, and emotion is central to human life: it reflects a rational assessment of the world, motivates action, and enables reason. The emotionless judge is a dangerous myth. But though judicial emotion cannot be eliminated, it can be well regulated. The Part briefly distinguishes between regulation efforts that are counterproductive and those that help a judge steer the correct emotional course. It then moves from emotion in general to anger specifically. It presents a summary of that emotion and its core attributes, engaging first with the ancient philosophical debate over whether anger ever is justifiable, and (after answering in the affirmative) outlining the physical and psychological effects with which it is associated. Finally, it explains that, among the emotions judges are likely to feel in the course of their work, anger is the most visible and readily identified.

Part II demonstrates the reality of judicial anger. It scours case law, news reports, new-media sources such as YouTube, and judges' self-reports to discern both the common objects of, and reasons for, judicial anger. Angry judges' most frequent targets are lawyers, who occupy first place by a considerable distance. Following lawyers are litigants, witnesses, and—perhaps surprisingly—other judges. The most common prompts for such anger are incompetence, disrespect, unwarranted harm inflicted on others, and lies. Judicial anger is not unusual and is not the mark of a “bad judge.” However, particular judges appear to have more difficulty than others in handling anger. Though the Article does not attempt to analyze the psychological makeup of individual judges, the findings of this Part suggest that certain judges seem prone to anger states that are relatively frequent and extreme.³¹

31. This sort of judge—some of whom are mentioned in this Article—will be analyzed in greater depth in the next article in this series, focusing on judicial temperament. Temperament is notoriously ill-defined, though all appear to concur that (whatever it is) it is extremely important. I anticipate proposing that lack of a proper judicial temperament should be understood to consist of poor emotion-regulation skills in persons with high levels of trait anger.

It is worth noting here that, while complaints about temperament usually focus on behavior in the professional setting, expressions of anger in a judge's personal life sometimes spark debate over fitness to serve. For example, Judge William Adams of Texas is under fire because his daughter posted to YouTube a video of him angrily beating her eight years earlier. The beating was a punishment for illegally downloading files to her computer. The incident received widespread press coverage, and many people have called for Adams to be removed from the bench. See Melissa Bell, *Hillary Adams Hopes Father, Judge William Adams, Will Repent After She Posted Violent YouTube Video*, WASH. POST, Nov. 3, 2011, http://www.washingtonpost.com/blogs/blogpost/post/hillary-adams-says-she-posted-violent-youtube-video-in-hopes-her-father-judge-william-adams-would-repent/2011/11/03/gIQAjoZliM_blog.html (describing popular outcry and official investigation after video went “viral” and daughter appeared on the Today show).

Having shown judicial anger as it is, Part III takes on the issue of how it ought to be. It presents a new theoretical model, that of the *righteously angry judge*. It begins by noting that the audience to judicial anger (whether the public, members of the media, or reviewing courts) tends to evaluate the propriety of anger states along two axes. The first is justification, or the reasons for the anger; the second is manifestation, or the manner in which it is experienced and expressed. The Part deepens the analysis of those two axes, which it positions as the core components of righteousness.

Focusing first on justification, it argues that anger can be a legitimate judicial experience, and a legitimate basis for judicial action, with the threshold condition being that it rest on good reasons. A reason is “good” if its premises are factually accurate, if it is relevant to an issue properly before the judge, and if it reflects good values. The Part then uses concrete examples to show how good and bad reasons can be distinguished. For example, it demonstrates that, when commingled with contempt, judicial anger conveys a belief in the judge’s superiority.³² Because judges in a democratic society have no claim to superiority, but only to authority, such anger reflects a fundamentally bad judicial value.

Good reasons are the threshold condition; however, judges’ anger also must manifest in an acceptable way. Judicial anger manifestation embraces both the judge’s own experience of anger and the way in which she expresses that anger to others. In its focus on manifestation, the Part transitions from philosophy to affective science, using that science to explain anger’s impact on behavior. Anger, it shows, has distinct effects on the processes and outcomes of decisionmaking—for example, a tendency to spur quick decisions that rely on heuristics. It also is associated with distinct modes of expression—for example, a tendency to spur physical approach. Again using concrete examples, the Part demonstrates how judicial anger is, and ought to be, experienced and expressed. Importantly, it also shows how emotion-regulation skills—the tools we use to shape what emotions we have, when we have them, and how we express them³³—can help judges manifest anger so as to maximize its benefits and minimize its dangers.

32. Paul Ekman, *Antecedent Events and Emotion Metaphors*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS* 146, 147 (Paul Ekman & Richard J. Davidson eds., 1994) (defining contempt as “feeling morally superior to someone”).

33. James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 *J. PERSONALITY & SOC. PSYCHOL.* 224, 224 (1998).

The Part concludes by encapsulating the new model. The righteously angry judge is angry for good reasons, experiences and expresses that anger in a well-regulated manner, and uses her anger to motivate and carry out the tasks within her authority. Righteously angry judges deserve not our condemnation but our approval.

I. JUDICIAL EMOTION AND ANGER

Before analyzing how and why judges get angry, it is important first to establish why judicial emotion warrants our attention; what is special about anger; and how anger can be identified.

A. *Judicial Emotion: Its Inevitability and Potential Utility*

The standard legal story is that judges ought to be—and are capable of being—emotionless. As I have explained elsewhere, since the time of the Enlightenment ideas of the “good judge” have included the command that such a judge be “divested of all fear, anger, hatred, love, and compassion.”³⁴ Over the course of the last century, this ideal—once considered a fundamental tenet of Western jurisprudence³⁵—has been somewhat moderated. Few today would dispute that judges are human, that humans experience emotion, and that judges therefore experience emotion.³⁶

However, our legal culture continues to insist that such judicial emotion be tightly controlled. Justice Sotomayor reflected the now-prevailing view when she testified at her 2009 confirmation hearings, “We’re not robots [who] listen to evidence and don’t have feelings. We have to recognize those feelings and put them aside.”³⁷ Under this postrealist account, judicial emotion is to be temporally isolated—that is, experienced only at a predecisional moment—and operationally neutered—that is, disabled from exerting any effects on behavior and decisionmaking.³⁸ At critical moments of deliberation and action, the judge is still expected to be emotionless.

34. Maroney, *supra* note 12, at 630–31 (quoting THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651)).

35. Karl Georg Wurzl, *Methods of Juridical Thinking* (1904), reprinted in *SCIENCE OF LEGAL METHOD: SELECT ESSAYS* 298 (Ernest Bruncken & Layton B. Register trans., 1917).

36. Maroney, *supra* note 13, at 1487.

37. *Id.* at 1483 (quoting Andrew Malcolm, *Sotomayor Hearings: The Complete Transcript, Part 1, TOP OF THE TICKET* (July 14, 2009, 9:57 AM), <http://latimesblogs.latimes.com/washington/2009/07/sonia-sotomayor-hearing-transcript.html>).

38. Maroney, *supra* note 13, at 1488–89 (tracing the evolution of thought on judicial emotion).

Even this moderated adherence to the ideal of emotionless judging is profoundly out of step with reality, for two reasons. First, even were it achievable, emotionlessness is not always a worthy goal, even for judges.³⁹ Second, emotion generally cannot be eliminated; it can only be regulated.⁴⁰

A foundational tenet of modern psychology is that emotions are critical to human flourishing.⁴¹ Emotions rest on thoughts: they reflect our evaluations of events in the world and the relationship of those events to our goals and values.⁴² Emotions thus reflect reasons. They also motivate action in service of reasons. An emotion signals that an event is of particular importance, facilitates responsive behavior, and can signal our needs to others.⁴³ Emotion also is critical to substantive rationality, particularly the ability to make social judgments, choices regarding one's own welfare, and moral decisions.⁴⁴ These concepts find further intellectual backing in philosophical accounts.⁴⁵ Emotion and cognition both contribute to rationality, just as both emotional and cognitive dysfunction can detract from it.⁴⁶

Were judges truly to suppress all emotion, then, they would lose something of importance. They would lose an important source of engagement with, and commitment to, the reality of their work. An Australian magistrate, for example, has expressed that a judge who loses contact with "that feeling for humanity," reflected in emotion, cannot do her job.⁴⁷ Judge Mark Bennett, in a rare instance of public self-disclosure, offers a similar assessment:

Early in my second year as a judge I had a discussion about sentencing with a mentor judge I told him of the extraordinary difficulty and emotional toll I was encountering in sentencing. He said, "Don't worry, Mark, it will get much easier." Out of

39. Maroney, *supra* note 12, at 668–71 (citing, *inter alia*, POSNER, *FRONTIERS OF LEGAL THEORY*, *supra* note 19, at 228, 242).

40. See generally Maroney, *supra* note 13.

41. Maroney, *supra* note 12, at 645 (citing, *inter alia*, JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 37–72 (1996)) (noting consensus that "emotions are evolved mechanisms for maximizing survival chances").

42. See, e.g., Richard S. Lazarus, *The Cognition-Emotion Debate: A Bit of History*, in *HANDBOOK OF COGNITION AND EMOTION* 3, 3 (Tim Dalgleish & Mick J. Power eds., 1999); Klaus R. Scherer, *Appraisal Theory*, in *HANDBOOK OF COGNITION AND EMOTION*, *supra*, at 637–63. For more in-depth explanation of this fundamental aspect of emotion theory, see Maroney, *supra* note 12, at 642–44, and Maroney, *supra* note 13, at 1501–03.

43. Maroney, *supra* note 12, at 644–45; Maroney, *supra* note 13, at 1502.

44. Maroney, *supra* note 12, at 645–48.

45. *Id.* at 647–48.

46. *Id.* at 646–48; see also Terry A. Maroney, *Emotional Competence, "Rational Understanding," and the Criminal Defendant*, 43 *AM. CRIM. L. REV.* 1375 (2006).

47. Maroney, *supra* note 13, at 1496 (citing Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 *J.L. & SOC'Y* 590, 612 (2005)).

respect, I did not respond, but I said to myself, if it gets easy to deprive someone of their liberty please shoot me. I have not been shot, and it hasn't gotten any easier.⁴⁸

As one commentator noted during the public debate over judicial “empathy” prompted by the nomination of Justice Sotomayor, without emotions judges “don’t know how much anything is worth.”⁴⁹

Though complete suppression of judges’ emotions is not a worthy goal, regulation of those emotions is.⁵⁰ Like all humans, judges can (and do) exert energy to shape what emotions they have, when they have them, and how those emotions are experienced and expressed.⁵¹ The innate human capacity for regulation allows us continually to try and steer the emotional course best suited to the situation at hand.⁵² This Article delves more deeply into judicial anger regulation at a later juncture.⁵³ For present purposes, it is sufficient to note that suppression and denial—efforts simply not to feel what one wants not to feel, or to pretend one is not feeling it—tend to be highly counterproductive, especially for judges.⁵⁴ This is as true for anger as for other emotions. In contrast, recognizing and engaging with emotion allows judges to rethink, change, or accept it.⁵⁵ Engagement strategies provide the greatest hope for helping judges maintain access to emotion in a way that furthers, not hinders, job performance.⁵⁶

These propositions together suggest that judicial emotion, including anger, is inevitable; that at best it can be managed, not eliminated; and that such management need not have the invariant goal of utmost minimization, because judicial emotion might sometimes be appropriate, even valuable.

48. Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge’s Musings on Defendants’ Right and Rite of Allocution*, THE CHAMPION, Mar. 2011, at 26 n.1.

49. David Brooks, Op-Ed., *The Empathy Issue*, N.Y. TIMES, May 29, 2009, at A25.

50. Maroney, *supra* note 13, at 1498 (“Literal absence of emotion cannot . . . be the desired end of [the] regulatory effort.”).

51. *Id.* at 1486 (citing James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, in HANDBOOK OF EMOTION REGULATION 3, 7–8 (James J. Gross ed., 2007)).

52. *Id.* at 1500 (citing, *inter alia*, DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 122–24 (1989)).

53. *See infra* Part III.B.

54. Maroney, *supra* note 13, at 1532–50.

55. *Id.* at 1509–27.

56. *Id.* at 1550–51.

B. Anger: A Summary

We now turn to the specific case of anger.⁵⁷ Anger is a complicated emotion, but one about whose basic properties philosophers and psychologists agree.⁵⁸ Anger consistently is associated with a sense that the self, or someone or something one cares about, has been offended or injured, coupled with a belief that another person was responsible.⁵⁹ The responsible person must appear to have acted culpably, either because she intended to harm or was neglectful where care was warranted.⁶⁰ To experience anger—as opposed to, say, despair—in response to such a trigger, one generally also holds some sense of being able to influence the situation or cope with it.⁶¹ Change any one of these components and you change the emotion. For example, if one perceives herself to be the responsible agent, she will feel guilt or shame; if a situation (say, a devastating earthquake), not a person, is responsible, she generally will feel

57. See, e.g., Leonard Berkowitz, *Anger*, in HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 411, 418 (discussing theoretical debate over how cleanly emotions can be distinguished); cf. Lisa Feldman Barrett, *Are Emotions Natural Kinds?*, 1 PERSP. ON PSYCHOL. SCI. 28, 29 (2006).

58. Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DECISION MAKING 115, 117 (2006) (a “remarkably consistent picture of anger emerges” from the psychological literature: anger is “associated with a sense that the self (or someone the self cares about) has been offended or injured,” a “sense of certainty . . . about what has happened” and “what the cause of the event was . . . that another person . . . was responsible,” and that “the self can still influence the situation” or has the “power or ability to cope” with it).

59. RICHARD S. LAZARUS, EMOTION AND ADAPTATION 222–25 (1991) (anger supposes an external human agent who ought to be held accountable); Berkowitz, *supra* note 57, at 415–16 (“appraisal conceptions” of anger locate the emotion in an appraisal of “offense or mistreatment,” and “disapproval of someone’s blameworthy action”); Paul M. Litvak et al., *Fuel in the Fire: How Anger Impacts Judgment and Decision-Making*, in INTERNATIONAL HANDBOOK OF ANGER, *supra* note 6, at 287, 291; see also Paul Ekman, *Facial Expressions*, in HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 301, 318 (“The specific event which gets an American angry may be different from what gets a Samoan angry” because what one “finds provocative, insulting or frustrating may not be the same across or within cultures,” but the core “theme will be the same.”).

60. This component of anger, central to many philosophical and psychological accounts, likely applies only to the anger of older children and adults. See Nancy L. Stein & Linda J. Levine, *The Early Emergence of Emotional Understanding and Appraisal: Implications for Theories of Development*, in HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 383, 395 (“[W]ith increasing age, children become . . . more likely to respond with anger when harm is intentionally caused by another person.”). Further, children and adults sometimes respond with anger to situations caused by no culpable agent, such as when they experience pain. See AVERILL, *supra* note 6, at 127–46; Stein & Levine, *supra* (acknowledging such “irrational” anger, which may be more properly understood as distress that primes one to interpret other stimuli as angering).

61. LAZARUS, *supra* note 59.

sadness; and if she has no power to influence or cope with the situation, she likely will feel fear and anxiety.⁶²

This Section begins by engaging with the ancient debate, relevant to our contemporary one, over anger's justification. It then presents a brief overview of how anger is experienced and expressed.

1. Justifying Anger

An important threshold question is whether anger *ever* can be justified. Contemporary ambivalence on this question reflects long-standing philosophical and theological debates. The anti-anger position is associated with Seneca, considered the greatest of the Roman Stoics, and the opposing one with Aristotle.⁶³ Seneca and Aristotle agreed on a number of fundamental principles, such as the fact that anger is directed at persons who culpably have inflicted harm on someone or something within one's zone of care,⁶⁴ and that it predisposes one to pursue punishment or correction of the wrong.⁶⁵ They agreed, further, that making such a complex evaluative

62. *Id.*; see also Berkowitz, *supra* note 57, at 415 (in differentiating emotions, "interpretation of the cause" is "vital"); *id.* at 417 (citing N.L. Stein & L.J. Levine, *Making Sense Out of Emotion*, in *PSYCHOLOGICAL APPROACHES TO EMOTION* 45–73 (N.L. Stein et al. eds., 1990)) (if a person believes the situation cannot be remedied, she is more likely to be sad). In psychology, these underlying reasons are referred to as the emotion's "appraisal" structure. PAULA M. NIEDENTHAL ET AL., *PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES* 13–17 (2006) (examining cognitive appraisal theories); NUSSBAUM, *supra* note 16, at 19–79, 139–69; Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in *THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS*, *supra* note 32, at 172, 179–234.

63. AVERILL, *supra* note 6, at 74. Seneca's actual opposite might have been Lacantius, who argued "that anger was given by God for the protection of humankind." *Id.* at 75–76. Aristotle's more nuanced position has unquestionably been more influential, however, and is more often offered as the relevant contrast.

64. I coin the term "zone of care" to encompass all persons on whose behalf one might properly be angry. See ROBERT C. SOLOMON, *A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT* 253 (1990) (though Aristotle defined anger as an injury to oneself or one's friends, it is possible to broaden the concept to all those about whom one is motivated to care, and with whom one can find a way to empathize).

65. AVERILL, *supra* note 6, at 74; see also NUSSBAUM, *supra* note 16, at 29 (anger requires this set of beliefs: "that some damage has occurred to me or to something or someone close to me; that the damage is not trivial but significant; that it was done by someone; probably, that it was done willingly"). Aristotle and the other Greek philosophers developed a sophisticated taxonomy of anger terms, including *menis* (wrath), *chalepaino* (annoyance), *kotos* (resentment), *cholos* (bitterness or bile), *thumos* (zeal), and *orgē* (intense anger). AVERILL, *supra* note 6, at 80; Potegal & Novaco, *supra* note 8, at 13–14. Philosophers and psychologists sometimes contest whether one can be angry only at another human, see NUSSBAUM, *supra* note 16, at 130 n.95, but most agree that anger at a nonhuman requires anthropomorphizing. AVERILL, *supra* note 6, at 95 ("[W]e all sometimes become angry at inanimate objects, and at events that are justified and/or beyond anyone's control. But in such circumstances we also typically feel somewhat foolish and embarrassed about our own anger. Hence, the exceptions tend to prove (test) the rule.").

judgment requires the exercise of reason.⁶⁶ Where they parted ways was on the fundamental question of whether anger always is destructive or sometimes is productive.

Seneca laid out his position in *De Ira*, the first known work devoted entirely to anger.⁶⁷ For Seneca, anger's dependence on reason did not redeem the emotion, for he believed it to be grounded in the wrong use of reason. First, Seneca advocated that the cognitive judgments underlying anger represent false valuations of the world and one's place in it. Affronts to one's pride, for example, should not arouse anger, because one should not be prideful.⁶⁸ Second, Seneca argued that the thinking underlying anger necessarily reflects illogic and weakness.⁶⁹ Third, he posited that anger depends on a free-will choice to yield to the feeling.⁷⁰ Though the ability to make such a choice stems from humans' status as rational agents, the consequences of so choosing are irrational. Once yielded to, anger—"the most hideous and frenzied of all the emotions"—vanquishes the reason on which its existence depends.⁷¹ Anger in this quintessentially Stoic view therefore is a mistake in all instances.⁷² And because Seneca framed anger as a choice, he could call it a blameworthy mistake, in a way that a primal urge is not.

Seneca wrote largely in response to the account advanced centuries earlier by Aristotle. In contrast to the Stoics, Aristotle believed that anger could be entirely good and proper.⁷³ One *should* value one's own safety, dignity, and autonomy, just as one should care about the safety, dignity, and autonomy of others. One should feel a strong impulse to respond to affronts to those goods, for only thus are those goods appropriately valued and the world set right.⁷⁴ Anger is in this view "commingled with, if not equivalent to, justice itself."⁷⁵

66. AVERILL, *supra* note 6, at 83 (quoting SENECA, DE IRA, Loeb Classical Library edition, AD 40-50/1963, at 115 ("Wild beasts and all animals, except man, are not subject to anger; for while it is the foe of reason, it is nevertheless born only where reason dwells.")).

67. *Id.* at 82-83 (citing SENECA, DE IRA).

68. GERTRUDE GILLETTE, FOUR FACES OF ANGER: SENECA, EVAGRIUS PONTICUS, CASSIAN, AND AUGUSTINE 7 (2010) (explaining that, to Seneca, anger always is caused either by arrogance (overvaluation of the self) or ignorance (wrongly thinking things of the world to have value)).

69. AVERILL, *supra* note 6, at 85 (quoting SENECA, DE IRA, *supra* note 66, at 267: "No mind is truly great that bends before injury. The man who has offended you is either stronger or weaker than you: if he is weaker, spare him; if he is stronger, spare yourself.")).

70. WILLIAM S. ANDERSON, ANGER IN JUVENAL AND SENECA 153 (1964) (the mind causes *ira* by assenting to it); AVERILL, *supra* note 6, at 83.

71. AVERILL, *supra* note 6, at 83 (quoting SENECA, DE IRA, *supra* note 66, at 107).

72. *Id.* at 75, 83.

73. *Id.* at 82.

74. WHAT IS AN EMOTION? CLASSICAL READINGS IN PHILOSOPHICAL PSYCHOLOGY 44-52 (Cheshire Calhoun & Robert C. Solomon eds., 1984) [hereinafter WHAT IS AN EMOTION?] (quoting

Not all anger, though, is the equivalent of justice in the Aristotelian account. Only virtuous anger is just.⁷⁶ To be enraged with a person who has violated one's mother is virtuous, as not to feel rage would signify an inadequate valuation of one's mother.⁷⁷ In contrast, to become furious at a slave for committing some small error in front of guests is not virtuous, for it bespeaks too heavy an investment in displaying one's status as a superior.⁷⁸

Reason thus is as central to Aristotle's account as to Seneca's, but it serves as anger's most redeeming quality. Reason supplies not just the underlying appraisal that triggers the emotion, but also the mechanism by which one evaluates it. Through reason one determines whether the beliefs and values reflected in angry feelings have a good factual and moral basis.⁷⁹ Moreover, reason helps us determine whether feelings and the actions they spur are commensurate to the insult. Aristotle wrote that, as to anger, "we stand badly if we feel it violently or too weakly, and well if we feel it moderately"⁸⁰—the goal being not "an algebraic mean between two set quantities," but rather a response that is perfectly calibrated to the nature of the offense, the qualities of the offender, and the prospects for corrective action.⁸¹

With the competing visions thus understood, it is apparent that the Aristotelian view is the superior one with which to evaluate judicial anger. This is so, in large part, because it is the view that most accurately captures lived human experience. Whatever the rhetorical value of eschewing anger, our lives would be unrecognizable

ARISTOTLE, *NICOMACHEAN ETHICS* ("[T]hey are thought to be fools who fail to become angry at those matters they ought.").

75. Potegal & Novaco, *supra* note 8, at 18. Plato, too, took the position that anger was "a natural, open response to a painful situation." *Id.*; see also AVERILL, *supra* note 6, at 77 (explaining that, to Plato, anger became "allied with reason to protect the individual from wrongs perpetrated by others").

76. Antony Duff, *Virtue, Vice, and Criminal Liability*, in *VIRTUE JURISPRUDENCE* 193, 194–98 (Colin Farrelly & Lawrence B. Solum eds., 2008) (explaining Aristotelian virtue, in which reason and passion "speak with the same voice" and jointly manifest in right actions).

77. AVERILL, *supra* note 6, at 97 (explaining that all but Seneca agreed that one sometimes has "not only the right but the *obligation* to become angry"); WHAT IS AN EMOTION?, *supra* note 74, at 44–52 (quoting ARISTOTLE, *RHETORIC*) (anger is directed at persons who harm "those whom it would be a disgrace not to defend—parents, children, wives, subordinates").

78. The example is drawn from Seneca, who criticized anger triggered by "a slave's breaking of a cup" or "a subordinate's less-than-fawning subservience." NUSSBAUM, *supra* note 16, at 393. An Aristotelian virtue perspective would offer a different reason to criticize the emotion—not because it is angry, but because the appraisal giving rise to the anger is condemnable.

79. NUSSBAUM, *supra* note 16, at 29–31.

80. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, *NICOMACHEAN ETHICS* 1105B25).

81. *Id.*

without it.⁸² Not even Seneca appears actually to have believed his hard line; his real target was violence and cruelty, not anger per se.⁸³ The Aristotelian account similarly condemns needless violence and cruelty, but does not in the same stroke condemn all anger. That account instead invites us to dissect, educate, and shape this fundamental human experience through the power of our reason.

The best defense of the Stoic view in the judging context might be that a judge ought to accept the experience of anger solely for the purpose of discerning and judging its underlying reasons. At that point, the judge can choose to act on the basis of the reasons while leaving the emotion itself behind.⁸⁴ This account reflects Seneca's position that there is nothing done in anger that could not be done better under other influences and motives.⁸⁵ For example, he rejected arguments that anger might be necessary to action—as to motivate courage in battle—or might motivate a proper response to evil—as when one's mother has been raped.⁸⁶ Rather, the good warrior or son would act solely because, coldly considered, that action is the one best designed to further his goals. Thus, good underlying reasons could be divorced from all other aspects of the emotion.

While this account has superficial appeal, it is more semantic than substantive. First, the purported distinction is not so clean. As

82. *Id.* at 31 ("More than most emotions, anger is often condemned as antisocial. . . . Yet anger is among the commonest of emotions."); see also NUSSBAUM, *supra* note 16, at 159–60 (stating that no human group has ever achieved the Stoic ideal, though it may aspire or purport to). Perhaps having a goal of total anger elimination could facilitate its minimization, which might be adaptive (particularly for persons with high trait anger); the more realistic goal of strategic minimization, however, could achieve that benefit without the dangers associated with striving for the unattainable. Maroney, *supra* note 13, at 1546–47 (detailing such dangers).

83. Seneca made his case against anger easier by focusing only on its most extreme manifestations. Where Aristotle contemplated a wide range of angering provocations, from minor insults to violent attacks, Seneca's examples are of unbridled rage and cruelty. AVERILL, *supra* note 6, at 85 (quoting SENECA, DE IRA) ("[I]f anger suffers any limitation to be imposed upon it, it must be called by some other name—it has ceased to be anger; for I understand this to be unbridled and ungovernable."); see also ANDERSON, *supra* note 70, at 56–57; NUSSBAUM, *supra* note 16, at 393. Seneca's view on anger appears diametrically opposed to Aristotle's largely because of definitional sleight of hand.

84. This proposition was suggested by a number of participants, including judges, in pre-publication workshops of this Article.

85. ANDERSON, *supra* note 70, at 160 (explaining that Seneca wrote that the angry man should "rationally set about the punishment or the ending of the crime. Anger contributes nothing to this goal."); AVERILL, *supra* note 6, at 84; Potegal & Novaco, *supra* note 8, at 15–16 (stating that Seneca maintained that "both in sport and war, the disciplined combatants defeat the angry ones," just as Sun Tzu, a 4th century BC military strategist saw anger as a "fault upon which military commanders could capitalize").

86. ANDERSON, *supra* note 70, at 150 (stating that the worst sort of "iniuria," or a "gratuitous, unmerited, unexpected act of evil," is "the murder of one's father or rape of one's mother").

reasons are a necessary part of any emotion, to act on anger is in large part to act on reasons.⁸⁷ This does not settle the matter, though, as anger is a complex bundle consisting not just of reasons but also behavioral effects (described more fully in the sections to follow).⁸⁸ When a judge describes herself as acting on underlying reasons alone, she almost certainly is describing a process of tightly controlling those effects. The second rejoinder, then, is that the effort to isolate reasons from behaviors and to mold the latter ought to be understood as a form of emotion regulation.⁸⁹ The judge may, for example, keep her voice low and steady, take a break, or restrain an impulse to decide an issue quickly, letting her temperature cool first. Such a judge is not refraining from “acting out of anger”; she is choosing how to enact her anger in light of situational demands. She is regulating anger rather than setting it aside. This distinction *is* a substantive one. As this Article later explains, controlling angry behavior does not generally eliminate anger experience, and trying to achieve the latter often has deleterious effects. Nor should we presume that tamping down anger’s behavioral concomitants is always the right path; those concomitants sometimes are useful, even for judges.⁹⁰ A judge who thinks of herself as engaging with her anger—both its reasons and its associated behaviors—is in a much better position to enact it appropriately than one who thinks of herself as not acting on it at all. The former perspective is encouraged by the Aristotelian account but forestalled by the Stoic one. In short, while stigma gives judges an incentive to draw this semantic distinction—acting on reasons sounds more palatable than acting on emotion—it is neither accurate nor justified.

Finally, the superiority of the Aristotelian account is evidenced by the number of allies it claims, both ancient and contemporary.⁹¹ For example, the early Christian theologian Sir Thomas Aquinas defined anger much as Aristotle had—a judgment “by which

87. See *supra* Part I.A.

88. Kate Stith, in this vein, has suggested to this author that in this Article the term “moral disapproval” could be inserted every time “anger” appears, and would more accurately describe what we want from judges. I maintain, in contrast, that while moral judgment is a necessary part of anger, anger’s other components merit recognition and, sometimes, approval.

89. See *infra* Part III.B.3.b.

90. See *infra* Part III.B.3.b.

91. Though Plato and Aristotle held differing views of emotions generally, their views on anger’s redeeming qualities are surprisingly harmonious. Plato asserted that anger can be allied either with the rational portion of the *psychē*, as when it helps protect the individual from wrongdoing, or with the irrational portion, as when loss of control leads to rash deeds. AVERILL, *supra* note 6, at 77–78; see also ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 93 (1880) (“[T]he violation of justice is injury,” and “is the proper object of resentment, and of punishment, which is the natural consequence of resentment.”).

punishment is inflicted on sin”—and maintained that, while it can be turned to bad ends, it is an indispensable aspect of justice.⁹² That account is strongly embraced by virtually all contemporary philosophers of emotion,⁹³ and underpins virtually all of modern affective science.⁹⁴ This Article therefore analyzes the propriety of judicial anger through a fundamentally Aristotelian lens.

2. Anger's Core Characteristics

Seneca and Aristotle devoted close attention to anger not just because of its close relation with reason, but also because of its distinctive effects, alluded to in the prior Section. If their debate highlighted the importance of examining those effects, contemporary psychology has taken up that challenge. A robust literature demonstrates how, “[o]nce activated, anger can color people’s perceptions, form their decisions, and guide their behavior.”⁹⁵ Such effects, more closely scrutinized at a later juncture,⁹⁶ may be briefly synopsized as follows.

Anger is strongly associated with a sense of certainty, individual agency, and control.⁹⁷ These characteristics tend to predispose one to make quick decisions, privileging fast judgment over close analysis.⁹⁸ Anger also energizes the body and mind for action;⁹⁹ an angry person feels motivated to approach the offending situation

92. AVERILL, *supra* note 6, at 87–90 (Aquinas synthesized Aristotelian thought with Christian teachings). Lacantius distinguished between uncontrollable rage and just anger, writing that the latter “ought not be taken from man, nor can it be taken from God, because it is both useful and necessary for human affairs.” *Id.* at 87 (quoting LACANTIUS, DE IRA DEI).

93. Martha Nussbaum and Robert Solomon have been perhaps the strongest contemporary philosophical voices advocating that emotion—including anger—be regarded as both reflective of reasons and constitutive of reason. Maroney, *supra* note 12, at 644.

94. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12, 142 (2008) (reflecting modern philosophical consensus that thought is “an essential element of an emotion”); Maroney, *supra* note 12, at 644 (citing THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 32, at 179–234).

95. Lerner & Tiedens, *supra* note 58, at 116; *see also id.* at 121–22 tbl.1 (synopsizing extant experimental literature on effects of anger on judgment and decisionmaking).

96. *See infra* Part III.B.2.

97. C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 J. PERSONALITY & SOC. PSYCHOL. 813, 813–38 (1985).

98. Lerner & Tiedens, *supra* note 58, at 126.

99. Emotions carry distinct “action tendencies,” or physiological changes that prepare the body for particular sorts of action. C.E. IZARD, THE PSYCHOLOGY OF EMOTIONS 241 (1991) (stating that in anger “the blood ‘boils’, the face becomes hot, the muscles tense[,] [t]here is a feeling of power and an impulse to strike out”); Berkowitz, *supra* note 57, at 411, 412–13 (explaining anger’s physiological concomitants, including increased heart rate, muscle tension, and a “hot” feeling), 424 (emotions’ “action readiness” tendencies).

and change it.¹⁰⁰ Though the goal of anger is thus in an important sense positive, the means by which change is pursued can be destructive.¹⁰¹ Whether acts that are immediately destructive—such as violent attack or sharp words—ultimately are positive or negative depends, of course, on context. Raising my voice at one who has insulted me can quickly signal how seriously I take the insult and jolt the offender into an apology; raising my voice at an infant who is crying from hunger serves no such purpose.

Moreover, anger can be—and often is—coexperienced with other emotions.¹⁰² One can feel simultaneously angry and sad, disgusted, or contemptuous. An angry person can even feel hope and joy, as when she is contemplating vengeance.¹⁰³ Combinations are as varied as the triggering events.

Finally, anger comes in many flavors. *State* anger refers to an anger episode consisting of the above-described components. Such episodes can be brief or they can linger; short spurts of anger often are experienced as being “hot,” while lingering anger can harden into a “cold” state.¹⁰⁴ Anger states can be experienced as uncontrollable, almost as if imposed by a force outside the self, or they can feel more manageable; the difference generally hinges on the emotion’s intensity.¹⁰⁵ *Trait* anger, in contrast, refers to a baseline tendency to feel angry.¹⁰⁶ Persons with high levels of trait anger are the ones we describe as having a short fuse or a “choleric disposition”; anger defines much of who they are and how they are perceived.¹⁰⁷

100. Berkowitz, *supra* note 57, at 416–17 (angry persons focus on goal of changing undesirable situations), 424–25 (summarizing research showing that anger often is experienced as an urge toward verbal expression, such as screaming, and physical aggression, perhaps with the aim of doing injury); Eddie Harmon-Jones et al., *The Effect of Manipulated Sympathy and Anger on Left and Right Frontal Cortical Activity*, 4 *EMOTION* 1, 1–6 (2004) (anger has strong approach tendency); Litvak et al., *supra* note 59, at 291.

101. Nico H. Fridja et al., *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 *J. PERSONALITY & SOC. PSYCHOL.* 212 (1989) (destructive means include aggression and fighting); *see also* LAZARUS, *supra* note 59, at 225 (the angry person may be “potentiated” toward open aggression).

102. Lerner & Tiedens, *supra* note 58, at 131; Mick J. Power, *Sadness and Its Disorders*, in *HANDBOOK OF COGNITION AND EMOTION*, *supra* note 42, at 497, 503–07 (suggesting that “two or more basic emotions might lock an individual into a complex emotional state,” such as with a combination of sadness and anger, “a common experience” typifying phenomena such as grief).

103. WHAT IS AN EMOTION?, *supra* note 74, at 44; Lerner & Tiedens, *supra* note 58, at 130.

104. Berkowitz, *supra* note 57, at 414. The speed with which anger arises also can vary. *See* Litvak et al., *supra* note 59, at 290 (explaining that “practiced” anger, as is common within a family, ignites quickly when “scripts” are activated).

105. AVERILL, *supra* note 6, at 164, 199, 207–08.

106. *Id.* at 260.

107. Tanja Wranik & Klaus R. Scherer, *Why Do I Get Angry? A Componential Appraisal Approach*, in *INTERNATIONAL HANDBOOK OF ANGER*, *supra* note 6, at 243, 256; *see supra* note 31

As this brief overview reveals, anger is in an important sense rational. Contrary to stereotype, it is triggered by reasons—and a fairly constrained set of reasons at that, having to do with culpable infliction of unwarranted harm. True to stereotype, it disposes the angry person to action. Like all emotions, anger is multifaceted, carrying a complex set of attributes that can be deployed poorly or well—including, as the remainder of the Article will show, by judges.

C. The Ubiquity and Visibility of Judicial Anger

Anger is particularly important to examine on its own, because it is one of the most common emotions that judges will experience. This is true because the sorts of situations and stimuli that tend to trigger anger commonly are present in judges' work environments. Not only will judges get angry, but they inevitably will express that anger to others. Among the judicial emotions, anger is also likely the easiest to see. Not only is anger one of the most easily recognized emotions, but (as the following Part will demonstrate) among the judicial emotions its expression appears to be the least stigmatized.

Anger likely is one of the most common judicial emotions, first, because it is one of the most common emotions that humans experience in our everyday lives.¹⁰⁸ Anger is a particularly common emotion to experience while at work.¹⁰⁹ Judges' work being what it is, anger triggers are especially likely to be a regular feature of judges' days. Many of the people with whom judges must interact, whether directly or indirectly, are angry. Litigation reflects disputes; disputes entail accusations of wrongdoing and attributions of blame; the parties therefore tend to start legal proceedings already angered.¹¹⁰ Moreover, the processes of litigation themselves tend to make people—particularly lawyers—angry. (Nonlawyers may not understand why being served with an improper interrogatory, or having opposing counsel repeatedly reschedule a deposition, can be so infuriating, but it is.) Judges therefore are exposed to a good deal of others' anger.

(proposing that trait anger, rather than state anger, is a core component of poor judicial temperament).

108. AVERILL, *supra* note 6, at 162–63.

109. See ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983).

110. See, e.g., Josh Getlin, *Law and Disorder; Tart, Tough-Talking Judge Judy Sheindlin Presides over the Grim Pageant of Dysfunction Known as Manhattan's Family Court*, L.A. TIMES, Feb. 14, 1993, at E1 (stating that in family court, “[e]verything that can go wrong with an American family plays out on its stage daily”); Don Van Natta, Jr., *Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995, at B3 (“With so many people and so many emotions jammed into such small spaces,” New York City courts can be hard to manage.).

Judges must actively manage that anger, including by encouraging negotiation, policing disputes, and curtailing outbursts.¹¹¹ Through constant exposure to such unpleasant interactions, a judge may find herself getting angry, too; this is particularly so if her work conditions are stressful and physically uncomfortable.¹¹² At a minimum, she may get irritated, which shortens her fuse.¹¹³ That fuse often will find a spark: as the following Part demonstrates, the people who surround the judge often act in a way reasonably calculated not just to make them angry at one another, but also to make her angry at them.

Anger also is relatively easy to identify. In addition to its strong tendency to motivate approach, it tends to manifest in a characteristic facial expression, typically including a frown and deeply furrowed brow.¹¹⁴ It also changes the quality of one's voice, making it sharper, louder, and more staccato.¹¹⁵ Importantly, this cluster of anger characteristics is remarkably consistent. Across cultures, people are more likely correctly to identify a typified "anger face" than any other facial expression of emotion.¹¹⁶

All of anger's typical manifestations, though—on face, voice, and body—can be deliberately regulated, and sometimes overridden.¹¹⁷ For example, a person can put on a "poker face," calm the voice, and restrain herself from shaking her fist.¹¹⁸ Some people are quite adept

111. Maroney, *supra* note 13, at 1495 (citing Anleu & Mack, *supra* note 47, at 614).

112. LAZARUS, *supra* note 59, at 419–21 (noting studies that show "exposure to irritating cigarette smoke, foul odors, high room temperatures" and similar conditions "can generate anger and aggression"). One theory why this is so is that the unpleasant feelings generated by aversive stimuli prime the person to interpret ambiguous stimuli in a manner consistent with anger. *Id.* at 423–24; see *infra* Part III.B.2. (explaining how anger at one object can predispose a person to become angry at another); cf. Elizabeth F. Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 94 GEO. L.J. 398 (2006) (offering theory of emotional contagion, by which one assumes the emotional state of another).

113. See MaryAnn Spoto, *N.J. Court Punishes Judge for Yelling at Woman*, NJ.COM (June 17, 2011, 6:00 AM), http://www.nj.com/news/index.ssf/2011/06/nj_court_punishes_judge_for_ye.html (explaining that a judge attributed angry "tirade" against mother in visitation case to "being 'burned out' from his years in family court with its increased caseload and decreased staff"); see also LAZARUS, *supra* note 59, at 418 (noting close relationship between anger and irritation).

114. Ekman, *supra* note 59, at 301, 305, 308–09.

115. NIEDENTHAL ET AL., *supra* note 62, at 49–50 (describing studies showing emotions' effect on speech).

116. Jonathan Haidt & Dacher Keltner, *Culture and Facial Expression: Open-ended Methods Find More Expressions and a Gradient of Recognition*, 13 COGNITION & EMOTION 225, 256 (1999). Evolutionary theorists posit that humans recognize anger expressions most readily because another person's anger is relatively likely to signal a survival threat. See Berkowitz, *supra* note 57, at 412–14 (describing research on cross-cultural consistency of many anger attributes).

117. Maroney, *supra* note 13, at 1501–12 (distilling research).

118. *Id.*

at such regulation, while others are not, and people both manifest and mask anger differently.¹¹⁹ The possibility of effective regulation and the reality of individual variation can frustrate the ability reliably to identify anger. Familiarity helps. One often can tell if one's spouse is angry, for example, by detecting subtle iciness in her vocal tone, or noticing that he is drumming his fingers heavily.¹²⁰ Absent such familiarity, masked anger can go undetected.

The possibility of effective masking poses a challenge for identifying judicial anger. Consider a YouTube video of a court proceeding, which shows a criminal defendant spitting in a judge's face.¹²¹ In that particular clip, the one emotion the judge clearly displays is surprise, and then her face quickly reverts to neutral.¹²² The judge might have been angry, and might have deliberately kept that anger from showing (perhaps because she believed that is what a judge is supposed to do), but one cannot tell from that video.¹²³

A converse problem must also be noted. Because anger is associated with physical aggression, one may assume that when aggression is observed the actor must have been angry. This is not the case.¹²⁴ An aggressor may act instrumentally—imagine a calculating paid assassin. One also may be aggressive from motives of self-defense or defense of others. For example, two Florida judges recently gained some infamy for acting aggressively in court. One (whose actions also were captured in a video posted on the Internet) jumped off the bench to join others in overpowering a defendant who was attacking a

119. *Id.* at 1539–41 (citing, *inter alia*, Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 COGNITION & EMOTION 4, 6 (2009)).

120. William Lyons, *The Philosophy of Cognition and Emotion*, in HANDBOOK OF COGNITION AND EMOTION, *supra* note 42, at 21, 36 (“[O]ne person might display anger by banging the table, shouting, and slamming the door,” while another “might display it by being unusually quiet and undemonstrative, and by closing the door with studied carefulness as he left the room with exaggerated courtesies.”).

121. *How to Piss Off the Judge*, YOUTUBE (Aug. 13, 2009), <http://www.youtube.com/watch?v=uCNo4ky6GXE>. Note that the title reflects the poster's assumption that the act of spitting *did* anger the judge.

122. *Id.* The typical “surprise” face entails a widening of both eyes and the mouth, forming an “O” shape. NIEDENTHAL ET AL., *supra* note 62, at 126. Particularly in the slow-motion portion of the video, one can see these markers of surprise on the judge's face for a quick moment.

123. Tellingly, in a longer version of the video one can gather that the judge *was* angry. That version shows her leaning close to the defendant and telling him that she is about to recuse herself, which will ensure that she will “never have to see him for one further second.” Her voice, facial expression, and words are strongly suggestive of controlled anger. He then spits at her. After he spits and she displays a surprised-then-neutral face, she sits back, folds her arms across her chest, and fixes her face into a glower. *Suspect Spits on Judge*, YOUTUBE (Aug. 6, 2009), http://www.youtube.com/watch?v=vuj2_7_uaAQ. Those bookends provide the needed clues to her emotional state. Many glimpses of a judge's actions will lack such bookends.

124. AVERILL, *supra* note 6, at 30–31.

witness;¹²⁵ the other pulled a gun from under his robe in similar circumstances.¹²⁶ These judges might have been angry when they acted, or they might have become angry upon reflecting on the events. But because their actions need not have been triggered by anger, they are not evidence of it.¹²⁷ Further, judges may sometimes feign anger in order to make a point.¹²⁸

Thus, a judge may be angry and we may not be able to tell, and a judge may act aggressively, or otherwise look and sound angry, but not be angry. Still, anger remains a *relatively* visible target. Where a typical anger trigger is present; where the judge allows typified anger expressions, such as a glowering face or raised voice; and where acts of aggression—not just actual violence, but pointing, shaking or banging a fist, or issuing threats—are accompanied by such facial and vocal clues, we can be fairly sure it is anger we are seeing.¹²⁹

Finally, we do not have to hunt aggressively for such moments because anger is the emotion judges appear to feel most free to express. Emotional expression generally is highly stigmatized in judges, and long has been.¹³⁰ This remains true for anger to some

125. Elie Mystal, *Judge of the Day: For Real*, ABOVE THE LAW (Mar. 25, 2009), <http://abovethelaw.com/2009/03/judge-of-the-day-for-real/>.

126. David Lat, *Judge of the Day: John Merrett*, ABOVE THE LAW (Mar. 28, 2007), <http://abovethelaw.com/2007/03/judge-of-the-day-john-merrett/>.

127. In contrast, when a judge of the Western District of Tennessee grabbed the lapels of an attorney, his aggressive behavior was by all accounts motivated by anger. See *Federal Judge Agrees to Six-Month Leave of Absence, Counseling, After Claims He Mistreated Lawyers*, ASSOCIATED PRESS, Aug. 31, 2001, available at http://www.law.com/jsp/article.jsp?id=900005523602&Federal_Judge_Agrees_to_SixMonth_Leave_of_Absence_Counseling_After_Claims_He_Mistreated_Lawyers.

128. Such “fake” anger is of course difficult to distinguish from “real” anger, particularly if the judge is skilled at fakery. In conversation with judges this author has found that they frequently speak of doing precisely this, often to give their words greater gravitas and ensure that people are listening. This author also has observed this tactic with some frequency in juvenile courts. When assigning consequences to juveniles, particularly when those consequences are relatively lenient, the judge may “gin up” a range of emotional displays designed to impress seriousness on the youth, make him feel lucky for not having received a harsher consequence, and make him afraid of reoffending. When asked, juvenile judges often will freely admit using that tactic. When an advocate knows the judge well enough, these theatrical displays are easy to recognize.

129. The primary danger in relying on those signals is, of course, the possibility of “ginned up” anger displays. See, e.g., *infra* note 161. Distinguishing between real and feigned anger, unfortunately, has an “I know it when I see it” quality. One way to work through that difficulty would be to ask the judge whether she was engaging in a manufactured display. However, because of the stigma, some judges may claim that to have been the case even when they *were* sincerely angry. Cf. Sam Dolnick, *After Delay, Kerik’s Trial to Start on Nov. 9*, N.Y. TIMES, Oct. 26, 2009, at A26. Teasing apart this puzzle is one important part of the ongoing project, especially its eventual empirical component.

130. Maroney, *supra* note 12, at 670–71 (citing POSNER, FRONTIERS OF LEGAL THEORY, *supra* note 19, at 226).

degree. For example, after media reports represented that a judge had spoken angrily to a high-profile defendant—the former New York City Police Commissioner—the judge put himself on the record insisting that he “wasn’t really angry.”¹³¹ But the stigma attached to anger is markedly less than the stigma attached to other emotions, say, sorrow or fear. One much more readily finds in the case law references to judges’ anger than to any other emotion. The media, too, much more frequently report instances of judges expressing ire at lawyers, defendants, and witnesses.¹³² Indeed, judges sometimes openly own up to even the most extreme bouts of fury. A state-court judge, after being repeatedly cursed at by a defendant, indicated that the “[r]ecord should show that . . . if I’d have had a shotgun I need to have shot him but I don’t have it today.”¹³³

The reputational costs of showing anger, while not zero, thus appear to be markedly less than the costs of showing other emotions. The likely reason for this lesser stigma is a cultural perception of anger as status enhancing.¹³⁴ Whatever the reason, its effect is to generate relatively more data on judicial anger, data we now may examine.

II. ANGRY JUDGES

This Part demonstrates the reality of judicial anger by gathering evidence of its expression. While the ways in which judges express anger vary, the usual objects of that anger are fairly stable: lawyers, litigants and witnesses, and other judges.

Judicial anger is common enough that just a bit of digging reveals its traces. In the case law, evidence of judicial anger may be found primarily in connection with allegations of judicial bias, often

131. Dolnick, *supra* note 129; Alice McQuillan & Hasani Gittens, *Judge Revokes Kerik’s Bail, Sends Former Commish to Jail*, NBC N.Y. (Oct. 20, 2009), <http://www.nbcnewyork.com/news/local/Judge-Revokes-Keriks-Bail-Sends-Former-Commish-to-Jail-65005027.html>.

132. Without purporting to attach to it a quantitative value, I base these qualitative statements on the experience of conducting (both alone and with research assistants) many searches for evidence of judicial emotion over the course of five years. Evidence of judicial anger is relatively plentiful. Evidence of other judicial emotions has been, in our experience, much more difficult to find, by several orders of magnitude.

133. *Johnson v. State*, 642 A.2d 259, 262 (Md. Ct. Spec. App. 1994).

134. See generally Larissa Z. Tiedens, *Anger and Advancement Versus Sadness and Subjugation: The Effect of Negative Emotion Expressions on Social Status Conferral*, 80 J. PERSON. & SOC. PSYCHOL. 86 (2001) (expressing anger raises social status). This may also be a point of gender differentiation, as male and female anger displays may be differentially assessed in this regard. See *supra* note 22.

urged in support of motions for recusal,¹³⁵ appeals from imposition of contempt¹³⁶ and other sanctions against attorneys and parties,¹³⁷ or due process challenges.¹³⁸ Anger may also underlie imposition of sanctions against the judge for violating codes of conduct,¹³⁹ or prompt review of his fitness to serve at all.¹⁴⁰ Judges sometimes also share their experience of work-related anger. Los Angeles trial judge Gregory O'Brien, Jr., for instance, recently penned a candid, self-deprecatingly humorous article titled "Confessions of an Angry Judge."¹⁴¹ Finally, as the "benchslaps" feature of *Above the Law* suggests, there is a robust market for media reports of judicial anger expressions. These windows into judicial anger reveal important information about its objects.¹⁴²

135. *Gottlieb v. Sec. & Exch. Comm'n*, 310 F. App'x 424, 425 (2d Cir. 2009) (explaining that plaintiff alleged that the judge "was biased against him because of 'the tempest which took place between them . . . when they clashed and had words in open court' "); *Johnson v. Schnucks Inc.*, No. 09-CV-1052-WDS-SCW, 2011 WL 219900, at *1 (S.D. Ill. Jan. 24, 2011) (stating that plaintiff complained that the judge's "tone of voice, overall demeanor, and statements . . . were angry and hostile"); *In re Russell*, 392 B.R. 315, 355 (Bankr. E.D. Tenn. 2008) (explaining that plaintiff alleged the judge "became very angry and used a very harsh tone").

136. 18 U.S.C. § 401 (2006); *Johnson*, 642 A.2d at 262; *State v. Hasan*, No. 2007-063, 2009 WL 2475304, at *3 (N.J. Super. Ct. App. Div. 2009) (attorney appealed a contempt finding by judge who admitted to being outraged by frivolous motions and who apologized for expressing anger).

137. FED. R. CIV. P. 11; *Tollett v. City of Kemah*, 285 F.3d 357, 362 (5th Cir. 2002) (stating that the judge admitted to feeling "insulted" and "angry by the fact that this case would go up on a simple \$5,000" sanction).

138. *Jones v. Luebbbers*, 359 F.3d 1005, 1009 (8th Cir. 2004) (describing a judge, who admitted to being angry at defense counsel, as "angry, abusive, and threatening"); *Galvan v. Ayers*, No. CIVS001142DFL DAD P, 2006 WL 657121, at *16 (E.D. Cal. Mar. 15, 2006) (stating that a judge expressed impatience with defendant's testimony and had both "exasperated expressions on his face" and was red in the face); *State v. Munguia*, 253 P.3d 1082, 1086-87 (Utah 2011) (explaining that a judge described the defendant's behavior as "selfish" and "filthy" and said he wished he could have imposed a longer sentence).

139. *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of the United States*, 264 F.3d 52, 54-55 (D.C. Cir. 2001).

140. *In re Sloop*, 946 So. 2d 1046, 1051, 1053, 1057 (Fla. 2007) (per curiam); Christopher Danzig, *Ex-Judge of the Day: Yes, Flashing Your Piece in Court Is a "Poor Rhetorical Point"*, ABOVE THE LAW (Feb. 29, 2012), <http://abovethelaw.com/2012/02/ex-judge-of-the-day-yes-flashing-your-piece-in-court-is-a-poor-rhetorical-point/> (explaining that a judge was "frustrated" with rape victim who was being "disrespectful, combative and unresponsive" during testimony; he pulled out a concealed handgun, pretended to hand it to her, and suggested she shoot her lawyer).

141. Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, 87 JUDICATURE 251, 252 (2004).

142. One important caveat is that these windows are just that: limited openings through which we see evidence of the phenomenon of interest. It is highly unlikely that written opinions, self-disclosures, and media reports capture the entire universe of judicial anger, particularly given the continued traction of the script of dispassion. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (stating that the role of emotion is concealed because judges are criticized for revealing it). Anger against other judges, for example,

A. Anger at Lawyers

Lawyers are the most frequent targets of judges' anger. Anger at attorneys tends to be triggered by perceptions that they are incompetent; interfering with the prompt, orderly, and fair hearing of cases; defying the judge's authority; or lying—and sometimes all of these. As Judge O'Brien quipped, not only is attorney incompetence a frequent provocation, but “[w]orse still is impertinence by the incompetent, a combination that persistently remains in fashion.”¹⁴³

One of the best-known explosions of judicial wrath came from U.S. District Court Judge John Sprizzo. He ignited a media firestorm when, in 1989, he excoriated prosecutors for having handled a drug case so badly, in his view, that he had no choice but to dismiss charges against half the defendants.¹⁴⁴ When a prosecutor protested that “heroin traffickers” were about to “walk out the door,” Sprizzo responded:

Now, wait. You are not going to lay that one on me. You let heroin traffickers out the door by not proceeding in a competent enough fashion. . . . Do you know what is wrong with your office, and you in particular? You assume all we have to do is say narcotics. . . . [a]nd the judge will roll over and let the case go to the jury. You people have not been trained the way I have been trained. . . . I am telling you that in this case you didn't get away with it. If you had been a competent prosecutor, which you are not, you would have hedged against the possibility that maybe the judge would disagree with you . . . on the law. . . . If these drug dealers are walking free, it is because you did not hedge against that possibility. Don't lay it at my doorstep. . . . [I]f they are walking out of here it is because you people were not competent enough to put in an extra charge in your indictment. Sit down.¹⁴⁵

The judge's words were so “scathing” that he promptly sealed the record to prevent media reports from reaching and prejudicing jurors.¹⁴⁶ As reported in his obituary nearly a decade later, the

is unlikely to bubble into public view at anything near the rate at which it occurs, given the infrequency with which judges' dealings with one another are open to public view. Still, these glimpses provide important clues as to what is likely happening more generally.

143. O'Brien, *supra* note 141; see also Keith L. Alexander, *D.C. Superior Court Judge Declares Mistrial over Attorney's Incompetence in Murder Case*, WASH. POST, Apr. 1, 2011, http://www.washingtonpost.com/local/dc-superior-court-judge-declares-mistrial-over-attorneys-competence-in-murder-case/2011/04/01/AFlymrJC_story.html (stating that a judge, “obviously angry and frustrated, told [lawyer] that his performance in the trial was ‘below what any reasonable person would expect in a murder trial’”).

144. William Glaberson, *The Law; Judge Refuses to Open Proceeding*, N.Y. TIMES, Mar. 10, 1989, at B7.

145. *Id.*

146. Sprizzo unsealed the transcript of the proceedings only after being legally challenged by the NEW YORK TIMES. *Id.*

infamous incident put Sprizzo's formidable "temper" on public display.¹⁴⁷

While Sprizzo's reaction may have been sharp, it was not unique. Ninth Circuit Chief Judge Alex Kozinski has spoken unapologetically about his anger at a federal prosecutor, whom he caught in a lie; indeed, he characterized the incident as perhaps the angriest he has ever been at work.¹⁴⁸ While Sprizzo chewed the errant lawyer out verbally, Kozinski did so in writing. In his telling, he deliberately included the prosecutor's name multiple times in a scathing written opinion, removing it only after the U.S. Attorney's Office asked him to do so, and after he was satisfied that his message to that lawyer and his Office had been heard.¹⁴⁹

Judicial anger at attorney incompetence and misconduct sometimes comes packaged not in a vicious tongue-lashing but in a thick layer of sarcasm. This varietal is heavily favored in the "benchslap" market. Consider, for example, the lawyer-directed benchslap with which this Article began. U.S. District Court Judge Sam Sparks, unhappy with lawyers who were seeking to quash certain subpoenas, issued an order directing them to attend a "kindergarten party" in his courtroom.¹⁵⁰ At that party, he wrote, they would learn such crucial skills as:

How to telephone and communicate with a lawyer

An advanced seminar on not wasting the time of a busy federal court and his staff because you are unable to practice law at the level of a first year law student.

147. Bruce Weber, *John E. Sprizzo, 73, U.S. Judge, Dies*, N.Y. TIMES, Dec. 18, 2008, at B12; see also Editorial, *The Judge Who Spoke Too Soon*, N.Y. TIMES, Mar. 10, 1989, at A32 (characterizing the judge's remarks as "heated" and "angry," and opining that "the judge would not have got involved with this insult to the First Amendment had he had the presence of mind to hold his tongue").

148. Maroney, *supra* note 13, at 1493 (citing Interview with the Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, in Nashville, Tenn. (Feb. 6, 2010)).

149. *Id.*; see also John Schwartz, *Judges Berate Bank Lawyers in Foreclosures*, N.Y. TIMES, Jan. 10, 2011, at A1 (stating that judges handling shoddily-done foreclosures have begun to "heap some of their most scorching criticism on the lawyers"); Christine Stapleton & Kimberly Miller, *Foreclosure Crisis: Fed-up Judges Crack Down on Disorder in the Courts*, THE PALM BEACH POST, Apr. 4, 2011, <http://www.palmbeachpost.com/news/news/real-estate/foreclosure-crisis-fed-up-judges-crack-down-on-dis/nLrJ2/> ("Angry and exasperated" judges are "hitting back by increasingly dismissing" foreclosure cases and accusing lawyers of "fraud upon the court."); Jonathan Bandler, *Angry Judge Delays Annabi, Jereis Corruption Trial Until 2012*, LOHUD.COM (May 17, 2011), <http://www.lohud.com/article/20110518/NEWS02/102170004/Angry-judge-delays-Annabi-Jereis-corruption-trial-until-2012> (stating that an "angry federal judge lashed out" at prosecutors for bringing charges that could have been brought months earlier).

150. *Morris v. Coker*, No. A-11-MC-712-SS, A-11-MC-713-SS, A-11-MC-714-SS, A-11-MC-715-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshalls have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.¹⁵¹

Aggressively snarky,¹⁵² the kindergarten-party order quickly went viral on the Internet.¹⁵³ The judge seems to have been so angry that he wanted not just to change the lawyers' behavior but also to humiliate them.¹⁵⁴

Other judges also use barbed sarcasm to communicate anger to lawyers. Consider *Fox Industries v. Gurovich*, a routine civil case that devolved into a "morass."¹⁵⁵ Multiple opinions by both the district judge and the magistrate paint a picture of two people being slowly, but effectively, driven crazy by Simon Schwarz, Esq. The judges were infuriated not only by the lawyer's incompetence, but also by his apparent willingness to defy their authority and lie. In one episode that the judge called the "mystery of the evanescent courthouse," Schwarz missed a hearing (resulting in a default against his client) and claimed that he and a taxi driver were excusably unable to find the (very large) federal courthouse, despite being in the right (very small) town. Such a mishap, wrote the judge, was plausible only if "Mr. Schwarz and his driver deliberately avoided looking at the courthouse (*cf.* Lot and his daughters fleeing the destruction of Sodom and Gomorrah, *see* Genesis 19:15-17)."¹⁵⁶ Refusing a motion to disqualify himself, the judge agreed that he had "expressed varying degrees of disapprobation, hostility, impatience, dissatisfaction, annoyance, and anger with [Schwarz's] antics," including by calling

151. *Id.*

152. MERRIAM-WEBSTER'S DICTIONARY (2012) (defining "snarky" as "crotchety, snappish; sarcastic, impertinent, or irreverent in tone or manner").

153. Two thousand three hundred and ninety-four people "liked" or shared the ABOVE THE LAW feature on the "kindergarten party order" on Facebook, and more than four hundred people "tweeted" it on their Twitter accounts.

154. *See infra* notes 270-74 and accompanying text (addressing propriety of seeking to humiliate).

155. No. CV 03-5166(TCP)(WDW), 2006 WL 2882580, at *8 (E.D.N.Y. Oct. 6, 2006). The case involved trade secrets and an employment noncompete agreement.

156. *Fox Indus., Inc. v. Gurovich*, 323 F. Supp. 2d 386 (E.D.N.Y. 2004). The judge continued:

[Schwarz] offers increasingly detailed and fantastic excuses for his absence. *See, e.g.*, Exhibit 17 to Gore's Motion to Disqualify, featuring three photos taken at various locations within Central Islip that purport to demonstrate the invisibility of the mammoth white courthouse. Yet, as a point of epistemology, as Defense Secretary Donald Rumsfeld has observed in other circumstances, "An absence of evidence is not evidence of an absence." Even if Mr. Schwarz "could not find" it, the Alfonse M. D'Amato United States Courthouse *does* exist and *is* visible to the dozens of other lawyers, as well as hundreds of jurors, witnesses and workers, who arrive here every day. (And, ironically, one of the photos . . . actually *does* picture the courthouse.)

Id. at 388 n.1 (emphasis in original).

various of his statements “ ‘baloney,’ ‘false,’ ‘fraud,’ ‘impossible,’ ‘incredible,’ and ‘a lie.’ ”¹⁵⁷ He refused, however, to apologize for his anger, for those statements, or for characterizing Schwarz’s briefs as “ejaculations.”¹⁵⁸

Snarky benchslaps draw attention because they are funny—a guilty pleasure, an indulgence in *Schadenfreude*.¹⁵⁹ Indeed, one of the main draws of television judges is their frequent use of over-the-top anger and sarcasm. Judge Judy, with her “iron gavel” and “tough-talking take-downs,” is “ratings gold”¹⁶⁰ for her network because people enjoy seeing “bozos loudly castigated.”¹⁶¹ Of course, whether one finds a benchslap funny depends on whether it seems like the person really is a “bozo” who deserves the derision.¹⁶² And attorneys on the receiving end, not surprisingly, often protest that they do not deserve it, or that even if they do, their clients should not be the ones to suffer.

157. *Id.* at 389.

158. About the term “ejaculations,” the court wrote:

[T]he Court is at a loss as to how else to describe the sentences in Mr. Schwarz’s brief that consist only of the words ‘How ridiculous!’ and ‘How pathetic!’ . . . Surely Mr. Schwarz is aware of the alternate definition of “ejaculation”: to wit, a “sudden short exclamation.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.2000). The Court obviously did not intend an alternative available meaning.

Id. at 388 n.2; see also *Fox Indus.*, 2006 WL 2882580, at *8–9 (magistrate furious over lawyer’s usurpation of court’s authority in matter of subpoenas).

159. MERRIAM-WEBSTER’S DICTIONARY (2012) (defining “Schadenfreude” as “enjoyment obtained from the troubles of others”).

160. Cynthia McFadden et al., *Judge Judy Rules No-Nonsense Court*, ABC NIGHTLINE (May 18, 2010), <http://abcnews.go.com/Nightline/judge-judy-rules-nonsense-tv-court/story?id=10667950>.

161. Brendan Koerner, *Judge Judy: The Most-Watched Court Show for 452 Straight Weeks*, SLATE (May 27, 2005), http://www.slate.com/articles/arts/number_1/2005/05/judge_judy.html (explaining that viewers love Judge Judy “because she offers them a fantasy of how they’d like the justice system to operate”). Of course, Judy Sheindlin acted the same way when she was a real judge in the Manhattan Family Court. Getlin, *supra* note 110 (“Scheindlin runs her court with an impatience that borders on rage” and speaks “with a hint of fury.”). But when she was a real judge, that angry manner drew “scathing criticism,” not adoration. *Id.* (lawyers complained that she was “needlessly cruel and sarcastic, a loose cannon in the halls of justice”). Judge Judy is a good example of the difficulty of distinguishing real from “ginned up” anger. See *supra* note 128. However sincere her anger displays may have been when she was a real judge, it is hard to believe that every televised anger display is sincere. She surely is acutely aware that her popularity and continued employment depend on successfully acting angry.

162. Cf. J. GILES MILHAVEN, *GOOD ANGER* 72–74 (1989) (noting the humor value in seeing someone get his “comeuppance”). Indeed, some of the pleasure a reader might take in seeing the apparently incompetent Schwarz get his comeuppance dissipates upon learning that he suffered from a serious brain disease, which might have contributed to his infuriating behavior. *Fox Indus. v. Gurovich*, No. CV 03-5166(TCP)(WDW), 2006 WL 941791, at *2 (E.D.N.Y. Apr. 12, 2006).

When judges make their anger at counsel known, those counsel may cry foul, claiming bias or partiality sufficient to damage their clients' interests.¹⁶³ Challenged benchslaps involve not just sarcasm but also raised voices, red faces, yelling, insults, and threats. Courts, however, are reluctant to grant relief on this basis. Importantly, they are reluctant precisely because they believe such anger to be exceedingly commonplace. As one reviewing court explained:

[T]here is one form of professional predisposition all judges share that may be classified as a kind of bias: expressions of dissatisfaction with deficient lawyering, overbearing advocacy and deceptions that stretch judicial patience to its outer boundaries. These practices often arouse manifestations of frustration, annoyance and even anger on the part of judges. But, even if short-tempered, such reactions alone are not sufficient to disqualify a judge from a case because they are not necessarily wrongful or inappropriate; indeed, at times they may be called for or understandable.¹⁶⁴

Thus, where counsel repeatedly failed to meet deadlines and submitted markedly inferior work product, it was perhaps "infelicitous or unmellifluous" for the judge to refer to his pleadings as "junk" and "garbage"; but these and other expressions of anger were to be expected and did not give rise to a claim of bias.¹⁶⁵

Legal doctrine, then, assumes that judges' anger at lawyers is common and pervasive. As the Supreme Court declared in the leading case of *Liteky v. United States*:

Not establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.¹⁶⁶

The empirical basis for this pronouncement is amply confirmed through the case law. Other courts give judges wide latitude in expressing anger at attorneys for making "misrepresentations" and speaking in "half-truths" before the court,¹⁶⁷ as well as for asking

163. At least in the context of a recusal motion or due process challenge, judicial bias against a lawyer is legally meaningful only if it inures to the detriment of the client. *See, e.g., United States v. Kahre*, No. 2:05-CR-0121-RCJ-RJJ, 2007 WL 2110500, at *1–2 (D. Nev. July 13, 2007); *Avitia v. Metro. Club of Chi., Inc.*, No. 88 C 6965, 1990 WL 205278, at *1 (N.D. Ill. Dec. 13, 1990).

164. *Teachers4Action v. Bloomberg*, 552 F. Supp. 2d 414, 416 (S.D.N.Y. 2008) ("[O]rdinarily frustration or anger are spontaneous reactions, often provoked by some objectively discernible cause In this category would fall expressions of dissatisfaction, frustration or anger that stem from the judge's response to what he or she regards as poor or excessive performance of counsel or inappropriate behavior of parties.").

165. *Id.* at 417.

166. 510 U.S. 540, 555–56 (1994).

167. *Avitia*, 1990 WL 205278, at *3 (attorney with a history of rude behavior was trying to judge-shop by prompting intemperate displays that he could use to justify a recusal motion).

improper questions and making baseless arguments.¹⁶⁸ Reviewing courts sometimes express discomfort with particularly vehement expressions, such as a judge commanding a lawyer to sit down and shut up,¹⁶⁹ and are particularly chagrined when benchslapping happens in front of the jury.¹⁷⁰

The very ubiquity of such anger, however, makes it hard to condemn. As the Second Circuit has noted: “Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation.”¹⁷¹

A courtroom video posted on YouTube provides a vivid example. A Kentucky state-court judge can be seen blowing his top when a smug lawyer accuses him of condoning jury tampering and threatens an investigation. The judge’s voice raises, he curses and becomes visibly agitated, and at one point he smashes the bench with his fist and declares, “I’ll yell all I want, this is my court.”¹⁷²

Very few such judicial anger displays are found to warrant relief, in no small part because doing so would upend a large number of cases. But judges do sometimes indulge in displays of anger that are sufficiently extreme as to prompt corrective measures.¹⁷³ In one criminal case, a trial judge created a poisonously “acrimonious” environment through repeated clashes with the defense attorney, at one point implying that he would physically harm the attorney were

168. *Kahre*, 2007 WL 2110500, at *2.

169. *Taylor v. Abramajtyts*, 20 F. App’x 362, 364 (6th Cir. 2001) (lawyer was trying to provoke judge into outburst; court declined to find trial judge ran afoul of *Liteky* standard, though it was displeased with anger displays before jury).

170. *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 647 (S.D.N.Y. 2002). The trial judge in a Mafia case was outraged at the defense for delivering a lengthy opening statement that she believed was full of irrelevancies and “vented her anger” at these and other perceived missteps in front of the jury. She also got angry at the defendant, calling him a “prima donna,” and accused defense counsel of making objections “rudely,” threatening that “I will do things you don’t like when you treat me in a way that I don’t like.” Though the reviewing court declined to award habeas relief, it expressed its displeasure with those anger displays.

171. *In re Bokum Res. Corp.*, 26 B.R. 615, 622 (D.N.M. 1982) (rejecting bankruptcy attorney’s request that the judge be recused because he was so angry as to be red in the face); see also *United States v. Weiss*, 491 F.2d 460, 468 (2d Cir. 1974) (rejecting claim of favoritism by the trial judge); *Green v. Court of Common Pleas*, No. 08-1749, 2008 WL 2036828, at *4 (E.D. Pa. May 30, 2008) (rejecting habeas claim; judge had been very angry at defense counsel for disobeying order, but did not act irrationally).

172. *Prosecutor Makes Threats to a Judge?*, YOUTUBE (posted on Feb. 19, 2009), http://www.youtube.com/watch?v=Dk6y5n_1-Yo&feature=related.

173. *United States v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977) (trial “judge’s sarcasm, his frequent interruptions and his antagonistic comments in the jury’s presence,” all directed at counsel, deprived defendant of fair trial).

he able.¹⁷⁴ But even though it overturned the defendant's conviction, the appellate court expressed sympathy for the judge:

[T]rials in the district courts are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower, and . . . enormous pressures are placed upon district judges by an ever increasing criminal docket and a demand for speedier trials of criminal defendants. These pressures can cause even conscientious members of the bench . . . to give vent to their frustrations by displaying anger and partisanship, when ordinarily they are able to suppress these characteristics. But grave errors which result in serious prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions.¹⁷⁵

In sum, judges' anger at lawyers is an inevitable, even ordinary occurrence. The degree to which this is so is reflected in the doctrine that has evolved in response: only the most extreme manifestations of judges' anger at lawyers trigger oversight, even if quotidian manifestations prompt occasional chagrin. Nor does it appear that courts provide breathing room for judicial anger simply as a concession to human weakness. Sometimes, it seems, they regard such anger and its expression as being "called for."¹⁷⁶

B. Anger at Parties and Witnesses

Judges' anger also is directed at parties and witnesses.¹⁷⁷ Compared with lawyers, these participants in the courtroom drama have fewer opportunities to display incompetence. The more common

174. *United States v. Nazzaro*, 472 F.2d 302, 311 n.10, 312 (2d Cir. 1973). The entire colloquy was as follows:

Mr. Schwartz: [The Assistant U.S. Attorney] promised me those papers for fourteen months, that's why I moved [for dismissal on speedy-trial grounds], not because of your Honor. I think you have disliked me since that time.

The Court: If you want to get on an emotional basis, you may.

Mr. Schwartz: I don't. I want to take out the personal feelings between us. I don't want to have any personal feeling.

The Court: Counselor, the jury box is empty, and I will tolerate some things that come close to being contemptuous.

Mr. Schwartz: I am only talking to your Honor without the jury.

The Court: You have now interrupted me four times. You are about twenty-five or thirty-five years my junior and I have not got the strength to cope with you, but I do have the power—so just stop it.

175. *Id.* at 304.

176. *Teachers4Action v. Bloomberg*, 552 F. Supp. 2d 414, 416 (S.D.N.Y. 2008).

177. See, e.g., *Judge Apologizes for Yelling, Says He Wants to Keep "Gossip" Out of Trial*, SAN DIEGO SOURCE, Jan. 2, 1998, <http://www.sddt.com/News/article.cfm?SourceCode=19981028cf&r=324> (stating that a judge acknowledged that "he had become 'emotional' " when yelling at defense witnesses). In one anecdotal measure of how much more frequently judges become angry with lawyers as compared with litigants, Judge O'Brien barely mentions litigants in his account of what used to make him angry. O'Brien, *supra* note 141 (complaining only about "stress" caused by trials of pro se litigants).

triggers for anger directed at this group are defiance of judicial authority, insulting the judge, lying, and (particularly for criminal defendants) having committed the acts underlying the case.

Disobeying direct orders is a particularly efficient route to judicial anger.¹⁷⁸ In *U.S. v. Gantley*, for example, the trial judge had ruled a polygraph examination of the defendant inadmissible; when the defendant tried on cross-examination to bolster his credibility by referring to that polygraph, the judge had an immediate outburst. Though he dismissed the jury and “cooled down,” he ordered a mistrial.¹⁷⁹ Another trial judge became enraged at an expert witness. He knew that the witness, one Taylor, would in his testimony be quoting someone who had used the word “goddamned,” and he asked Taylor not to repeat that word. In his testimony, Taylor replaced “goddamned” with “GD,” which made the judge apoplectic: he excused the jury, chewed Taylor out, and then told the jury that Taylor had disobeyed him on purpose.¹⁸⁰

Criminal defendants, in particular, run into problems when a judge perceives defiance. One defendant, for example, talked out of turn.¹⁸¹ The judge sent the jury out and attempted to explain to the defendant why he was not permitted to speak. When the defendant protested, he and the judge engaged in the following colloquy:

Court: Listen to me now. . . . We are going to have order. . . . I have asked you kindly to please speak through your attorney. What . . . I may have to do is have you bound and gagged

Defendant: I asked kindly to speak to you.

Court: Listen to me.

Defendant: I sure did.

178. See Carol Marbin Miller, *Barahona Judge Goes After Gag-order Violators*, THE PALM BEACH POST, Oct. 21, 2011, <http://www.palmbeachpost.com/news/news/barahona-judge-goes-after-gag-order-violators/nLy5T/> (explaining that a judge was angry at child welfare workers for apparently leaking to media information about a case in which they were witnesses, despite a gag order).

179. *United States v. Gantley*, 172 F.3d 422, 431 (6th Cir. 1999) (upholding declaration of a mistrial because the “jury’s observation of Judge Forester’s understandable, if short-lived, anger . . . is likely to have caused some level of unfair jury bias”).

180. *Cappello v. Duncan Aircraft Sales of Fla., Inc.*, 79 F.3d 1465, 1475 (6th Cir. 1996) (finding the furious response inappropriate, as witness was trying to comply with judge’s order, but calling it harmless error). Defiance also may be found in *Fox Industries*, in which the civil defendant, Gore, appeared to be doing nearly as much to drive the judge and magistrate crazy as his lawyer. Gore repeatedly violated court orders not to compete with plaintiff’s business. Even after being found in contempt he insisted (implausibly) that the judge had not found his conduct to be willful, leading the court to comment drily on the lack of evidence that Gore had been “having an out-of-body experience.” *Fox Indus., Inc. v. Gurovich*, No. CV-03-5166, 2004 WL 2348365, at *2 (E.D.N.Y. Aug. 25, 2004).

181. *Shaw v. State*, 846 S.W.2d 482, 485 (Tx. Ct. App. 1993).

Court: . . . The jury is going to sit there and see you bound and gagged before them, and they are going to determine you are dangerous person [sic] right before they go out and determine whether to give you life. Do you really think that's an intelligent thing to do?

Defendant: Do you think what you are doing is an intelligent thing to do?

Court: I'm not going to discuss it any further with you. If you will conduct yourself as a gentleman, we will proceed. . . .

Defendant: I've been trying. I've been trying. . . .

Court: Let's get the tape.¹⁸²

The judge then had the defendant bound and gagged. One gets the distinct sense that the defendant's cheeky rejoinders, turning the judge's words back on him, were the last straw for the judge.¹⁸³

As that colloquy suggests, judges may get particularly angry when they perceive that a party or witness has insulted them. In yet another episode of the *Fox Industries* saga, the judge was none too pleased to hear tape recordings in which the civil defendant referred to his orders as "a joke" and described them with "an earthy term"¹⁸⁴ that the judge tactfully translated as "*merdique*."¹⁸⁵ Consider, too, the defendant in *Mayberry v. Pennsylvania*.¹⁸⁶ On trial for holding hostages in prison, he was found guilty of criminal contempt for calling the presiding judge a " 'dirty sonofabitch,' 'dirty tyrannical old dog,' 'stumbling dog,' and 'fool' "; accusing him of "running a Spanish Inquisition"; and telling him "to 'Go to hell' and 'Keep your mouth shut.' "¹⁸⁷ Though the judge at whom these abuses were directed tried to "maintain calm," the Court found it necessary to have the contempt proceedings overseen by a different judge "not bearing the sting of these slanderous remarks."¹⁸⁸

Similarly, in *Ungar v. Sarafite* the Court noted that some criticisms are "so personal and so probably productive of bias that the judge must disqualify himself."¹⁸⁹ Though the majority did not find

182. *Id.* at 485–86.

183. *Id.* at 486 ("Even from our appellate perch, we acknowledge that the patience of the trial judge is often pushed to the limit, however, judicial patience is part of the job . . ."); see also KRQE, *Judge Angry at Mouthy Criminal*, YOUTUBE (Sept. 7, 2011), http://www.youtube.com/watch?v=uWXFbVpF_pQ (judge scolding accused "mouthy" criminal for impolite courtroom behavior).

184. 323 F. Supp. 2d 386, 388 (2004).

185. *Fox Industries, Inc.*, 2004 WL 2348365, at *2. *Merdique* translates as "shitty." REVERSO, <http://dictionary.reverso.net/french-english/merdique> (last visited July 30, 2012).

186. *Mayberry v. Pennsylvania*, 91 U.S. 499, 505 (1971).

187. *Id.*

188. *Id.*

189. 376 U.S. 575, 583 (1964).

that to be such a case,¹⁹⁰ the dissenters opined that the defendant's outbursts created

a head-on collision between the judge and a witness The bias here is not financial but emotional Judges are human; and judges caught up in an altercation with a witness do not have the objectivity to give that person a fair trial. . . . An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny.¹⁹¹

Thus, the Court has recognized that judges would have to be superhuman to avoid being angered when insulted. Judge Marvin Frankel admitted as much in his widely read 1973 book on sentencing, in which he recounted the following story:

Judge X . . . had tentatively decided on a sentence of four years' imprisonment. At the sentencing hearing . . . [t]he defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the "kangaroo court" in which he'd been tried. . . . Judge X said, "I listened without interrupting [and] I simply gave the son of a bitch five years instead of the four."¹⁹²

Lying also is a potent trigger.¹⁹³ For example, in response to harsh words spoken at sentencing by a judge who found the defendant's testimony to have been "totally unbelievable and preposterous," the reviewing court wrote that even if the remark were improper, "it should be recognized that a judge is only human, being ordinarily imbued with a strong sense of duty and responsibility to the community. In his or her conscientiousness, the judge will sometimes speak out in frustration and even anger."¹⁹⁴

Much as it has in the anger-at-lawyers context, then, doctrine has evolved in recognition of the inevitability of judicial anger against parties and witnesses because of their behavior during the litigation.

Finally, judges get angry at persons for having committed the acts that gave rise to the litigation. As the *Litkey* Court noted, "[t]he judge who presides at a trial may, upon completion of the evidence, be

190. *Id.* at 584 (1964) ("We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions."); *id.* at 585–86 ("Neither in the courtroom nor in the privacy of chambers did the judge become embroiled in intemperate wrangling with petitioner . . . petitioner's final intemperate outburst provoked no emotional reflex in the judge.").

191. *Id.* at 601–02 (Douglas, J., dissenting).

192. MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 18 (1973).

193. Ron Arnold, *Angry Federal Judge Rips 'False Testimony' of Federal Scientists*, WASH. EXAMINER (Sept. 22, 2011), <http://washingtonexaminer.com/article/41022> (in a "searing opinion," judge "ripped two Interior Department scientists for giving 'false' and 'incredible' testimony").

194. *Carr v. Senkowski*, No. 01-CV-689, 2007 WL 3124624 (W.D.N.Y. Oct. 23, 2007); *see also infra* notes 271–72 and accompanying text (discussing *Campbell v. United States*, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va. Mar. 10, 2010)).

exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person.”¹⁹⁵ Both civil and criminal parties draw judicial ire on this basis. For example, local television coverage reposted on YouTube shows an Alabama Family Court judge yelling at a mother accused of neglect. After she mutters something in response to his statement that she might deserve jail time, he smacks his hand on the bench and barks, “You’re not taking care of your child *now*, ma’am!” Asked by the reporter to reflect on his outburst, the judge said, “I reacted humanly. I’ll try not to do that in the future.”¹⁹⁶

A judge may become “ill disposed towards” nonparties as well. Another YouTube reposting of local news coverage shows a judge, presiding over the sentencing of a man convicted of child sexual abuse, loudly berating the victims’ mother. She had left the children accessible to the boyfriend despite having been sexually assaulted by him herself. Visibly angry—with a red face, raised voice, and shaking finger—the judge tells the mother that her behavior is “despicable,” and that she is “disgusting,” “an atrocious mother,” and “not a victim.”¹⁹⁷

Though anyone’s behavior can draw the judge’s wrath, this is particularly an issue for criminal defendants. First, anger at the conduct underlying the defendant’s offense might increase the potency of some other provocation. For instance, one Minnesota judge reported the following incident:

I said, “Sir, you are going to prison, and that’s where animals like you belong.” And I usually don’t say that but, if you get called a MF [expletive abbreviated] ten times, and it was by someone who raped a step-daughter, and he’s in your face . . . And I felt bad later. I thought, “OK, you lost your cool.”¹⁹⁸

The combination of personal attack and a particularly egregious offense may explain why this judge was unable to maintain his composure. Similarly, another YouTube video shows a judge becoming irate while sentencing a man convicted of shooting at police officers because the man openly mocked him, smiled, and laughed during the proceeding.¹⁹⁹

195. 510 U.S. at 550–51.

196. *Judge Naman Yells at Mom*, WKRG (May 14, 2009), www.wkrg.com/a/53028/. The judge later expressed embarrassment. *Id.*

197. *We Need More Judges Like This*, YOUTUBE (July 23, 2007), <http://www.youtube.com/watch?v=jbfZGSy-ydY&feature=related> (sentencing in Fulton County, Georgia, reported on Local News 2).

198. Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 L. CULTURE & HUMAN. 75, 93 (2010).

199. Associated Press, *Judge, Defendant Spar During Sentencing*, YOUTUBE (Mar. 24, 2009), <http://www.youtube.com/watch?v=X7Z4LQO6B58> (judge threatened to gag defendant, threw a folder onto his desk, imposed the maximum sentence—to which the defendant replied “thank

But defendants' offense behavior alone may be sufficient, and the moment at which judges tend to give voice to that sort of anger is at sentencing.²⁰⁰ Judicial anger at sentencing is a special sort of anger because it is the most likely to be unapologetically acknowledged, its expression both deliberate and controlled. At sentencing, judges may perceive that it is part of their role to express anger—not just on their own behalf, but on behalf of the victims and the public.²⁰¹ Reflecting others' anger is part of the expected script at sentencing, particularly in high-profile and death penalty cases.²⁰²

It would be a mistake to assume that judges are merely acting as mouthpieces, however; they may well feel the anger themselves. Indeed, it is extremely common for the media, in reporting on judges' remarks to the defendant at sentencing, to refer to these judges as angry.²⁰³ Of course, these judges might be skilled at mimicking anger

you, I'll take another"—and waved mockingly at the defendant while saying “bye bye”); *see also Vancouver Judge Yells at Convict, Then Apologizes*, SEATTLE TIMES, Mar. 3, 2009, http://seattletimes.nwsources.com/html/localnews/2008807477_apwavancouverwatsentencing1stldwritethru.html (judge spars with defendant and mockingly calls out “bye bye”).

200. Anthony McCartney, *Angry Sentencing for Murray*, ASSOCIATED PRESS, Nov. 30, 2011 (judge delivered a “tongue lashing” to doctor convicted of involuntary manslaughter in death of Michael Jackson).

201. In the words of a judge of the Iowa Court of Appeals:

I see absolutely nothing wrong, and as a matter of fact I think it should be encouraged, in a judge speaking freely, openly and expansively to the defendant, lecture, cajole, empathize, sympathize, show compassion, warmth, and comprehension, show anger, umbrage, ire and indignity. These are human emotions that are meaningful to the person before the court, emotions they understand and easily comprehend. To go by rote in an emotionless ritual loses its human values and is less effective . . . [Sentencing is] a ‘show-down’ where society, as represented by the judge, confronts a defendant for his antisocial conduct . . . The time of sentencing is a desirable place for the judge to let his feeling be known . . .

State v. Bragg, 388 N.W.2d 187, 194 (Donielson, J., specially concurring) (Iowa App. 1986). The view that judicial anger at sentencing communicates a deserved moral message is unabashedly retributivist. *See* Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 331–36 (1993) (a sentencing judge's role includes the task of “correcting” a defendant's “false statement” of his worth relative to that of the victim); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 671 (1989) (“retribution cannot be neatly divested of anger,” and it is “hard to imagine a sentencer finding that an offender deserves a severe punishment” without calling on anger). However, anger expression also can serve utilitarian aims. *See Bragg*, 388 N.W.2d at 190, 192 (harsh words meant to encourage the defendant to “alter his conduct” and become a “productive, useful citizen”).

202. Pillsbury, *supra* note 201; *see also* Benjamin Weiser, *Madoff Judge Recalls Rationale For Imposing 150-Year Sentence*, N.Y. TIMES, June 29, 2011, at A1 (Judge Chin “seemed to find a way to translate society's rage into a number”).

203. *See, e.g.*, Martha Neil, *Judge Detains 2 Teens, Puts Ankle Monitor on Boy, 11, for Flash Mob Attack on Law Student and Others*, A.B.A. J., Aug. 19, 2011, http://www.abajournal.com/news/article/judge_jails_2_teens_puts_ankle_monitor_on_boy_11_re_flash_mob_attack_on_1aw/ (describing sentencing by “angry juvenile court judge”).

in order to achieve a desired effect.²⁰⁴ That phenomenon might be routine at sentencing, as the judge is explicitly positioned as the voice of the community. Speaking candidly about sentencing, though, Judge Denny Chin has acknowledged that “there is a lot of emotion involved.”²⁰⁵ Anger appeared to play an important role in his decision to impose a heavy sentence against a defendant convicted of passport fraud and trying to fake his own death in the 9/11 attacks, actions Chin called “despicable and selfish.”²⁰⁶ Anger may have played a similar role in his decision to sentence disgraced financier Bernard Madoff to 150 years in prison.²⁰⁷ Similarly reflecting on the high emotionality of sentencing, not just as a mouthpiece but also as a person, Judge Bennett wrote that some of the sentencing allocutions he has heard from defendants “have pulled at my heartstrings and even brought me to tears, while others have given me heartburn and elevated my already too high blood pressure.”²⁰⁸ He placed into the latter category “infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants.”²⁰⁹

When judges get angry at parties and witnesses, then, it often is because those persons act disrespectfully, lie, buck the court’s power, insult the judge or the legal system, or have committed acts (sometimes in court, sometimes just proven there) that lead the judge to conclude they are “thoroughly reprehensible.”²¹⁰

204. See *supra* note 128 and accompanying text.

205. Benjamin Weiser, *A Judge’s Education, a Sentence at a Time*, N.Y. TIMES, Oct. 7, 2011, at MB1 (quoting Judge Chin as saying that “[e]motion comes into play in every sentencing decision”).

206. *Id.*

207. Weiser, *supra* note 202 (“Two years later, [Chin’s] recollections resurrect all the anger, shock and confusion that surrounded Mr. Madoff’s crimes”); cf. Richard F. Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 27 (1961) (sentencing introduces a “human element” because different judges respond differently “in the presence of emotionally charged situations personally pleasing or especially repugnant to them”).

208. Bennett, *supra* note 48, at 26.

209. *Id.* Another apparently infuriating allocution was as follows:

I addressed the defendant: ‘I note in paragraph 45 of the PSR report that you knocked your then live-in girlfriend off the front porch and broke her jaw in seven places and her leg in three places. Why would you do that to her?’ He responded: ‘She deserved it.’ I countered: ‘Excuse me, I don’t think I heard your answer.’ His follow up: ‘I said she deserved it.’ I don’t know what you could have said that would have helped you, but this really, really hurt you! He received an extra 10 months per word.

Id.

210. *Liteky v. United States*, 510 U.S. 540, 550–51 (1994).

C. Anger at Other Judges

Finally, judges get angry at one another. This permutation of judicial anger is the least visible, and it tends to draw the most attention when it surfaces. In news coverage of *Bush v. Gore*, for example, a commentator noted that the evident procedural wrangling within the Supreme Court over whether a Florida recount should go forward laid bare the “tension and anger that the court had managed to contain under a veneer of civility.”²¹¹

On multijudge courts, dissents provide one window into such anger. Dissent, of course, follows disagreement. While disagreement is unpleasant, it need not be angering. “Principled disagreement”²¹² is highly valued in our system of law, and judges often go to great pains to express respect for one another even as they clash over legal and factual interpretation. But dissents sometimes reveal disagreements with a more personal tone, and these tend to come dipped in particularly biting rhetoric.

Perhaps no one has perfected the art of the angry dissent better than Justice Antonin Scalia.²¹³ Linda Greenhouse has described Scalia as “enraged” and “dyspeptic,” particularly when writing in

211. Linda Greenhouse, *Bush v. Gore: Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A18. Judges are not the only court personnel at whom judges get angry. Don Von Natta, *Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995, at B3 (detailing “high-volume clash laced with personal attacks and, at times, profanity” between New York City judges and uniformed court officers).

One might assume that interjudicial anger would be more common on multijudge courts, as those judges are more frequently in contact with one another, and thus have more opportunities to be angered. This may be true, but as this Section reveals, judges who primarily operate solo—such as district judges within the Fifth Circuit—also get angry with one another. The impact of the court on which a judge sits, including not just the question of multi-member versus solo jurisdiction but also subject matter restrictions (e.g., family versus criminal), hierarchal position (e.g., trial versus appellate), and so on, are worthy of further exploration. One reader has suggested, for example, that trial-court judges are more likely to get angry at misbehaving people, while appellate judges are more likely to get angered by ideas—for example, a colleague’s opposing position on a contested idea. Future installments of this judicial-emotion project will look squarely at these structural distinctions.

212. In *Grutter v. Bollinger*, Judge Moore said in his concurring opinion:

Dissenting opinions typically present principled disagreements with the majority’s holding[, which are] perfectly legitimate and do not undermine public confidence in our ability as judges to do what we have sworn to do [and which] can be phrased in strong terms without damaging the court’s ability to function as a decision-making institution in a democratic society. Judges criticize their colleagues’ reasoning all the time, and, if they are to carry out their oaths of office, they must do so. This robust exchange of ideas sharpens the focus and improves our analysis of the legal issues.

Grutter v. Bollinger, 288 F.3d 732, 752 (6th Cir. 2002) (Moore, J., concurring)

213. LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 20–21 (1999) (Scalia frequently demonstrates both anger and contempt).

dissent;²¹⁴ another commentator describes Scalia's writing as "equal parts anger, confidence, and pageantry," such that his opinions—particularly dissents—"read like they're about to catch fire from pure outrage."²¹⁵ Of course, Scalia is far from the only Justice to use that forum to rail against his fellows' perceived misdeeds.²¹⁶ Nor need anger always be deduced from words on the page. As Adam Liptak has noted, choosing to read a dissent from the bench—as Justice Stevens did in *Citizens United*—allows a Justice to "supplement[] the dry reason on the page with vivid tones of sarcasm, regret, anger and disdain."²¹⁷

A look beyond the Supreme Court reveals other instances of judges publicly expressing their anger at one another. The Sixth Circuit's handling of challenges to the University of Michigan's race-conscious admissions policies provides an example.²¹⁸ A divided *en banc* court disagreed sharply over the policies' constitutionality.²¹⁹ Nothing remarkable there. What was remarkable was Judge Boggs's decision in dissent to accuse colleagues of deliberately manipulating the composition of the panel in order to determine the result.²²⁰ Charged language on both sides left little doubt as to the high emotional pitch.²²¹ Judge Moore, one of the accused judges, wrote that Boggs had caused "grave harm" to them, the court, and "the Nation as a whole," declaring that his "shameful" opinion would "irreparably damage the already strained working relationships among the judges

214. Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES OPINIONATOR (Mar. 9, 2011, 8:40 pm), <http://opinionator.blogs.nytimes.com/2011/03/09/justice-scalia-objects/>.

215. Conor Clark, *How Scalia Lost His Mojo*, SLATE (July 5, 2006, 3:59 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/how_scalia_lost_his_mojo.html (Scalia's dissent in *Planned Parenthood v. Casey* "achieved a level of frustrated fury usually reserved for undersea volcanoes and small dogs tied to parking meters").

216. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 538–47 (1989) (Blackmun, J., dissenting) (railing against majority's opinion as a "[b]ald assertion masquerad[ing] as reasoning," and claiming majority was "deceptive" and "disingenuous").

217. Adam Liptak, *In a Polarized Court, Getting the Last Word*, N.Y. TIMES, Mar. 8, 2010, at A12 (Justice Stevens's angry dissent in *Citizens United v. Federal Election Comm'n*, 130 S. Ct. 876, 929 (2010) (Stevens, J., dissenting), gained significant power through his decision to read it aloud, despite obvious physical and mental strain); Dahlia Lithwick, *The Pinocchio Project*, SLATE (Jan. 21, 2011, 2:15 PM), http://www.slate.com/articles/news_and_politics/supreme-court_dispatches/2010/01/the_pinocchio_project.html.

218. See *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The cases ultimately were resolved by the United States Supreme Court. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

219. *Grutter*, 288 F.3d 732 (splitting 5-4 in favor of constitutionality of race-conscious admissions policy).

220. *Id.* at 810 (Boggs, J., dissenting).

221. For example, Judge Clay decried Boggs's decision "to stoop to such desperate and unfounded allegations." *Id.* at 772.

of this court.”²²² Nor did the rancor dissipate. When a report (prepared by one of the dissenters) later concluded that the Chief Judge had committed misconduct, he disputed its methods and conclusions to *The New York Times*—a rare public move, the reporter wrote, evidencing “continued strained relations.”²²³

The Fifth Circuit, too, has exposed its fair share of collegial relations strained by anger. A long-running feud involving District Judge John McBryde—reputed to have a “particularly nasty temper, even for a judge”²²⁴—blossomed in the mid-1990s into one of “the biggest, rawest brawls in the history of the Federal judiciary.”²²⁵ At the feud’s pinnacle, a Special Investigative Committee of the Fifth Circuit Judicial Council investigated charges that McBryde had abused lawyers, witnesses, and a court clerk.²²⁶ The lengthy, rancorous, and public proceedings²²⁷ revealed serious interjudge conflict. McBryde once became “angry and lashed out at a fellow judge who joked about” his impatience; he called two fellow judges “despicable”; and he ordered a visiting state-court judge removed from his courtroom without even asking why he was there.²²⁸ It came to light that the Chief Judge of his District, Jerry Buchmeyer, had written a nasty satirical song about McBryde and his wife had sung it at a bar revue performance.²²⁹ The acrimony between the two men was pronounced enough to warrant mention in Buchmeyer’s obituary.²³⁰

222. *Id.* at 752–58 (Moore, J., concurring) (arguing that Boggs’s dissent “marks a new low point in the history of the Sixth Circuit”). The personal element of the discord was underscored by Moore’s assertion that Boggs had “refused to accept” personal assurances that “we did not engage in the manipulation of which he has accused us.” *Id.* at 753 n.2.

223. Adam Liptak, *Court Report Faults Chief Judge in University Admissions Case*, N.Y. TIMES, June 7, 2003, at A16.

224. Christine Biederman, *Temper, Temper*, DALL. OBSERVER, Oct. 2, 1997, <http://www.dallasobserver.com/1997-10-02/news/temper-temper/>.

225. *One Federal Judge Does Battle with 19 Others*, N.Y. TIMES, May 1, 1996, at B6.

226. The Committee held a nine-day hearing with fifty-five witnesses, tried (unsuccessfully) to persuade McBryde to accept psychiatric treatment, found a pattern of abuse, and recommended sanctions, which eventually were upheld by the D.C. Circuit. Judge McBryde’s disciplinary history, of which this is just one example, is long. See *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of Judicial Conference of United States*, 264 F.3d 52 (D.C. Cir. 2001) (citing to, *inter alia*, *In re Matters Involving Judge John H. McBryde*, Under the Judicial Conduct & Disability Act of 1980, No. 95-05-372-0023 (Jud. Council 5th Cir. 1997); Report of the Special Comm. of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde (Dec. 4, 1997)).

227. *McBryde*, 264 F.3d at 54–55.

228. *Id.* at 71–72 (“Because of the chilling effect of Judge McBryde’s rules and his manner of enforcement . . . attorneys, fearing humiliation or embarrassment, forego actions they believe are in their clients’ best interests and fail to preserve issues for appeal.”).

229. Nathan Koppel, *Law Blog Obituary: U.S. District Judge Jerry Buchmeyer*, WALL ST. J. L. BLOG (Sept. 23, 2009, 3:34 PM), <http://blogs.wsj.com/law/2009/09/23/law-blog-obituary-us->

Given cultural fascination with “dirty laundry,” public attention to judicial infighting tends to be colored with more than a shade of titillation. This is even more so when judges lash out at each other in ways that are more outré. When Chief Judge Jones publicly told her Fifth Circuit colleague to “shut up” because she perceived him to be hogging oral argument time, it was perceived as truly shocking.²³¹ Even more shocking are allegations of physical violence, such as those swirling around the Wisconsin Supreme Court. That court in 2011 was asked to rule on a controversial bill curtailing the collective bargaining rights of public employees. Chief Justice Shirley Abrahamson prepared a “stinging” dissent accusing Justice David Prosser of partisanship.²³² The night before the opinion’s release, a number of the justices gathered in the chambers of Justice Ann Walsh Bradley. “The conversation grew heated,” and Bradley asked Prosser to leave after he made “disparaging” remarks about Abrahamson. While accounts here diverge, Bradley claims that Prosser then choked

district-judge-jerry-buchmeyer/. The song, set to the meter and tune of “King Herod’s Song” from *Jesus Christ Superstar*, contained these lyrics:

Lawyers I am overjoyed
 That you’re all here today.
 Now listen very carefully
 To what I have to say.
 Stupid lawsuits, motions wasting time,
 That’s gonna stop, ‘cause I’m your God,
 And I’ll treat you just like slime.
 Yes! I’m the Judge,
 I’m the Great John McBryde,
 Miss a deadline like a fool,
 I’ll send you to reading school[!]

Biederman, *supra* note 224. The reference to “reading school” reflects an instance in which McBryde “bludgeoned” a “hapless” attorney into attending “reading comprehension classes” and filing “demeaning affidavits” of attendance. These steps were punishment for having (for good reason) failed to follow the letter of a standing order related to depositions. *McBryde*, 264 F.3d at 68.

230. Koppel, *supra* note 229 (“[F]or our money, the most entertaining thing Buchmeyer ever wrote was directed at a fellow jurist, U.S. District Judge John McBryde.”). Many years later, McBryde remains on the bench, and complaints still roll in at a regular clip. See, e.g., Jonathan Turley, *Texas Judge Clears Attorneys After Judge McBryde Refers Them for Possible Criminal Prosecution After They Sought His Removal from Case*, A.B.A. J. (Jan. 13, 2001, 6:30 am), http://www.abajournal.com/news/article/federal_judge_recommends_criminal_charges_for_lawyers_who_questioned_his_im/.

231. For a representative example, see David Lat, *Judicial Diva Gone Wild? Chief Judge Jones Tells Judge Dennis to Shut Up*, ABOVE THE LAW (Sept. 21, 2011, 7:43 pm), <http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennis-to-shut-up/>.

232. Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices’ Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011, <http://www.jsonline.com/news/statepolitics/124546064.html>.

her.²³³ The choking allegation (currently under investigation) has a history: Bradley has complained of Prosser's periodic "flashes of extreme anger," and Prosser, for his part, admits to having once called Abrahamson a "total bitch" and vowing to "destroy her."²³⁴

In sum, judges get angry, sometimes very angry. Anger at lawyers is the most commonplace and the least frequently condemned manifestation. Anger at others in the *dramatis personae* of any given case, though less ubiquitous, is nonetheless common. It also is increasingly visible, given the proliferation of cameras in courtrooms and the ease of online video circulation. Judges' fury at one another occasionally surfaces, too, despite both incentives to keep it under wraps and layers of secrecy that facilitate such discretion.

The following Part proceeds from this knowledge base as to how judicial anger is and takes on the question of how it ought to be.

III. THE RIGHTEOUSLY ANGRY JUDGE

Exposing judicial anger, the project of the preceding Part, is interesting not only for what it reveals about its objects but also for what it reveals about its audience. How such anger is evaluated—whether by a reviewing court, a journalist, a member of the public, or the anger's target—revolves around two essential axes: *justification* and *manifestation*.

Justification captures the "why" of the anger, while manifestation refers to the way in which it is experienced by the judge and expressed to others. Some instances of judicial anger seem both wholly justified and experienced and expressed in an appropriate way. For example, lawyers and parties sometimes are seen as bringing the judge's wrath upon themselves, and it may seem entirely proper for the judge to feel angry and to let that anger show.²³⁵ Some wrath might seem justified, as might expression of it, but we might nonetheless worry about its impact on the judge herself: if the anger responds to a personal insult, for example, perhaps she will act rashly out of a desire for score settling.²³⁶ Sometimes only the manner of expression seems inappropriate, such as when understandable ire is

233. *Id.*

234. *Id.*; see also *Supreme Court Debate Focuses on Rancor Among Current Justices*, MILWAUKEE-WISCONSIN J. SENTINEL, Mar. 21, 2011, <http://www.jsonline.com/news/statepolitics/118410829.html> (providing background on the incident).

235. See, e.g., *Campbell v. United States*, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va. Mar. 10, 2010); *United States v. Kahre*, No. 2:05-CR-0121-RCJ-RJJ, 2007 WL 2110500 (D. Nev. 2007).

236. See, e.g., *Mayberry v. Pennsylvania*, 91 U.S. 499, 505 (1971).

vented before the jury.²³⁷ In other instances, the anger itself seems unjustified—for example, being angry at counsel for imagined wrongs—and thus *any* experience or expression of it is deemed inappropriate.²³⁸ In capturing how we actually think about judicial anger, then, these elements emerge as the critical ones.

As this Part asserts, those are the correct elements, and it is possible to conceptualize them in a coherent way—though to date we have not done so. Relying on the elements of justification and manifestation helps us to more tightly draw the distinction between acceptable and unacceptable judicial anger. Recalling Aristotle's counsel, they allow us to give substance to the idea—otherwise just a platitude—that judges ought to be angry “at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way.”²³⁹

This Part takes on justification first. It draws on concrete examples to elaborate the distinction between good and bad reasons for judicial anger, and argues that a good reason is one that is accurate, relevant, and reflects good values. It then takes on manifestation. It explores the various behavioral impacts of judicial anger, such as increased reliance on heuristics—an experiential effect—and a tendency to show on the face—an expressive effect. These effects create both opportunities and dangers for judges. This Part again draws on concrete examples to demonstrate how we might distinguish the former from the latter in theory, and argues that strong emotion-regulation skills help judges enact that distinction in practice. Adequate justification and appropriate manifestation together comprise righteous judicial anger.

A. Being Angry “with the Right Motive”

Justification captures Aristotle's concern that anger be underlain by a correct “motive,” in the sense that it is directed at the right persons and for good reasons. Righteous judicial anger rests on accurate premises; is relevant; and reflects worthy beliefs and values.

237. See, e.g., *Taylor v. Abramajtys*, 20 F. App'x 362 (6th Cir. 2001); *Francolino v. Kuhlman*, 224 F. Supp. 2d 615 (S.D.N.Y. 2002).

238. See, e.g., *In re McBryde*, 117 F.3d 208, 213 (5th Cir. 1997); *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973).

239. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, *NICOMACHEAN ETHICS* 1106B20, in *THE BASIC WORKS OF ARISTOTLE*, *supra* note 10, at 958).

1. Righteous Judicial Anger Reflects Factually Accurate Premises

The most straightforward of these inquiries is the first, going to accuracy. If a judge is angry at a lawyer for having lied to him, for example, it is relevant whether the lawyer really lied. To be more precise, it matters whether the statement actually was untrue, whether the lawyer believed it to be untrue, and whether the lawyer intended to mislead. The judge's assessment of the truth status of any of these questions might be literally wrong.²⁴⁰

This was precisely the issue underlying one of the many allegations of misconduct against Judge McBryde. McBryde angrily accused an Assistant United States Attorney of being "engaged in falsehood and deception" when she asserted that certain information, which he wanted her to produce, had been ordered sealed by another judge.²⁴¹ The Fifth Circuit found the accusation to have been baseless.²⁴² It eventually imposed a three-year ban barring McBryde from hearing cases involving certain lawyers, apparently out of concern that he was unable accurately to judge reality where they were concerned.²⁴³ At least as to those persons, the Circuit seemed to worry, the judge was liable to become angry for no reason.

McBryde is not unique in this regard; other judges get angry for reasons that prove ephemeral.²⁴⁴ A Florida judge, for example, became enraged with a group of traffic-offense defendants whom he thought had disobeyed their orders to appear. It turned out that a court officer had led them to the wrong courtroom, where they were waiting as instructed.²⁴⁵ In another incident, captured on video and posted on the Internet, a judge appears to have become angry at a

240. Cf. Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 869–77 (2009) (evaluating truth status of judges' assertions about emotion).

241. *In re McBryde*, 117 F.3d at 213.

242. *Id.* at 217 ("Judge McBryde's attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both."). According to Janet Napolitano, then the United States Attorney for the District of Arizona, McBryde's rash accusation hindered a grand jury investigation, and meant that several persons would likely avoid prosecution entirely. *Id.* at 216.

243. *Id.*

244. See *Cappello v. Duncan Aircraft Sales, Inc.*, 79 F.3d 1465 (6th Cir. 1996) (recounting an incident where a trial judge "excoriated" a witness who said "GD" after the judge instructed him not to say "goddamned").

245. *In re Sloop*, 946 So. 2d 1046 (Fla. 2007). More disturbing than the original error was the fact that the judge seemed unconcerned when that error was pointed out to him. He neglected to take timely steps to release the accused traffic offenders, who because of his orders had been jailed and strip-searched.

litigant who sat down slowly when court was called into session.²⁴⁶ The judge likely thought the man was refusing to sit, but it appears that he was confused about whether he was supposed to sit or stand, as the judge had just called out his name.

Judges can, of course, make mistakes. The fact of a mistake does not impugn her qualifications or character, particularly if it is an honest one, but it does rob her anger of justification. This is particularly so if the mistake could have been noticed and corrected. We do not expect judges to be factually correct as if by magic. We expect them, rather, to exercise due diligence as to facts, and to be prepared to subject angering facts to an appropriate, even heightened, level of scrutiny.²⁴⁷

The more difficult cases are those requiring that we judge the anger's underlying premises not for their accuracy but for their propriety. In these instances, we ask not whether the judge is angry for no reason, but whether she is angry for no *good* reason.

2. Righteous Judicial Anger is Relevant

If a judge becomes angry for reasons having nothing to do with the matter at hand, that anger is irrelevant.²⁴⁸ It may stem from a reason, even a good reason, but because it does not pertain to legally or morally salient features, it is not a good reason for the purposes of judicial action in that instance.

Liteky offers a constructive parallel, as it reflects a concern with irrelevance.²⁴⁹ The primary issue in that case was whether disqualifying bias could be found only if a judge's ill opinion of a party, witness, or attorney stemmed from an "extrajudicial source"—that is,

246. RidleyReport.com, *Judge Loses It on Cam, Jails Man for Sitting Too Slow*, WORLD NEWS (Nov. 14, 2008), http://wn.com/Judge_loses_it_on_cam,_jails_man_for_sitting_too_slow.

247. See *infra* Part III.B.2 (demonstrating how anger itself can curtail such diligent scrutiny).

248. Unlike other iterations of judicial anger, it is difficult to see reflections of truly irrelevant anger in the case law or media reports. Judges are highly unlikely to recognize, let alone admit to, such anger as a basis for action, and it would be difficult for an outside observer to deduce hidden sources of anger. This therefore is one instance in which the window on judicial anger is unduly limited. See *supra* note 132. We can get intermittent hints, including from the secondary literature. See, e.g., *Former Judge Newton Reprimanded by Court*, FLA. B. NEWS, June 15, 2000, at 13 (reporting a judge made "threatening and abusive" comments to a lawyer who had filed a recusal motion, saying "judges can make or break attorneys" and "clients come and go, but you have to work with the same judges year in and year out. You better learn who your friends are."); Bennett, *supra* note 48, at 26 ("Another poor [sentencing] allocution came from a defendant who, after a lengthy trial, told me what a terrible and unfair judge I was. Hmmm . . . Who do you think the trial judge on your § 2255 petition is going to be?").

249. *Liteky v. United States*, 510 U.S. 540, 550 (1994).

one rooted in events outside the four corners of the case.²⁵⁰ Though it declined such a holding, the Court did opine that bias is more likely where the ill will stems from such a source. Its prime example was not anger but hatred—specifically, hatred of Germans.²⁵¹ If a judge, entrusted with a case involving a German defendant, begins with a fixed hatred of Germans—based, for example, on his military service—that hatred is likely to undergird a disqualifying bias. Though the Court was not explicit as to precisely why, the apparent concern was that the emotion reflects a category judgment that prevents the judge from responding adequately to the defendant's individuality.

A similar argument might be made about anger. Anger from an irrelevant source might color the judge's perceptions and opinions in diverse and subtle ways.²⁵² Indeed, the analysis of the following Section shows that this often is true.²⁵³ A person who is angry for one reason may attribute ambiguous signals (like slowness to sit) to deliberate wrongdoing. Such anger seems obviously unfair if its trigger has literally no relevance: perhaps the judge was ticked off at the obnoxious lawyer who argued the previous case, and took it out on the next person to appear. It may also seem unfair even if rooted in the case but misapplied within it. A judge might find cause for anger with a litigant when she is really mad at his lawyer. Even if the lawyer is the target both times, the judge might find fault with some current, relatively blameless act because she is seething over an earlier misstep. In still other instances, the judge might have access to information that she ought not to have, as when a party improperly raises extraneous and prejudicial information, or that she ought to put aside for the moment, as when she learns facts during a suppression hearing that are not at issue at trial. Anger also may be irrelevant because it relates only to an issue delegated to another decisionmaker, such as the jury.

In none of these instances is a judge's anger justified, even if it is entirely understandable.

3. Righteous Judicial Anger Reflects Good Beliefs and Values

Perhaps most importantly, anger that is anchored to an accurately perceived, relevant event may nonetheless be unjust if the

250. *Id.*

251. *Id.*

252. *Id.*

253. *Infra* Part III.B.2.

evaluation of that event's significance reveals undesirable beliefs and values.²⁵⁴

Liteky again provides a starting point for that deeper level of inquiry. In defining the distinction between an "unfavorable opinion" of a party, which may be allowable, and bias against that party, which is not, the Court wrote: "One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful or inappropriate . . .*"²⁵⁵

As the *Liteky* Court wrote, the unfavorable opinion would be wrong only if it is "undeserved."²⁵⁶ In that instance, the Court was implying that hatred of Hitler is deserved, as it represents an appropriate response to evil.

Drawing again the parallel to anger, judicial anger would be deserved if it responds to evil,²⁵⁷ but undeserved if the triggering action is not properly characterized as wrongful, and its result not properly considered an unwarranted harm (or any sort of harm at all). These determinations often are quite different in the judging context than in other areas of life because actions that constitute wrongful infliction of harm in other contexts might lack that status in law. Pleading not guilty to a crime one actually did commit, for example, might constitute a "lie" in a colloquial sense, but it is not properly treated as a lie by a judge. Judicial anger at a defendant for having pleaded not guilty would never be appropriate because the judge who treats as a lie the decision to put the state to its proof has chosen to devalue something that law commands her to value. Deeming reasons as "bad" or "good" for purposes of judicial anger, then, requires that we

254. SOLOMON, *supra* note 64, at 271 ("Our emotions betray our philosophies, whether they are petty, pathetic and narrowly self-serving or expansive, compassionate, principled, and bold."); MARONEY, *supra* note 240, at 873-75 (judges' emotions reflect their underlying beliefs and values, which may be normatively assessed).

255. *Liteky*, 510 U.S. at 550 (emphases in original). The Court went on to quote Jerome Frank thus: "Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions." *Id.* at 551 (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2d Cir. 1943)). Frank, the famous early-twentieth-century legal realist, was one of the first to argue that judges' emotions do, and perhaps should, play a role in their decisionmaking. Maroney, *supra* note 12, at 654-56.

256. *Liteky*, 510 U.S. at 550.

257. GILLETTE, *supra* note 68, at 99 (Augustine held that anger, "when it is a reaction against evil," is "not to be lightly dismissed").

keep firmly in mind both the legal context and the judge's role within it.²⁵⁸

Contrast, for example, *Shaw*, the earlier-described case in which a judge had the defendant's mouth taped shut,²⁵⁹ with *Lewis v. Robinson*.²⁶⁰ In *Lewis* the defendant, after having his motion to represent himself denied multiple times, shouted profanities at his attorney and hit him, causing the attorney to bleed.²⁶¹ The judge ordered the defendant shackled and his mouth taped shut. In both cases the judge appeared to be angry at the defendant when he issued the order to apply the tape.²⁶² However, in *Shaw* the judge was angry because the defendant had talked back to him, while in *Lewis* the defendant had become violent. What distinguishes the cases is the judge's entitlement to be angry, based on normative conceptions of what represents an unacceptable affront to the judge and others within his zone of care. Violence clearly is such an affront; being "mouthy" generally is not, however irritating and unwise it may be.²⁶³

Similar issues arise when a party successfully appeals a ruling and appears before the same judge on remand. In one such case, in which a race-discrimination plaintiff won reversal of a directed verdict, the trial judge complained that the Sixth Circuit had put "egg on my face."²⁶⁴ Though he immediately went on to insist that he was

258. O'Brien, *supra* note 141, at 252 (a judge is supposed to "have thick skin and remain calm, neutral, friendly, and courteous," even though "in a non-judicial setting I might be commenting on the horse counsel rode in on").

259. *Shaw v. State*, 846 S.W.2d 482, 485–86 (Tx. Ct. App. 1993).

260. 67 F. App'x 914 (6th Cir. 2003).

261. *Id.* at 917.

262. *Id.* at 923 ("[S]tatements by the trial judge . . . clearly expressed impatience, dissatisfaction, annoyance, and also anger . . ."); *Shaw*, 846 S.W.2d at 487.

263. *Shaw*, 846 S.W.2d at 485–86 (court distinguished judge's reaction to back-talking from cases in which the defendant is reasonably believed to be a danger if unrestrained). Being "mouthy" generally will not provide an adequate reason because litigants have the right to assert their points of view, even if they do so poorly and to their ultimate detriment. While a judge has a responsibility to police and channel such expressions as a matter of courtroom management, she does not have the power to shut them down completely. See N.Y. DAILY NEWS, Sept. 10, 1998, at 18 (reporting that a judge yelled "Are you physically unable to keep your mouth closed?" at a defendant who whispered loudly during the prosecution's opening statement); *Clark County Judge Shouts Down Defendant*, KHQQ6 (Mar. 5, 2009), <http://www.khq.com/story/9953585/clark-county-judge-shouts-down-defendant> (judge apologized, saying incident was "the worst I've ever had happen in a courtroom with someone being mouthy"); Michelle Caruso & Helen Kennedy, *Shaddup, Irate Judge Tells McDougal*, N.Y. DAILY NEWS (Sept. 10, 1998), http://articles.nydailynews.com/1998-09-10/news/18081885_1_nancy-mehta-susan-mcdougal-partner-of-president-clinton; Spoto, *supra* note 113 (judge told party, "Don't you dare talk back to me"). These cases also implicate not just the reasons for the judges' anger but their actions in response. A good deal of the difficulty in *Shaw* is that the judge's reactions seem overblown, even though his anger had some basis. See *infra* Part III.B (addressing appropriate anger manifestation).

264. *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988).

“not mad about it,” when the case again went up on appeal the Circuit seemed clearly to disbelieve that disclaimer.²⁶⁵ As the Fifth Circuit succinctly declared in a different case, “a litigant’s taking an appeal of right should not be a source of ‘insult’ or ‘anger’ for a district judge.”²⁶⁶

As these and other cases²⁶⁷ reveal, one recurring bad reason for judicial anger is that the object of anger has done something she is entitled to do. Unjust anger may also be triggered when the anger object does something she is *required* to do.

In *Harrison v. Anderson*, for example, a murder victim had, before her death, mentioned a local judge’s name in connection with a drug operation closely related to the attack that caused her eventual demise.²⁶⁸ When that judge was assigned to the homicide trial, the attorney for the accused sought recusal. The judge became enraged at the suggestion that he was involved in drug dealing. If, however, the attorney had potentially credible information that the judge’s personal interests were implicated, he was required as a matter of professional responsibility to seek the recusal. Indeed, the case makes clear why, because the judge went on to make a series of rulings against the defense that seemed designed primarily to keep his name out of the story.²⁶⁹ While any judge would be upset at the suggestion of serious criminal wrongdoing, no judge is entitled to be angry at an attorney for doing her job.²⁷⁰ Even were the allegations in the recusal motion to cause reputational harm, that would not be an unwarranted harm; the professional obligation provides the warrant.

Judicial anger, then, may be undeserved by reason of being directed at persons who have exercised a right or lived up to an obligation. However, a judge’s ire sometimes hits just the right mark.

265. *Id.* The district judge also appeared to be angry at the plaintiff because he had resisted settlement offers toward which the judge was pushing the parties. *Id.*

266. *Tollett v. City of Kemah*, 285 F.3d 357 (5th Cir. 2002); *see also* *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (imposition of greater penalty based upon a successful appeal violates due process).

267. *See* Alicia Cruz, *N.J. Judge Max Baker Reprimanded for Yelling at Mother During Family Court*, N.J. NEWSROOM (June 17, 2011), <http://www.newjerseynewsroom.com/state/nj-judge-max-baker-reprimanded-for-yelling-at-mother-during-family-court> (judge yelled at party while she was trying to answer a question).

268. 300 F. Supp. 2d 690 (S.D. Ind. 2004).

269. *Id.*

270. *See also* *United States v. Nazzaro*, 472 F.2d 302 (2d Cir. 1973) (trial judge became progressively more angry with the defense attorney as he made reasonable efforts to protect the defendant’s interests); *cf.* *Draughn v. Johnson*, 120 F. App’x 940, 945 (4th Cir. 2005) (noting and reversing lower-court decision granting state prisoner’s claim on habeas that the trial judge “gave the appearance of anger” when the prisoner asked his attorney to move for recusal on the ground of racial bias).

Contrast these cases with one in which a prisoner made false allegations of serious government misconduct.²⁷¹ The government had to thoroughly investigate his allegations before debunking them. As the reviewing court correctly concluded, the judge presiding over that case was “appropriately angered” by the prisoner’s conduct, as he had sought to waste time and divert law-enforcement resources.²⁷² Similarly, federal judges in New York reportedly were “outraged” when they observed police officers telling blatant lies while under oath.²⁷³ In such instances, anger is directly responsive to a blameworthy harm, and the objects are the persons who committed those harms. The victims, such as criminal defendants harmed by the lies of government actors, fall within the judge’s zone of care, for she is responsible for protecting their legal rights. The judge herself is a victim in many such cases, as when her reliance on lawyers’ or police officers’ good faith is abused. The offender’s wrongful actions may also make the judge an unwilling partner in a wrong, as when she lacks power to improve the performance of a borderline-incompetent lawyer who is harming his client’s interests.²⁷⁴ More broadly, the fair administration of justice itself is within the judge’s zone of care. Insults to justice are insults about which the judge is entitled to be angry.²⁷⁵

Judicial anger at criminal sentencing often can be justified as well, and for a similar set of reasons.²⁷⁶ By the time of sentencing, blameworthy conduct already has been shown. Assuming, as the judge must, the accuracy of that finding, the judge is entitled to respond emotionally to any harm the defendant has caused. Expressing anger vividly demonstrates to victims and their survivors that they are within the judge’s zone of care. It communicates, in a way that other demonstrations could not, that they are members of the valued

271. *Campbell v. United States*, No. 5:07-0120, 2010 WL 1379992 (S.D. W. Va., Mar. 10, 2010).

272. *Id.*; see also Maroney, *supra* note 13, at 1498 (Kozinski became livid upon learning that a federal prosecutor had lied to him).

273. Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, <http://www.nytimes.com/2008/05/12/nyregion/12guns.html?pagewanted=all>.

274. See, e.g., *Carrington v. United States*, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) (“[S]ometimes . . . [t]he 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 SPENCE, *OF MURDER AND MADNESS: A TRUE STORY* 490 (1983))).

275. Potegal & Novaco, *supra* note 8, at 18 (“In classical Athens . . . [a] frequent trope is that law itself was angry at the accused.”).

276. See *supra* notes 190–97.

community.²⁷⁷ It also demonstrates judicial respect for the defendant. As one feels anger only where a human agent has chosen to inflict an unwarranted harm, showing anger reveals the judge's assessment that the defendant is a fellow human possessed of moral agency. By using his authoritative position to send moral messages to the wrongdoer, the judge ideally frees others in society from feeling a need to do so themselves, including through vigilante action.²⁷⁸

In contrast, judicial anger might be used not to send deserved moral messages but to belittle, humiliate, or dehumanize. This is a particular danger in criminal sentencing, but it is by no means limited to that setting. For example, rather than force the defendant to hear both an account of the harm he has caused and the judge's moral condemnation of those acts,²⁷⁹ she might call him a "lowlife" or "scumbag."²⁸⁰ Insults, gratuitous displays of power, extreme sarcasm, mocking, and demeaning language all reflect that the judge is using anger to assert her dominance. Assertions of power are, to be sure, sometimes appropriate. Anger at lawyers, witnesses, and parties may be helpful in reminding those persons that the judge is in charge of both the courtroom environment and the processes of litigation.²⁸¹ Belittling actions appear meaningfully different. Acting so as to humiliate or belittle strongly suggests that anger is no longer

277. This message may be particularly important for victims whose interests have been diminished not only by the defendant's actions but also by relative societal disadvantage or scorn. See Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568 (1998) (quoting judge who actively denigrated gay Asian-American homicide victim).

278. CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* 48 (1983) ("[I]n the absence of a formal judiciary, anger operates as a personal" emotion, driving individuals to "see to it that their rights are respected and justice seen to").

279. Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES, June 28, 2011, <http://www.nytimes.com/2011/06/29/nyregion/judge-denny-chin-recounts-his-thoughts-in-bernard-madoff-sentencing.html?pagewanted=all> ("In a society governed by the rule of law, [Judge Chin] wrote, the message had to be sent that Mr. Madoff would be 'punished according to his moral culpability.'").

280. See *In re Merlo*, 34 A.3d 932, 972 (Pa. Ct. Jud. Disc. 2011) (judge "in a tirade" called defendant a "low life" and "a scumbag"); *In re Lokuta* 964 A.2d 988, 1054 (Pa. Ct. Jud. Disc. 2008) (judge screamed at the defendant that she was "nothing but a fat pig, whore, lowlife"); cf. *Milmir Constr. v. Jones*, 626 So. 2d 985, 986 (Fla. Ct. App. 1993) (judge called attorney a "scumball").

281. Judges' expressions of anger at one another are harder to justify by this particular criterion. Judges who are peers—like colleagues on the Sixth Circuit or Wisconsin Supreme Court—should not attempt to assert power over one another, whether by use of anger or otherwise. Judges who sit in a superior position, such as those on appellate courts and courts of last resort, seldom need anger to assert their power over the judges below them in the hierarchy. Cf. *Roper v. Simmons*, 543 U.S. 551, 585 (2005) (O'Connor, J., dissenting) ("tak[ing] issue with the Court's failure to reprove . . . the Supreme Court of Missouri's unabashed refusal to follow our controlling decision in *Stanford*").

operating in isolation: instead, it has become corrupted with contempt.²⁸² Contempt, like anger, reflects a judgment that a fellow human has acted badly. Unlike anger, it goes on to value that fellow human as “vile, base, and worthless.”²⁸³ It explicitly positions its target as an inferior,²⁸⁴ not just hierarchically but as a human being, and motivates public assertions of that inferior status.²⁸⁵ When judicial anger becomes intertwined with contempt, it loses its claim to justification, for it has internalized a fundamentally bad judicial value: superiority. While judges have a legitimate claim to authority, they have no such claim to superiority.

Diagnosing the corrupt values underlying anger that has become intertwined with contempt delineates a sort of judicial anger that is particularly unjustified. But the analysis thus far also has

282. See *supra* notes 96–97 (anger often co-occurs with other emotions); see also Taylor v. Abramajty, 20 F. App'x 362 (6th Cir. 2001); Morris v. Coker, Nos. A-11-MC-712-SS, A-11-MC-713-SS, A-11-MC-714-SS, A-11-MC-715-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011); *In re Moore*, 626 N.W.2d 374 (Mich. 2001); Dorian Block, *Bronx Supreme Court Judge Joseph Dawson Calls for Proper Attire in Court*, N.Y. DAILY NEWS, July 28, 2009, http://articles.nydailynews.com/2009-07-28/news/17927682_1_shorts-shirt-office-of-court-administration; Cruz, *supra* note 267 (“I’m a Superior Court judge that demands the respect of my position, and you will give it to me.”). One striking aspect of Judge McBryde’s opinions is the frequency with which he points out the spelling and grammar errors of pro se litigants, which seems unnecessary and belittling. See, e.g., Scales v. Texas, No. 4:07-CV-160-A, 2007 WL 1341926, at *1–2 (N.D. Tex. May 1, 2007) (repeating three times in the space of a page that the defendant submitted a document entitled “A Writ of Mandams”); Berry v. Bridgeport Pre Release Ctr., No. 4:03-CV-638-A, 2003 WL 21529726 (N.D. Tex. July 2, 2003) (quoting defendant’s allegation that during an ankle surgery “the other side was life along,” and stating that he “assumes” this was intended to convey that one side of the ankle was fixed and the other was left alone); cf. Fox Indus., Inc. v. Gurovich, No. CV 03-5166(TCP)(WDW), 2006 WL 941791, at *2 (E.D.N.Y. Apr. 12, 2006) (poking fun at attorney for complaining he needed additional time because of “the ‘onslaught of the Sabbath’”).

283. ROBERT PLUTCHIK, EMOTIONS: A PSYCHOEVOLUTIONARY SYNTHESIS (1980); Cendri Hutcherson & James J. Gross, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt*, 100 J. PERSONALITY & SOC. PSYCHOL. 719, 733–34 (2011) (differentiating anger and contempt). Contempt often is conceptualized as a mixture of anger and disgust. Ursula Hess, *Contempt*, in OXFORD COMPANION, *supra* note 15, at 99–100.

284. ROBERT C. SOLOMON, THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE (1993) (anger is directed toward an equal status individual, contempt toward a lower status individual); Dacher Keltner et al., *Emotions as Moral Intuitions*, in AFFECT IN SOCIAL THINKING AND BEHAVIOR 161, 163 (Joseph P. Forgas ed., 2006) (“Contempt is defined by feelings of superiority and dominance vis-à-vis inferior others.”).

285. For example, a sneer—commonly (though not universally) associated with this emotion—vividly communicates one’s belief that the other person is contemptible. Paul Ekman, *Antecedent Events and Emotion Metaphors*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 32, at 147 (contempt’s distinct facial expression is characterized by curling the lip on one side of the mouth). Contempt is uniquely destructive to relationships of equality. In marriage, for example, evidence of contempt is an especially destructive force that predicts marital conflict and dissolution. See MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2007) (discussing research to that effect by John Gottman).

suggested two situations in which judicial anger is most likely to be justified. One is obvious moral wrongs against society; the other is obvious moral wrongs against the legal system.

Law and morality need not (and often do not) overlap, but they sometimes do.²⁸⁶ Even in a democratic society in which a wide diversity of moral judgments is permitted, certain acts of disregard for others offend virtually everyone, demonstrating the persistence of a moral baseline.²⁸⁷ It is at these moments of convergence—where we share a strong moral instinct as to what constitutes an unwarranted wrong, what it means to act culpably, and who is a member of the valued community—that judicial anger is at its peak level of justification. This can explain not just the tolerance, but the expectation, of judicial anger at criminal sentencing, especially in cases involving *malum in se* offenses. The same can be said of judicial anger at insults to the legal system itself. Those not operating within that system are unlikely to have a strong sense of precisely what constitutes an unwarranted harm inflicted upon it, particularly as we have delegated to judges the authority to police the legal sphere. But the broader categories into which such harms fall—lying, cheating, taking advantage, insulting—often do offend a shared moral sense. The most unambiguously justified judicial anger, then, arises at the clear intersection of law and morality.

In sum, judicial anger is unjustified if its underlying reasons are literally incorrect or irrelevant; if the anger object has acted within the zone of his rights or obligations; or if anger becomes infected with contempt. In contrast, judicial anger may be justified if it is based on an accurate perception of reality; is relevant to the issues properly before the judge at that moment; and reflects a correct judgment that the offender has inflicted an unwarranted harm on someone or something within the judge's zone of care—particularly if that assessment coheres with widely shared moral values.

286. "Hard positivists" maintain that there is no necessary connection between morality and the category of "law." "Inclusive positivists" agree, but maintain that in any given system of law, law might sometimes depend on, or at least overlap with, morality. Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 *RATIO JURIS* 359 (2009).

287. See, e.g., *Liteky v. United States*, 510 U.S. 540, 550 (1994) (condemnation of Hitler is the paradigmatically easy case); Paul H. Robinson, *Empirical Desert*, in *CRIMINAL LAW CONVERSATIONS* 29 (Paul H. Robinson et al. eds., 2009) (presenting theory of punishment rooted in empirical evidence of "shared intuitions of justice").

B. Being Angry “In the Right Way”

Justified judicial anger, even though felt “with reference to the right objects, towards the right people, and with the right motive,” should be interrogated further, to determine if it is manifested appropriately²⁸⁸—in Aristotle’s words, whether it is felt “in the right way.” The mechanism for feeling and expressing judicial anger neither “too violently nor too weakly,”²⁸⁹ given the context, is emotion regulation. If well regulated, judicial anger does not unduly detract from the work at hand, nor does its expression unduly disrupt either the mechanisms or image of justice. In fact, well-regulated judicial anger can benefit those interests, not merely fail to harm them.²⁹⁰

If justification relies heavily on philosophical accounts, manifestation relies heavily on affective psychology. The empirical data indicate that anger creates both opportunities and dangers for judges; effective regulation can maximize the former and minimize the latter.

1. The Behavioral Benefits of Judicial Anger

It may seem odd to speak of anger as having any benefits, given the negativity with which it often is regarded. Even within psychology, it historically has been referred to as one of the “negative” emotions.²⁹¹ But all emotions confer at least some benefits in some circumstances, and anger is no different.²⁹² Anger can be constructive

288. O’Brien, *supra* note 141, at 251 (describing learning to act differently despite that fact that the “reasons for [his] anger were real enough”).

289. AVERILL, *supra* note 6, at 82 (quoting ARISTOTLE, NICOMACHEAN ETHICS).

290. It is important to note that unjustified anger, too, must be regulated. Just because anger is not warranted does not mean that judges will not feel it. People often feel emotions they should not. Maroney, *supra* note 13, at 1503. A judge may know that he is not entitled to be angry at a lawyer or party for having appealed, but may feel his temper rising nonetheless. O’Brien, *supra* note 141, at 251 (“No one enjoys receiving notice of a writ or published reversal,” and “[t]here is no salt in the wound worse than that of a smug petitioner/appellant helpfully informing me in front of a crowded courtroom of a just-issued writ or reversal.”). The regulatory strategies discussed at a later juncture are, therefore, also relevant to unjustified anger. See *infra* Part III.B.3. The primary focus here, however, is on the effects that even *justified* anger can have on judicial behavior.

291. Lerner & Tiedens, *supra* note 58, at 129–31 (anger might properly be regarded as a positive emotion).

292. Maroney, *supra* note 12, at 670 n.4 (emphasizing “emotion’s capacity for flexible adaptation to changing conditions”) (citing Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, in HANDBOOK OF EMOTION REGULATION, *supra* note 51, at 47–68; Marie Vanderkerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, in REGULATING EMOTIONS 1, 1–12 (Marie Vanderkerckhove et al.

and prosocial.²⁹³ Certain of anger's effects, particularly its tendency to facilitate judgment and motivate responsive action, make it useful to judges.

First, anger facilitates judgment. It does this in part by narrowing and focusing attention.²⁹⁴ Angering events are vivid and compelling. The emotion is a signal that something of import is taking place, and it helps keep attention directed at the offending person and the situation he has brought about.²⁹⁵ Once attention is focused on those objects, anger predisposes one to approach them.²⁹⁶ Whereas some emotions have a strong tendency toward withdrawal—for example, disgust makes one back away, whether literally or metaphorically—anger keeps one engaged.²⁹⁷ And, of course, anger is strongly associated with attributions of blame. Blame runs through the entire experience: anger will not be triggered unless the initial appraisal of the situation suggests a blameworthy actor, and will not persist unless that appraisal does as well. Thus, through the experience of anger, one's attention is focused on the offender and the harm he has caused; one is motivated to approach the situation, which provides an opportunity for a closer look; and if that closer look confirms the attribution of blame, one reaches a judgment.

Second, anger motivates responsive action. It is associated not only with judgments of injustice, but also with a motivation to restore justice.²⁹⁸ An angry person tends to have a strong desire to change the unjust situation for the better.²⁹⁹ And because "anger exacerbates risk seeking and causes people to perceive less risk," angry persons are likely to take chances in order to bring about that change.³⁰⁰ Further,

eds., 2008)). Whether anger's effects are on balance helpful or unhelpful depends on context, and should not be presumed to be negative. Litvak et al., *supra* note 59, at 301–04.

293. Potegal & Novaco, *supra* note 8, at 19 ("[R]ighteous anger' is not necessarily constructive and prosocial, but depends on who is getting angry, what they do about it, and who is telling the story.").

294. Lerner & Tiedens, *supra* note 58, at 116; Litvak et al., *supra* note 59, at 298.

295. Litvak et al., *supra* note 59, at 288 (anger commands attention and is a strong judgment cue).

296. *Id.* at 291.

297. Hutcherson & Gross, *supra* note 283 (noting disgust's withdrawal tendency).

298. Litvak et al., *supra* note 59, at 301.

299. Lerner & Tiedens, *supra* note 58, at 116 (anger makes one "eager to act"); Litvak et al., *supra* note 59, at 291. The way in which one strives to make the situation better may take the shape of actions that are destructive in the short term, like aggression and fighting. Nico Fridja, P. Kuipers, & E. ter Schure, *Relations Among Emotion, Appraisal, and Emotional Action Readiness*, 57 J. PERSONALITY & SOC. PSYCHOL. 212 (1989).

300. Jennifer Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSONALITY & SOC. PSYCHOL. 146 (2001); Lerner & Tiedens, *supra* note 58, at 123–24; Litvak et al., *supra* note 59, at 296–97.

because the emotion is associated with optimism and feelings of being in control,³⁰¹ angry people have heightened confidence in their ability to succeed, which helps them take those chances.³⁰² Experientially, anger generates the energy necessary to enact change.³⁰³ The physiological changes that cause one to feel “hot” or “boiling”³⁰⁴ literally prepare the muscles and mind for action.³⁰⁵ Indeed, experimental studies show that people tend to prefer being in an angry state when faced with a confrontational task because the anger helps them both take on and succeed at the confrontation.³⁰⁶

Third, anger carries expressive benefits. Anger expressions—raised voice, clenched eyebrows, narrowed eyes, scowls, tensed muscles—are extraordinarily potent communicative devices.³⁰⁷ Such physical manifestations command the attention of others and convey seriousness of purpose.³⁰⁸ Anger, simply put, conveys power.³⁰⁹

These attributes of anger are of obvious utility to judges—indeed, one is tempted to say they are *necessary* to judging. Given the welter of stimuli to which judges are exposed, they may need the assistance of anger to flag possible misconduct and direct attention to

301. C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 ATTITUDES & SOC. COGNITION 813 (1985); Cai Xing, *The Effects of Emotion and Motivation on Attentional Patterns in the Decision-Making Process* 2–3 (Feb. 2009) (unpublished Ph.D. dissertation, Brandeis University Dept. of Psychology).

302. Jennifer S. Lerner et al., *Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment*, 14 PSYCHOL. SCI. 144 (2003) (angry and happy persons have similar levels of optimism about the self; angry people tend to believe they can control and improve a situation, and conquer obstacles); Lerner & Tiedens, *supra* note 58, at 125 (anger triggers “a bias toward seeing the self as powerful and capable”); Litvak et al., *supra* note 59, at 295, 296–97, 303 (“Anger co-occurred with appraisals of individual control and triggered continuing perceptions of such control,” not “just in the immediate situation but in novel situations.”).

303. Lerner & Tiedens, *supra* note 58, at 130 (“[S]tudies have found that angry people often sense themselves as ‘more energized’ to assault the cause of their anger.”).

304. NUSSBAUM, *supra* note 16, at 60–61; WHAT IS AN EMOTION?, *supra* note 74, at 49 (The “substance” of anger is “the boiling of the heart’s blood and warmth.”).

305. Nico Fridja, *Action Readiness*, in OXFORD COMPANION, *supra* note 15, at 1.

306. Litvak et al., *supra* note 59, at 303; *see also id.* at 297 (presenting experimental evidence supporting conclusion that “anger could produce better judgments and choices than neutrality in situations where risk aversion is inappropriate”).

307. *Id.* at 287.

308. *Id.* at 287–88.

309. WALTER B. CANNON, *BODILY CHANGES IN PAIN, HUNGER, FEAR, AND RAGE* 276 (1915) (“Anger is the emotion preëminently serviceable for the display of power . . .”); Lerner & Tiedens, *supra* note 58, at 116; Litvak et al., *supra* note 59, at 296; Potegal & Novaco, *supra* note 8, at 10 (“While community members may experience anger at the social deviance of others, expressing that anger is the particular province of dominant individuals and leaders who are deemed to be justified in doing so.”); Larissa Z. Tiedens, *Anger and Advancement Versus Sadness and Subjugation: The Effect of Negative Emotion Expressions on Social Status Conferral*, 80 J. PERSONALITY & SOC. PSYCHOL. 86 (2001) (expressing anger raises social status).

it. Given the wearying nature of the job, particularly in the high-volume courts where most judges work,³¹⁰ they may need anger's boost to keep attention from sagging.³¹¹ And, clearly, the most critical task with which we entrust our judges is that of rendering judgment. Anger helps them perceive what their judgments are, for the emotion is a clear sign of the underlying appraisal.³¹² It then helps them muster both the desire and energy to do what must be done. Moreover, the expressive benefits are considerable. The object of judicial anger is on immediate notice: her attention, too, is more sharply focused, and the angry judge's message has substantially greater power. Moreover, when a member of the public sees the judge's outrage, she can immediately perceive the nature of the underlying judgment, serving transparency interests. If that judgment coheres with her own, she is assured that the judge is a worthy steward, one who cares deeply about the things about which she wants him to care.

Finally, judicial anger can be particularly helpful because making attributions of blame can be risky. Judges sometimes have to alienate powerful interests, upset potential voters, and even jeopardize public safety. Recall, for example, Judge Sprizzo's scathing indictment of prosecutors' incompetence, which required him to free a number of people who likely were high-level narcotics dealers.³¹³ Such a decision takes resolve, which anger can fortify. Similarly, some judges who concluded that police officers had committed perjury hesitated in enacting that judgment out of fear of ruining careers or conferring an undeserved benefit on criminal defendants.³¹⁴ Outrage can help judges push past those fears. It also will make the costs of action seem more worthwhile. The angry judge has a greater sense of his potency; that, combined with a more optimistic outlook, helps to reassure him that his actions can bring about an ultimately positive outcome, even if the repercussions feel negative in the short term.

310. Anleu & Mack, *supra* note 47, at 612 (judges' emotional labor can entail significant costs on judges themselves, including "distress and emotional exhaustion").

311. Indeed, repetition and boredom are regular features of many trials. These phenomena clearly affect juries, and likely affect judges too. *Cf.* Juliet Macur, *As Clemens Trial Drags, Jury Keeps Dozing*, N.Y. TIMES, May 16, 2012, at B15 (noting the dismissal of two jurors for falling asleep during the Roger Clemens trial).

312. Ellen Peters et al., *Affect and Decision Making: A "Hot" Topic*, 19 J. BEHAV. DECISION MAKING 79, 80 (2006) ("[A]ffect can act as information: at the moment of judgment or choice, decisionmakers consult their feelings about a choice and ask, 'How do I feel about this?' ") (citing N. Schwarz & G. Clore, *Mood as Information: 20 Years Later*, 14 PSYCHOL. INQUIRY 294 (2003)).

313. *See supra* note 145.

314. Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008, at B1.

Further, if the judge chooses to broadcast his anger, he significantly increases the force of his message.

Thus, anger triggered by injustice generates the zeal necessary for difficult action in service of social betterment,³¹⁵ zeal judges can put to good use.

2. The Behavioral Dangers of Judicial Anger

Anger's effects, however, are not uniformly positive. Just as all emotions confer benefits in some circumstances, they create dangers in others.³¹⁶ For judges, the main dangers of anger are that it may trigger relatively shallow patterns of thought; lead to premature or overly punitive decisions; bleed over into unrelated contexts; and manifest in a grossly disproportionate way.³¹⁷

First, anger triggers relatively shallow thought patterns.³¹⁸ Other ostensibly "negative" emotions, such as sadness, tend to spur deeper information processing.³¹⁹ Anger tends to have the opposite effect. An angry person, like a happy one, will tend to skate more on the surface of available information.³²⁰ Anger is strongly associated with greater use of heuristics, or short-cut guides to interpreting stimuli.³²¹ It also is associated with reliance on other sorts of readily

315. MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 366 (1966) ("They called me 'the angriest Negro in America.' I wouldn't deny that charge. . . . I believe in anger. The Bible says there is a time for anger."); Potegal & Novaco, *supra* note 8, at 19 (noting popular notion that good works can be triggered by anger, and giving as an example movement to abolish slavery).

316. Maroney, *supra* note 12, at 642.

317. This was one of Seneca's primary concerns. ANDERSON, *supra* note 70, at 169 (to Seneca, anger does not suit the "role of ruler and judge"; anger "should as much as possible be routed from the mind of [the] judge," lest he "commit the most outrageous injustice in the name of righteous wrath; and, stubborn in his anger, he will refuse to bend before criticism").

318. Litvak et al., *supra* note 59, at 293 (distinction between anger's process and outcome effects), 298–99 (depth-of-processing effects). Note, however, that at least one study shows this tendency is not invariable. "Because anger is associated with the desire to confront, oppose, and argue," angry persons may "become particularly vigilant about creating oppositional arguments," in the course of which they examine evidence carefully and "engaged in better hypothesis testing." *Id.* at 299 (citing M.J. Young & L.Z. Tiedens, *Mad Enough to See the Other Side: The Effect of Anger on Hypothesis Disconfirmation* (2009) (unpublished manuscript)).

319. Xing, *supra* note 301 (sadness associated with systematic decisionmaking).

320. Litvak et al., *supra* note 59, at 299; Xing, *supra* note 301 (anger associated with faster decisions and reliance on heuristics).

321. Larissa Z. Tiedens & S. Linton, *Judgment Under Emotional Certainty and Uncertainty: The Effects of Specific Emotions on Information Processing*, 81 *J. PERSONALITY & SOC. PSYCHOL.* 973 (2001) (anger-activated heuristic processing (e.g., greater reliance on the superficial cues of the message and less attention to the argument quality)); Larissa Z. Tiedens, *The Effect of Anger on the Hostile Inferences of Aggressive and Non-Aggressive People*, 25 *MOTIVATION & EMOTION* 233 (2001) (anger-activated heuristic processing (e.g., use of chronically accessible scripts)).

“accessible cognitive scripts” such as stereotypes.³²² Anger therefore increases the odds of interpreting others’ behavior and intentions in conformance with preconceived ideas about how one expects people of that sort—whatever the salient category—to act.³²³ Anger-fueled shallowness of thought can be characterized not only by taking shortcuts but also by quick endorsement of information that confirms the initial anger appraisal.³²⁴ The angry person also will be disproportionately persuaded by angry arguments.³²⁵ Thus, though anger’s approach tendency ensures some closer look, that closer look may be cursory, biased, and self-reinforcing.³²⁶

Second, anger might lead to premature decisions. The heightened sense of certainty it brings can make one feel confident in the correctness of her decisions at a relatively early stage, discouraging consideration of alternatives.³²⁷ This decisional effect is the natural outcome of the process effects described above. Script-driven, shallow processing enables quick decisionmaking.³²⁸ Similarly, a disinclination to second-guess oneself allows for fast responsive action. While these tendencies confer obvious advantages in situations in which further deliberation will be of no utility, they are just as obviously disadvantageous where information gathering and reflection would disrupt an unwarranted assumption, uncover a subtle point, or

322. Lerner & Tiedens, *supra* note 58, at 126; Litvak et al., *supra* note 59, at 299 (“Angry persons tend more to find explanations for behavior in accessible cognitive scripts, rather than consider alternatives.”).

323. Anger thus can activate prejudice. D. DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 *PSYCHOL. SCI.* 319 (2004); D.M. Mackie et al., *Intergroup Emotions: Explaining Offensive Action Tendencies in an Intergroup Context*, 79 *J. PERSONALITY & SOC. PSYCHOL.* 602 (2000).

324. This bias toward emotion-confirming information is not unique to anger. Litvak et al., *supra* note 59, at 298. It also is true of most decisionmaking; once one has come to an initial hypothesis one selectively attends to and privileges evidence that confirms it. See Keith Findley, *Tunnel Vision, in CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* 303, 303–24 (Brian L. Cutler ed. 2012).

325. D. De Steno et al., *Discrete Emotions and Persuasion: The Role of Emotion-Induced Expectancies*, 86 *J. PERSONALITY & SOC. PSYCHOL.* 43 (2004); Lerner & Tiedens, *supra* note 58, at 125.

326. Litvak et al., *supra* note 59, at 290 (citing B.M. Quigley & J.T. Tedeschi, *Mediating Effects of Blame Attributions on Anger*, 22 *PERSONALITY & SOC. PSYCHOL. BULL.* 1280 (1996)) (describing a feedback dynamic, in which the more anger one feels, the more one perceives others to be responsible for a negative event, and the more one perceives others to be responsible for a negative event, the more anger one feels).

327. Litvak et al., *supra* note 59, at 299 (certainty “gives people the meta-level sense that they already have enough information to feel confident in their judgment”).

328. *Id.* at 289 (emotions automatically trigger a set of responses that enable a person to deal quickly with problems or opportunities).

otherwise bring the ultimate judgment in line with a more factually grounded or desirable one.³²⁹

Third, as suggested in the previous Section, anger can have bleed-over effects. The fact of being angry at one person for one set of reasons can dramatically increase the odds of becoming angry at another person for another set of reasons.³³⁰ Such incidental anger effects have been robustly demonstrated.³³¹ The angry person is likely to interpret ambiguous stimuli consistently with an anger hypothesis, even in entirely unrelated situations.³³² Given the centrality of blame to anger, one common outcome of this phenomenon is that “anger triggered in one situation can automatically elicit a motive to blame in other situations.”³³³ For example, experimentally induced, irrelevant anger has been shown in mock-jury studies to correlate with more punitive judgments of tort defendants, as well as with greater levels of punishment.³³⁴ Thus, anger can—and often does—spill over, leading the already-angry person to find additional reasons to be angry, assign blame, and take punitive action. This incidental effect is clearly disadvantageous if the new anger objects have done nothing to deserve it.

Finally, anger can manifest in a grossly disproportionate fashion. Though the emotion is not always associated with hostility

329. *Id.* at 299 (though angry persons “will be more biased than neutral individuals in a judgmental context in which additional mental resources will aid decision-making,” in “some contexts, more thinking can produce worse judgments”; for example, “induced sadness increased reliance on arbitrary anchors in judgment,” showing that the “decreased depth of processing associated with anger may be a boon in some situations” (citing G.V. Bodenhausen et al., *Sadness and Susceptibility to Judgmental Bias: The Case of Anchoring*, 11 J. PSYCHOL. SCI. 320 (2000))).

330. Litvak et al., *supra* note 59, at 287–88; see also NUSSBAUM, *supra* note 16, at 98 (“Given one and the same induced physiological condition, subjects will identify their emotion as anger if placed in a situation in which they are given reasons to be angry (e.g., at the experimenters for their insulting and intrusive questions).”).

331. Lerner & Tiedens, *supra* note 58, at 116 (anger has “infusive potential,” in that it “commonly carries over from past situations to infuse normatively unrelated judgments and decisions”).

332. One psychological hypothesis for why this would be so is the “Appraisal Tendency Framework,” which proposes that the “original appraisal patterns associated with each emotion triggered distinct appraisal tendencies in the subsequent judgments,” meaning the subsequent judgment is likely to be consonant with the first. Litvak et al., *supra* note 59, at 295, 288–89.

333. *Id.* at 289.

334. Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003); Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOC. PSYCHOL. 576 (2001); Lerner & Tiedens, *supra* note 58, at 119 (angry persons’ judgments of criminals and unjust behaviors are likely to be relatively harsh; the emotion also reduces generosity); D.A. Small & J. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 POL. PSYCHOL. 149 (2008) (induced-anger subjects provided less assistance to welfare recipients than sad subjects).

and aggression, it often is.³³⁵ It can drive urges to yell, strike out, and injure. When such urges pass a tipping point, they can feel literally involuntary—hence the vernacular description of rage as “losing it.”³³⁶ And even when anger does not boil over into verbal or physical aggression, it can make one “indiscriminately punitive.”³³⁷ The powerful nature of the emotion is, in this instance, one of its greatest liabilities. Further, the sense of personal power anger engenders might combine uncomfortably with judges’ actual power over other people. Power that goes to a judge’s head, particularly if combined with the feelings of superiority attending contempt, can foster arrogance and abuse. A judge may act like an “absolute monarch,”³³⁸ or declare—in the words of one trial judge—“I am God in my courtroom.”³³⁹

If the previously described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. We hope judges will engage in deep thinking and analysis if the legal or factual issues before them are at all complex. We expect them to consider alternatives and resist simplistic conclusions. Stereotypes, particularly very pernicious ones based on factors like race or gender, would seem to have no proper place.³⁴⁰ An angry judge might cut off deliberation and argument before important ideas and information

335. Lerner & Tiedens, *supra* note 58, at 116.

336. This is an interesting point of gender divergence. Men typically see anger expression as a way of taking control, while women tend to see it as loss of self-control. One hypothesis is that women are more reluctant to express anger and do it only when anger is at a higher intensity, when they are more likely to feel they already have lost control. Litvak et al., *supra* note 59, at 304; *see supra* note 22 (previewing future focus on emotion and female judges).

337. Lerner & Tiedens, *supra* note 58, at 116, 123.

338. *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the United States* 264 F.3d 52, 68 (D.C. Cir. 2001) (quoting *Chandler v. Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 84 (1970)); *see also* *Ungar v. Sarafite*, 376 U.S. 575, 601–02 (1964) (Douglas, J., dissenting) (expressing concern with judicial “tyranny”); *McBryde*, 264 F.3d at 66 (“Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt.”).

339. *Gottlieb v. Sec. & Exch. Comm’n*, 310 F. App’x 424, 425 (2d Cir. 2009). This particular danger of judicial anger is acute in judges with high levels of trait anger. In the Article to follow, focused on poor judicial temperament, *see supra* note 22, I will argue that judges who deploy their anger in a relentlessly top-down fashion have aggrandized to themselves the wrath typically reserved for gods and kings. *See* AVERILL, *supra* note 6, at 86–87 (tracing accounts of anger in Old and New Testaments of the Christian Bible); ARISTOTLE, RHETORIC, *IN WHAT IS AN EMOTION?*, *supra* note 74, at 44–52 (the “anger of divine king is mighty”); Potegal & Novaco, *supra* note 8, at 9–12 (divine wrath a feature of virtually every known religious system); *see also* *Ungar*, 376 U.S. at 601–02 (1964) (Douglas, J., dissenting) (expressing concern with judicial “tyranny”); *supra* note 217 (Judge *McBryde* compared to both God and a king).

340. Lerner & Tiedens, *supra* note 58, at 123 (“[T]he mere experience of anger can automatically activate precursors to prejudice.”).

have time to emerge. A strong sense of certainty can blind her to a more complicated reality.

It seems clear, too, that we hope judges will assess people, issues, and cases on their own merits. Most judges juggle many cases at once, meaning anger triggered in one can infect multiple others. Litigated cases usually are comprised of a long series of interactions between the judge and a large cast of characters, meaning grievances easily can accumulate and relevant distinctions become muddy.³⁴¹ Bleed-over effects therefore pose a concrete danger in the real world of judging.

Moreover, it nearly goes without saying that we would rather our judges not engage in violent anger displays.³⁴² When a judge truly “loses it,” she has also lost control over the courtroom, impairing both her ability to project authority and popular perceptions of justice. Indeed, it is precisely these displays that draw the most media attention. The damage to the public image of justice can be considerable even where extreme anger displays take place outside the courtroom, as with the choking allegation on the Wisconsin Supreme Court. We hope, further, that even where anger is tethered to a legitimate trigger—such as clear proof that a civil or criminal defendant committed a serious wrong—judges will be punitive only to the degree called for by the situation, particularly as they serve as a hedge against popular calls for disproportionate punishment. Finally, we hope that judges will use their considerable power responsibly. Anger’s extraordinary strength might push them to abuse it. In sum, because judges often work under difficult conditions in which the ideals of deliberation, impartiality, and calm already are besieged, it seems that adding anger to the mix might sound the death knell for those ideals.³⁴³

One recent case, *Sentis Group v. Shell Oil*,³⁴⁴ provides a rich example of many of these potentially deleterious effects. In that case, a district court judge dismissed plaintiffs’ case with prejudice as a sanction for discovery abuse. The Eighth Circuit’s careful dissection of

341. Recall the consistently infuriating Mr. Schwarz of *Fox Industries*. See *supra* notes 155–58 and accompanying text.

342. See Rene Stutzman, *Judge Shea to Be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, ORLANDO SENTINEL, June 1, 2011, http://articles.orlandosentinel.com/2011-06-01/news/os-judge-shea-yells-too-much-20110601_1_public-reprimand-agency-that-polices-judges-complaint (describing particularly inappropriate courtroom behavior that led to the reprimand of a Florida judge).

343. O’Brien, *supra* note 141, at 251 (“It is hard to suffer fools gladly when my courtroom is packed with people wanting my urgent attention.”).

344. 559 F.3d 888 (8th Cir. 2009).

the path to that dismissal, performed under the doctrinal auspices of a judicial-bias allegation, provides the raw material from which we may discern a judicial anger spiral in action.

The judge³⁴⁵ in *Sentis* had ample grounds for anger. The plaintiffs played games with discovery, provided misleading information, and seemed to be looking for ways to evade orders.³⁴⁶ Once triggered, though, anger took the judge down a very bad road. He became predisposed to interpret every new dispute consistently with his anger baseline. Possible lies became clear ones; investigation seemed unnecessary.³⁴⁷ He became disproportionately receptive to arguments pointing to willful wrongdoing, even though defendants (sensing an opportunity) seemed deliberately to be “fanning the flames” of his outrage.³⁴⁸ Conversely, he became curtly dismissive of contrary evidence.³⁴⁹ These phenomena came to a head in an in-chambers hearing, a portion of which reads as follows:

THE COURT: Have you produced the 58 documents that were the original request that's generated the trip to the Eighth Circuit[?]

MR. STARRETT [Plaintiffs' counsel]: To them?

THE COURT: Well, hell, yes. Why would you ask a question like that? Hell, yes, to the defendant.

[. . .]

THE COURT: I kept telling you to produce stuff You ducked. You wove. You did everything to keep from producing them. You go to the Eighth Circuit. They tell you to produce them, and you still goddamn don't produce them. Now what the hell do you not understand? You must produce them. Jesus Christ, I don't want any more ducking and weaving from you on those 58 documents. That's unbelievable. That gives credence to everything I just heard from the defense. Now, tell me why else you don't think that I ought to dismiss this case You better tell me. I'm about ready to throw this thing out. When you tell me that you still haven't produced those goddamn 58 documents after four times, four times I've ordered you to produce them. You are abusing this Court in a bad way. Now tell me.

345. In a telling move, the Circuit appears studiously to have avoided naming the judge, referring to him only as “the court” or “the district court.” *Id.* at 888–905. The decision not to call the judge out personally reflects its oft-noted “sympathy” for the judge and its unwillingness to “condemn” his anger, even as it found its effects unacceptable. *Id.* at 891. Contrast this move with other courts that have chosen specifically to name the offending persons, so as to make the anger more pointed. *Cf.* *Maples v. Thomas*, 132 S. Ct. 912 (2012) (Court, ruling that death-row inmate did not lose opportunity to appeal because of gross negligence by Sullivan & Cromwell, repeatedly called out two of that firm’s associates by name).

346. 559 F.3d at 891–98 (recounting plaintiff’s actions that “provoked” the defense and district court).

347. *Id.* at 897 (demonstrating certainty that all allegations of plaintiff misconduct were true).

348. *Id.*

349. *Id.* (judge interrupted plaintiff’s counsel when he offered contrary information to explain plaintiff’s conduct).

MR. STARRETT: Well, may I start with the fact—

THE COURT: Yes.

MR. STARRETT: —that you have not ruled four times to give them those 58 documents—

THE COURT: That's it. I'm done. I'm granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. Mr. Harris [defense counsel], I direct you to prepare a proposed order with everything you've just put on that presentation. I'll refine it and slick it up. [Plaintiff's witness] has abused this court, has misled you, has lied on his deposition. It's obvious he's lying about that e-mail. This case is gone. . . . What a disgrace to the legal system in the Western District of Missouri. . . . We're done. We are done, done, done. What a disgrace. . . . We're done.

As the initial exchange shows, the judge had a short fuse. To be sure, counsel's "To them?" is asinine, even taunting—to whom would plaintiffs produce discovery if not the defendants? At an earlier juncture, though, the remark might have been merely irritating. But by that point in the litigation it was all that was required to set the judge off. His language quickly became hostile and unbounded. The final straw was counsel's effort to explain that not all of the documents had been ordered four times. Though perhaps tin-eared, and certainly poorly timed, the assertion was true; counsel's distinction between discovery that had and had not been subject to particular orders was accurate and potentially relevant.³⁵⁰ But that technical distinction had ceased to have meaning to the judge. The simple cognitive schema of discovery abuse, and the flat characterization of plaintiffs and their attorneys as liars, appeared to supply sufficient answers. All discussion was cut off; the judge was simply "done." And once he was "done," he went straight to the most punitive response possible: dismissal of the entire action, with prejudice.

The Circuit went to great pains not to condemn the judge for what appears to have been an understandable human reaction to trying circumstances. The initial point here is the same. Good judges sometimes will lose it.³⁵¹ While such moments do not impugn them as people, neither does the fact that they had good reasons always salvage the situation. And though the Circuit carefully ruled only on the basis that the *Sentis* judge's anger spiral created an *appearance* of partiality,³⁵² the second point here is deeper: it created *actual* partiality. Moreover, it did so in an entirely predictable way, a way that likely is operative in many cases, very few of which will be so closely dissected. This is precisely what judicial anger, even when it

350. *Id.* at 902–03.

351. Maroney, *supra* note 13, at 1542.

352. 559 F.3d at 891.

has a legitimate starting point, can do if left unchecked—hence Judge Posner’s caution to “beware” the angry judge.³⁵³

3. Regulating Judicial Anger to Maximize Benefits and Minimize Dangers

To summarize thus far: anger facilitates judgment, including by focusing attention and motivating responsive action. Anger makes it easier to take chances, confront difficult people and situations, and incur the costs of action. Its expression communicates with unusual clarity, conveying the underlying judgment and underlining its seriousness. But anger also increases reliance on heuristics and stereotypes, contributes to premature decisions, biases how evidence and arguments are heard, and can bleed over into unrelated contexts. An angry person might be unduly punitive, engage in distasteful and even violent outbursts, and acquire an unwarranted sense of her power over others.

So at this juncture we find ourselves back on the horns of our original dilemma. Anger giveth and anger taketh away. Justified anger is necessary to critical aspects of judging, but simultaneously has tendencies that can impair judging.³⁵⁴ We therefore have come to the juncture at which judges need to call upon emotion regulation. Emotion regulation is the mechanism by which humans “fine-tune” our emotional responses to serve situational demands.³⁵⁵ Strong regulation skills enable judges to draw on the unique features of anger when they are helpful and to minimize them when they are not.³⁵⁶

In previous work, I have outlined a theory of judicial emotion regulation that provides the relevant theoretical model.³⁵⁷ Rather than repeat that analysis, the purpose of this Section is succinctly to encapsulate the model’s fundamentals, demonstrate its applicability to anger, and offer additional insights about anger management.

353. POSNER, *supra* note 9, at 110.

354. Lerner & Tiedens, *supra* note 58, at 132 (“The emerging portrait of the angry decisionmaker is more complex than one might have expected.”).

355. Maroney, *supra* note 13, at 1504 & n.117 (citing Marie Vandekerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, in *REGULATING EMOTIONS 3* (Marie Vandekerckhove et al. eds., 2008)).

356. *Id.* at 1492 (analogizing to heuristics, which are beneficial in some instances and detrimental in others).

357. *Id.* at 1531–32.

a. Applying the Engagement Model of Judicial Emotion Regulation to Anger

What I have called the *engagement model* of judicial emotion regulation is comprised of three core components: preparing realistically for emotion, responding thoughtfully to it, and integrating lessons about (and from) emotion into one's judging. Insistence on emotionless judging, in contrast, encourages denial and suppression. That approach not only fails to extinguish undesired emotions, but also tends to both magnify emotions' effects and needlessly consume cognitive resources. Much of the psychological literature on which this model relies has to do with anger.³⁵⁸ The empirical evidence is particularly persuasive in showing that anger suppression consumes resources such as memory; distorts social judgment; risks ironic emotion "rebound" effects; and increases physiological arousal.³⁵⁹ Engagement thus provides a solid model for judicial anger management.

Preparing realistically for anger. First, judges can prepare realistically for anger by acknowledging that many of the people they encounter in the course of their work, including lawyers, litigants, witnesses, and colleagues, are bound to make them mad. A given judge's anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, and abusing others.³⁶⁰ Judge O'Brien, for example, was able to identify several reliable triggers for his own anger, including "lack of civility," "attorney incompetence," and the "herding cats" work of trying to get everyone in the courtroom at the same time.³⁶¹ In contrast, it appears that what makes Justice Scalia "bl[o]w his stack" is his assessment that other judges are being sloppy, inconsistent, or adhering to views he finds legally unsupportable or socially destructive.³⁶²

Identifying recurrent triggers is a critical first step.³⁶³ Using a regulation technique known as anticipatory cognitive reappraisal, the judge then may think in advance about how those recurrent triggers

358. *Id.* at 1527.

359. *Id.* at 1511 (cataloging experimental evidence showing negative effects of anger suppression).

360. *See supra* Part I.A.

361. O'Brien, *supra* note 141, at 252 ("What is so hard about taking a 15-minute recess in a jury trial? What is hard is that apparently nobody wears a watch anymore. . . . 'Here, kitty, kitty, kitty.'").

362. Clark, *supra* note 215.

363. O'Brien, *supra* note 141, at 251 (describing the first step in handling his anger: "I first had to articulate the causes").

relate to her professional goals and obligations.³⁶⁴ In so doing, she may precommit to a set of beliefs that will enable her to remain relatively nonreactive to angering stimuli when they arise. She also may train herself to focus, and frequently refocus, on her unique professional role as a neutral arbiter, which can have the same effect.³⁶⁵ For example, a judge may realize that she tends to get snappy when a party has prevailed against her on appeal.³⁶⁶ The judge can remind herself that just as she has a job to do, so too does the lawyer; that just as she is trying to do her job well, so too is the lawyer; and that dealing with error correction is part of being a judge in a system with appellate review, a system that confers many benefits, not just to society but also to her. That judge can also remind herself that the legally important element of a reversal is to discern where the higher court thinks she went wrong, analyze that decision, and work with it; focusing on those highly specialized tasks makes it harder to dwell on a sense of personal insult. Another judge, like Justice Scalia angered by the perceived failings of his colleagues, may remind himself that part of the point of having multijudge courts is that decent, competent people sometimes will differ on fundamental issues and call hard cases differently, not because those people are stupid, but because there are “conflicting correct” ways of seeing both the world and the law.³⁶⁷

Judges thus can precommit to ideas that rob a recurring situation of its angering significance. When that situation arises, it is far less likely to make them angry, even if it displeases them.³⁶⁸

364. Maroney, *supra* note 13, at 1508–09, 1514–17 (defining cognitive reappraisal and collecting evidence of its efficacy).

365. As I have shown elsewhere, even laboratory subjects who commit to a “neutral observer” role are able to avoid most normal emotional reactivity for short periods of time. Whether humans can embody such neutrality in the real world, for longer periods of time, and when exposed to extraordinarily vivid stimuli is largely unstudied. The best evidence that they can do so comes from the medical profession. Neutrality is highly valued in doctors but very difficult to achieve. Medical educators, therefore, increasingly are seeking to teach productive emotion-regulation strategies, the goal being to help doctors achieve sufficient neutrality to perform competently but not so much as to lose touch with the human element of their work. Because the emotional challenges facing doctors and judges can be strikingly similar, that approach holds great promise in the judicial setting. To draw a crude parallel, the judge learns to search for legally relevant information in emotionally salient situations, much as a doctor learns to look for medically relevant information in (for example) a disgusting wound. For both the judge and the doctor, focusing on the professionally salient aspects of a situation, rather than on the aspects that would evoke an emotion such as disgust in a layperson, can reduce emotional reactivity relatively effortlessly. Maroney, *supra* note 13, at 1521.

366. O’Brien, *supra* note 141, at 251.

367. Maroney, *supra* note 240, at 879.

368. Maroney, *supra* note 13, at 1514–15 (just as a doctor learns to examine a gruesome wound for clinically relevant evidence, the judge may learn to examine a gruesome autopsy photo

Responding thoughtfully to anger. Judges will, of course, continue to get angry. They are not “icebergs,”³⁶⁹ and if they remain open to the dramas unfolding before them they cannot help but react at least some of the time. Fortunately, anger can be cognitively reappraised midstream as well as in advance.³⁷⁰ The judge can choose to reinterpret a provocative stimulus in a way that will disrupt or replace the emotion. For example, if an attorney appears to be gloating over his appellate victory, the judge might ask if she is truly angry at him for *this* incident, or whether anger has cumulated or crept in from elsewhere and is being displaced. Realizing that it is the latter is likely to diffuse her anger. She also can decide to chalk up his obnoxious manner to social ineptitude. That attribution may prompt annoyance, or even sympathy, but is unlikely to trigger anger.

However, cognitive reinterpretation is not always realistic. Not all stimuli can be anticipated or rethought: perhaps that lawyer really *is* gloating, enjoying the experience of publicly taking the judge down a notch.³⁷¹ In such a situation the judge can interrogate the propriety of the valuation she has attached to her anger’s factual basis. She might, for example, ask herself what is it that she feels has been harmed. If it is her reputation or dignity, does this lawyer’s conduct pose any real threat to those goods? Perhaps the people whose opinions matter most to the judge, such as judicial peers, will be utterly unaffected, even sympathetic. And even if important others truly will regard her less favorably, the judge still can ask whether responding with anger reflects defensible values.³⁷² Perhaps that reaction shows that she prizes her public reputation inordinately. She might prefer to ground her sense of dignity and worth, as a person and as a judge, in her own honest assessment of the value and quality of her work. She may also ask herself honestly whether she has come to regard the offending lawyer as literally beneath her—a cretin, a moral inferior—indicating the corrosive presence of contempt. The judge may diffuse the feeling by determining that her anger reflects evaluations that, despite their grounding in reality, she has reason to reject.

for legally relevant criteria; both come to experience such stimuli as not disgusting but informational).

369. *Id.* at 1537 (quoting judge in *People v. Carter*, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009)).

370. Maroney, *supra* note 13, at 1522–23.

371. O’Brien, *supra* note 141, at 251 (“There is no salt in the wound worse than that of a smug petitioner/appellant helpfully informing me in front of a crowded courtroom of a just-issued writ or reversal.”).

372. *Id.* at 253 (“The rules are rules. They are not commandments. It may be a sin to break a commandment, but a rule is simply a rule.”).

Some anger might pass all these checkpoints. A defendant spitting in one's face, for example, is virtually impossible to interpret as anything other than a deliberate expression of hatred. That expression is condemnable because of the extreme and unwarranted disregard it shows, not just of the judge but also of the legitimacy of the legal process.³⁷³ The anger is both reality based and normatively proper; indeed, Aristotle might identify this as a situation in which *not* getting angry would be suspect. Regardless, the judge can ask herself whether it is relevant to the tasks at hand, and whether giving voice to it would further or hinder her overall goals.³⁷⁴

As the case of the spitting defendant shows, such a determination involves complex judgment calls. If the defendant is going to continue to appear before that judge, the anger might inform how she chooses to interact with him. For example, it may help her feel comfortable concluding that he has no respect for the forum and deciding to withhold discretionary benefits—such as continuances—or chances to be near her.³⁷⁵ Similarly, expressing her anger in some way might convey how seriously she regards the conduct. Such a move might both prompt behavioral change and reassert her authority, both to him and to spectators. But several variables could shift her assessment. If (as was the case in the actual situation) the defendant is being removed and will pose no ongoing threat, there is no need to set ground rules for future interaction. Expressing anger to prompt behavior change or an apology³⁷⁶ would be wasted effort if (as seems likely) the defendant has no interest in obeying the judge, no matter what she says or does. Nor will such expression necessarily reinforce authority. Particularly if it is loud or hostile, it might model for others behavior that the judge will then have to expend energy to control.³⁷⁷ If everyone else present shares the assessment that the defendant is

373. This is not to say that cognitive reappraisal is impossible, just that it would be particularly hard. The judge might, for example, decide to believe that a defendant who would act this way is deeply disturbed for reasons having nothing to do with her. Positioning herself as an accidental object of his hatred might sap the situation of its personal relevance, and thus its angering propensity.

374. Maroney, *supra* note 13, at 1540–41.

375. Restricting the defendant's physical access to the judge would be a productive sort of "situation modification." *Id.* at 1541.

376. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85 (2004) (explaining power of apology).

377. Maroney, *supra* note 13, at 1540 n.325 (explaining how judges regulate emotion in order to model courtroom behavior for others). If in a different situation the judge's anger is based in reality, defensible, and relevant, she might nonetheless choose to mask it—for example, because she wants to hide her opinions from a jury. *Id.* at 1540–41; see also Kenji Yoshino, *The "Civil" Courts: The Case of Same-Sex Marriage*, 54 ARIZ. L. REV. 469, 478 (2012) ("[T]he presence of a judge can do wonders for mitigating the race to the bottom of incivility.").

irrational and beyond reach (which also seems likely), expressing anger might lead them to perceive that he “won” by getting the judge to “sink to his level.” In that case, restraint might seem admirable. What course of action is most advantageous to the judge often will rely on a split-second assessment of all these variables, a process that for a good judge likely becomes more intuitive and well calibrated over time.³⁷⁸

Finally, judges can respond thoughtfully to anger if they are specifically aware of some of its more dangerous tendencies, such as increasing reliance on heuristics and stereotypes. Having cultivated the requisite self-awareness, the judge can take the feeling of rising anger as a sign that she might need to force herself to proceed with greater than usual caution, to take more rather than less time, and to honestly interrogate the adequacy of her thought processes.

Integrating lessons from anger. The final aspect of judicial emotion regulation is to strive to incorporate lessons from one’s emotions into the broader story of her life as a judge. Much of this process depends on the self-awareness and introspection that also underlies the preceding steps. Two other components are worthy of additional explanation: disclosure and self-acceptance.

Expressing anger in the moment—for example, to an offending attorney—is one form of emotional disclosure. But other forms may be equally or more helpful, particularly in encouraging the judge to identify recurrent triggers and evaluate their relevance to her work. The judge may choose to discuss angering experiences with family, friends, other judges, or even the public.³⁷⁹ Those to whom anger is disclosed can offer their insights into whether it seems factually based, relevant, normatively defensible, and the like; this discursive process can provide the judge with needed feedback. The judge thus builds a “database” of her work-related anger, one that can inform the process of preparing and responding to anger going forward.

Disclosure may also have subjective benefits. While disclosing anger is unlikely to diffuse it (and, as explained below, may sometimes increase it), disclosure can make it far easier to live with.³⁸⁰ This is even so where the judge is not proud of how she acted. Efforts at regulation will sometimes (perhaps often) fail. The judge may lose

378. I say “for a good judge” because judges with consistent anger management problems do not appear to improve with practice. Poor emotion regulation habits can become dangerously self-reinforcing, and in the case of anger likely ossify into patterns that eventually we regard as evidencing poor temperament. Maroney, *supra* note 13, at 1543.

379. *Id.* at 1527–30.

380. *Id.* (discussing research on the many social and personal benefits of emotion disclosure, even for unpleasant emotions).

composure when she wishes she had not, or continue to feel anger she knows she should not.³⁸¹ In those instances, she might feel shame,³⁸² which might motivate her to hide her feelings.³⁸³ She could choose instead to regard the shame-inducing anger episode as an opportunity for self-improvement.³⁸⁴ Such an effort might include public sharing; for example, the judge may find it helpful to apologize.³⁸⁵ If public expressions feel counterproductive or intimidating, she might talk with trusted confidantes.³⁸⁶ Even if the judge keeps her dialogue entirely internal, she can choose simply to be forgiving of her own humanity.³⁸⁷ Such self-acceptance may help the judge recover valuable perspective—allowing her, for example, to focus instead on the satisfying aspects of her job, and to regard occasional turmoil as the price of gaining the many benefits of being a judge.³⁸⁸

In sum, these three steps—realistic preparation, thoughtful response, and integration—are recursively related. Commitment to each facilitates success at any one. Judges can leverage the power of their reason to anticipate and, if needed, rethink their angry feelings. They can allow, restrain, or shape anger expression to serve utilitarian goals. They can build a highly personalized account of what sort of anger is to be welcomed and what rejected, and forgive themselves their inevitable missteps. Judges must invest time and thought in recognizing what tends to make them angry, how they tend

381. See Schuster & Propen, *supra* note 198 (quoting judge who “lost [his] cool”); *Judge Naman Yells at Mom*, *supra* note 196.

382. Johnny R.J. Fontaine, *Shame*, in OXFORD COMPANION, *supra* note 15, at 367–68 (shame is a painful, self-conscious emotion representing a negative perception of the self in relation to unmet expectations, either those set by others or one’s own “ideals and aspirations”).

383. Bernard Rimé et al., *Social Sharing of Emotion: New Evidence and New Questions*, in 9 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 145, 163 (W. Stroebe & M. Hewstone eds., 1998) (experiences of shame are particularly likely to be kept secret).

384. Batja Mesquita & Janxin Liu, *The Cultural Psychology of Emotion*, in HANDBOOK OF CULTURAL PSYCHOLOGY 734, 744 (Shinobu Kitayama & Dov Cohen eds., 2007) (explaining research showing that while in Western cultures shame tends to prompt withdrawal, in East Asian cultures shame tends to be met with attempts at “self-improvement,” sharing, and development of “adaptive resources”).

385. *Vancouver Judge Yells at Convict, Then Apologizes*, *supra* note 199 (judge shouted “shut your damn mouth” at defendant, then apologized).

386. Bernard Rimé et al., *Long-lasting Cognitive and Social Consequences of Emotion: Social Sharing and Rumination*, 3 EUROPEAN REVIEW OF SOCIAL PSYCHOLOGY 225, 238 (W. Stroebe and M. Hewstone eds., 1992) (sharing of shameful experiences is often “more restricted to close and intimate partners than [is] talking about other emotions”).

387. Maroney, *supra* note 13, at 1535–36 n.295 (“[T]he most productive step for the judge might be simply to notice the emotion, accept its existence, and disengage from any judgment of it, including a negative self-judgment.”).

388. O’Brien, *supra* note 141, at 253 (“Judging is one of the world’s great jobs. We are independent, relatively well compensated, and . . . have box seats to the great game of life. The knowledge that this is so puts the stresses of the job into proper perspective.”).

to act when angry, and how anger has worked to help or hinder their judging.³⁸⁹ These skills, fortunately, can be practiced and learned.³⁹⁰ Anger management is a process that, while never perfected or finished, should grow easier over time.

b. Special Issues in Judicial Anger Management

As this analysis reveals, judicial engagement with anger promises to be as helpful as judicial engagement with emotion more generally. It is important to emphasize that the model is not a rigid checklist, nor could it be. The most critical element in judicial anger management, as with all emotion regulation, is flexible responsiveness to context.³⁹¹ Considering three regulatory challenges unique to anger helps demonstrate how this is so.

First, research involving the well-known “ultimatum game” paradigm provides an instructive example.³⁹² In a simple ultimatum game, an experimental subject is told that a game partner will be given a sum of money and will choose what portion of it to offer the subject. If the subject accepts the partner’s offer, she receives that sum; if she rejects the offer, neither gets anything. Accepting any offered amount therefore is economically advantageous. Subjects tend, however, to reject offers they perceive to be unfair.³⁹³ Tellingly, they disproportionately reject unfair offers when they believe the game partner to be a human being (rather than a computer program), and those rejections are associated with a strong response in brain areas correlated with anger.³⁹⁴ Such studies demonstrate that anger can motivate principle-driven decisions, even when those decisions are disadvantageous from the perspective of pure utility.³⁹⁵ That is, it seems to take particular effort to override an anger response where

389. *Id.* at 251 (“I used to be an angry judge. The reasons for my anger were real enough. Being a judge is stressful. For the past 10 years, though, I have been mellow. In deciding to change, I first had to articulate the causes of my stress and then to determine which were within my ability to minimize. (If some of my complaints sound petty, or unreasonably harsh, they in fact were. That was part of my self-discovery.)”).

390. Maroney, *supra* note 13, at 1522–23, 1555.

391. *Id.* at 1510–11, 1514 (“[C]ompetent judicial emotion regulation . . . depends upon flexibility and judgment in responding to a full array of real-time challenges.”).

392. See Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000) (describing ultimatum games).

393. Samuel M. McClure et al., *Conflict Monitoring in Cognition-Emotion Competition*, in HANDBOOK OF EMOTION REGULATION, *supra* note 51, at 204, 211–12.

394. *Id.* The fact that humans are far more likely to be angered at another human, as opposed to an inanimate object (unless it is anthropomorphized), drives home the salience of anger as the driving force in enacting fairness judgments.

395. *Id.*

doing so would confer a concrete benefit—such as some money over no money—at the cost of a moral benefit.

The fact that anger has this characteristic, though, does not dictate any particular response from the perspective of judicial emotion regulation. Favoring principle-driven decisions over utilitarian ones is of obvious benefit where this is just the calculus we expect of our judges. One might, for example, speculate that such a process underlay the recent decision of a federal district judge to reject what he assessed to be a patently unfair settlement proposal between the Securities and Exchange Commission and Citigroup.³⁹⁶ While accepting the settlement would have conferred some financial benefit to harmed parties, and would have saved the judge future time and effort (not to mention criticism), anger may have enabled him to assume those costs. If the deal was actually unfair, those costs are worthwhile, as the parties now have an incentive to craft a fairer one. In other instances, elevation of moral principle over practicality is not what we ask of our judges. If, for example, a judge were presented with a carefully brokered *Alford* plea³⁹⁷ that would free three almost-certainly innocent inmates, we would not want her to reject it because she is angry that the state stubbornly refuses to vacate the convictions.³⁹⁸ The deal may be unfair, but so too is the consequence of rejecting it.³⁹⁹ If the inmates are competent they should be the ones to make that choice, given that they would be the ones to bear the costs.

396. Sec. & Exch. Comm'n v. Citigroup Global Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011) (“[T]he Court concludes, regretfully, that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest.”). Interestingly, several workshop participants reacted to this speculation as if it were insulting to the judge in question, the Hon. Jed Rakoff. The point here is quite the opposite: that if Judge Rakoff felt angry at the parties, such anger was likely to have been both appropriate and helpful. Such reactions by the workshop participants demonstrate the persistence of stigma associated with judicial emotion.

397. *North Carolina v. Alford*, 400 U.S. 25 (1970) (finding constitutional the entry of a guilty plea from a defendant who protests his innocence).

398. This example is drawn from the case of the “West Memphis Three.” See Campbell Robertson, *Deal Frees “West Memphis Three” in Arkansas*, N.Y. TIMES, Aug. 20, 2011, at A1 (describing the case). One may be tempted to say the judge should use that anger to motivate an act of courage in dismissing the charges himself, but in many jurisdictions—including Arkansas—he may lack that authority, see Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes “Actual Innocence,”* 22 U. ARK. LITTLE ROCK L. REV. 629 (2000), meaning he has the choice of taking the *Alford* plea or consigning the inmates to continued incarceration.

399. WEST OF MEMPHIS (Fearless Films 2012) (documentary showing path to the *Alford* pleas, as well as hearing in which pleas entered, despite one defendant’s reluctance to take any action suggesting responsibility; quoting that defendant’s friend as saying, “this deal sucks,” but showing he took it in order to free co-defendant from death row).

We therefore would expect the judge to find a different manner in which to channel her anger.⁴⁰⁰

Second, other aspects of anger that affect its regulation profile similarly point to the importance of context. Because of anger's strong tendency to motivate and fuel approach, it may take particular effort to halt its physical concomitants. These tendencies are suited perfectly to some situations, terribly to others. If a lawyer begins to make a wildly improper argument in front of the jury, the judge may need to react quickly and forcefully to forestall a mistrial—she may need to raise her voice, smack the bench, point at the lawyer to get his attention, and force him immediately to stop talking. In other instances she will have (or can create) time and space within which to choose a different reaction.⁴⁰¹ Similarly, anger's certainty renders the processes of cognitive reappraisal less accessible and more effortful. Avoiding reappraisal prevents waffling, which confers a distinct advantage in some situations.⁴⁰² But other situations call for deliberation and introspection, or even aggressive skepticism about one's initial conclusions, even if the judge is facing criticism as a "waffler" and is under pressure to reach a fast conclusion.

Third and finally, anger disclosure creates special dangers. Though disclosure of other emotions—say, sadness—has been shown to not reduce emotional experience,⁴⁰³ anger disclosure actually has been shown to *increase* it.⁴⁰⁴ Despite the folk wisdom underlying primal scream therapy, anger often is not diffused by letting it out, for example, by "venting."⁴⁰⁵ This holds true for various forms of anger disclosure, including both spontaneous expression (like shouting at a

400. The point here is not to assert, as a matter of fact, that Judge Jed Rakoff was in fact angry at Citigroup and the SEC, or that the judge in the West Memphis cases was angry at Arkansas state officials. This may be true, but the larger point is that these cases show the distinction between situations in which anger could either support or not support rejection of a deal, highlighting the importance of the precise legal context and the interests at stake.

401. Maroney, *supra* note 13, at 1584 n.287 ("[A] retired judge . . . reported that he did sometimes walk out of his courtroom if something happened to make him 'really upset.' He would take some time to calm down and think, then walk back in and respond to whatever had happened.").

402. Lerner & Tiedens, *supra* note 58, at 132 ("[A]nger can buffer decision makers from indecision, risk aversion and over analysis"); O'Brien, *supra* note 141, at 251 ("[M]ost decisions from the bench must be made without benefit of preparation, reflection, or consultation.").

403. Maroney, *supra* note 13, at 1523. The primary benefits of emotion disclosure are increased access to resources such as constructive feedback and social support.

404. Brad J. Bushman, *Does Venting Anger Feed or Extinguish the Flame? Catharsis, Rumination, Distraction, Anger, and Aggressive Responding*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 724, 724–31 (2002).

405. *Id.* at 725–26, 729–30 (marshaling empirical evidence against "catharsis theory" of anger venting).

lawyer in court), informal disclosure (like talking with a spouse), and carefully planned communications (like publishing a fiery dissent). Further, contrary to popular belief, anger is often experienced as hedonically enjoyable, specifically when one is anticipating confronting, defeating, or otherwise getting back at the person at whom one is angry.⁴⁰⁶ This phenomenon raises the distinct danger that judges who express anger may come to enjoy it, including the sense of power it generates, and may become progressively less selective in allowing its expression. Further, making anger known can be destructive in a way that showing other emotions, like sadness, generally cannot. The poisonous effect of the Boggs dissent in the Sixth Circuit affirmative action case, for example, or the interpersonal rancor brought on by performing the biting satirical song about Judge McBryde, is extraordinarily difficult to repair.

These realities do not provide a reason for judges to not express or discuss anger. They do, however, mean that anger expression and disclosure are to be treated with far greater care than other forms of disclosure. Because they will not lessen the feeling, such steps should be designed to serve another purpose, such as processing a given anger trigger's basis or strategizing future responses. More than with other emotions, private disclosures often may be preferable to public ones. Moreover, it will be more important for judges to allow themselves time—even a moment—to choose their anger expressions carefully, to be sure that expression serves a prosocial purpose rather than an antisocial one.⁴⁰⁷

Regulating emotion in light of these three special features of anger requires the judge to make a great many distinctions—between situations in which moral concerns do or do not predominate over utilitarian ones, in which quick, decisive action is or is not called for, and in which disclosing anger will or will not be prosocial. Making those distinctions necessarily depends on context, substance, and particulars. It depends, in other words, on reasoned analysis and self-reflection, tasks that rest in the nonalgorithmic mental processes of human judges.

406. Lerner & Tiedens, *supra* note 58, at 129–31.

407. Maroney, *supra* note 13, at 1530 n.287 (describing how one judge would buy himself such time by leaving the courtroom momentarily); *see also supra* notes 379–88 and accompanying text (giving examples of prosocial uses of anger disclosure).

C. The New Model of Judicial Anger, Encapsulated

This Part has proposed a new model for judicial anger, that of the righteously angry judge. The model is rooted in the core themes of anger itself—a judgment that a rational agent has committed an unwarranted wrongdoing, which generates a desire to affix blame and assign punishment, and facilitates action to carry out that desire. It may be encapsulated as follows.

Righteous judicial anger is, first, based on an accurate perception of reality. It is responsive to actual, not imagined, acts. Those acts must have been committed by persons who had some meaningful level of choice, and must have caused real harms, not ephemeral or insignificant ones. The righteously angry judge strives to be as open as possible to accurate perception of these elements, to be diligent in her search for truth, and to prevent anger from coloring her view or blocking her ability to update information.

Second, righteous judicial anger is relevant. It bears on issues properly before the judge and sheds light on how those issues should be evaluated. The righteously angry judge strives to perceive the causes of her anger—whether, for example, it reflects the seriousness of an attorney’s defiance of court orders, or whether it stems from that attorney’s consistently abrupt manner or an unrelated insult suffered earlier in the day. If the anger is irrelevant, or only marginally relevant, the judge seeks to ground her actions in other factors.

Third, righteous judicial anger reflects beliefs and values that are worthy of a judge in a democratic society. The righteously angry judge seeks to avoid anger at attorneys, witnesses, colleagues, and parties for taking actions they have a right, or even an obligation, to take. She seeks to do so even though such actions might be highly irritating; entail acts that are oppositional to the judge and her decisions; open her to the possibility of criticism and reversal; make her work significantly harder; and (in the case of judicial colleagues) embody substantive judgments she believes to be incorrect or harmful. The worthiness of the beliefs and values underlying judicial anger is at its peak where they reflect widely shared moral sentiments of harm, culpability, and shared community. The righteously angry judge also seeks to avoid contempt, as that emotion reflects an unwarranted claim of superiority.

Righteous judicial anger not only is accurate, relevant, and reflective of good values, it also is experienced and expressed in an appropriate way. The righteously angry judge is aware of both the benefits and dangers of anger, and seeks to maximize the former and minimize the latter. She seeks to draw on anger’s certainty and power

when justice requires her to make fast, difficult, even risky, decisions, and to resist its pull where the situation merits greater scrutiny and caution. She interrogates her punitive impulses to see if they are well grounded and commensurate to the harm. She considers the impact on others of expressing her anger, and seeks to embody only those reactions as will further some legitimate interest—such as stopping destructive behavior, broadcasting authority, or channeling society's moral messages.

Finally, righteous judicial anger is enabled by strong emotion-regulation skills, which can be learned and must be regularly practiced. The righteously angry judge seeks to prepare realistically for anger, for it is certain to come; to respond thoughtfully to anger, for she may be able to rethink the situation or select a different response to it; and to integrate anger into her behavior and decisionmaking, by making use of it when it is righteous and by finding other outlets—such as private disclosure to a trusted colleague—when it is not. The judge must not deny or suppress her anger. Rather, she must face it honestly and engage with it closely. She must also accept that she is fallible. She will make mistakes, allow anger to bleed from one situation to another, value things like her pride more than she ought, and indulge in displays she wishes she had not. The righteously angry judge faces these failings and seeks to learn from them.

When judicial anger has all these characteristics, feeling and expressing it serves the ends of justice—indeed, in the Aristotelian view it *is* justice. As the Greek tradition would hold, when “law itself is angry,” so too should be the judge.⁴⁰⁸

CONCLUSION

As this Article has shown, judicial anger is inevitable, and its manifestation both frequent and obvious. We cannot get away with ignoring it. Interestingly, the Article also has shown that despite the historical party line against any judicial experience or expression of emotion, anger escapes blanket condemnation in practice. The close look shows why anger would be treated specially: in the real world, people in contact with law often act in ways that would make any reasonable person—including a reasonable judge—angry. Fellow judges are reluctant to impose on others feeling rules they could not possibly live up to themselves. Nor *should* they live up to such a standard. Courts' reluctance to condemn judicial anger is deepened by

408. Potegal & Novaco, *supra* note 8, at 18.

a strong sense that it is sometimes warranted, such that failing to feel it would be suspect. If a judge were to feel entirely unmoved by lying, scheming, derailing legal proceedings, and harming others for no reason, we might question whether she had lost touch with reality in some fundamental, career-ending way. As Robert C. Solomon, the eminent contemporary philosopher of the emotions, has written, we cannot “have a sense of justice without the capacity and willingness to be personally outraged.”⁴⁰⁹

On the other hand, even though we cannot look away from judicial anger, we might sometimes wish we could. Angry judges scream and flail about; they threaten and insult lawyers, parties, and one another; in the most extreme instances, they physically attack. Just as the absence of anger seems fundamentally at odds with our aspirations for judges, unbounded anger does as well. While the YouTube-viewing or Judge Judy-loving public might consume such incidents with glee, those who care deeply about justice and its image cannot help but wince.

While adherence to the ideal of dispassionate judging places us on record as Stoics, then, reality has made us accidental Aristotelians. Law is of two minds about judicial anger for good reason.⁴¹⁰ Our legal culture simply cannot eschew judicial anger, any more than it could applaud all its iterations. We have no choice but to ask whether it stems from good reasons and is felt in the right way.

However, because we have not come to this place deliberately or transparently, our analyses tend to be shallow and undertheorized. Indeed, it is typical in the case law for a reviewing court to recite the evidence of anger, quote the general principles of cases creating a generous buffer zone, and simply conclude that the anger was (or, far less frequently, was not) within the buffer. Just as often, courts dodge the issue entirely—for example, by quickly characterizing the display as harmless error. Popular assessments of judicial anger are even less coherent, as they tend to swing on whose ox is being gored. This Article has demonstrated that our evaluation can be more disciplined and principled. By focusing tightly on questions of justification and manifestation, we can test judicial anger for righteousness.

409. SOLOMON, *supra* note 64, at 42 (“[N]egative’ emotions” such as “outrage” have “an essential place in the cultivation of justice.”); *id.* at 243 (“Our sense of justice is not just the product of New Age sentiments but a dynamic engagement in a world which we ourselves know to be often offensive and unfair . . . a world we accordingly resent and act to change.”).

410. Lerner & Tiedens, *supra* note 58, at 132 (anger might take a decisionmaker in a bad direction sometimes, a good direction in others); Peters et al., *supra* note 312, at 83 (Emotion “can have frightening effects on decision making,” but also can assist “decision makers to integrate disparate information and to make sense out of a complex world.”).

We should entertain no illusions that this will be easy. Judges will not find it easy to feel only righteous anger, nor will those of us who judge the judges find it easy to diagnose righteousness. Indeed, we should expect these tasks to be hard.⁴¹¹ This is particularly so as—despite a shared moral baseline—we are unlikely ever to be in true consensus as to the normative values underlying all instances of judicial anger. As Aristotle wrote:

[I]t is not an easy task to delineate how, at whom, at what, and for how long one should anger, nor at what point justifiable anger turns to unjustifiable. He who swerves a bit toward excess of anger is not to be blamed[, but] [h]ow far and how much one has to swerve before he becomes . . . blameworthy is not easy to specify.⁴¹²

Faced with this difficulty, we need not rely on vague intuitions or deal with anger episodes as a disconnected series of one-offs. The model set forth in this Article provides us with theoretical tools with which to imagine righteous judicial anger and practical tools with which to achieve it. Except in extreme circumstances, and there will be some, judges who fall short of this ideal merit not condemnation but guidance. Righteously angry judges, in contrast, merit our approval and thanks.

411. Lerner & Tiedens, *supra* note 58, at 132 (“[A]ngry decision makers may then, as Aristotle suggested long ago, have a difficult time being angry at the right time, for the right purpose, and in the right way.”).

412. WHAT IS AN EMOTION?, *supra* note 74, at 51 (quoting ARISTOTLE, NICOMACHEAN ETHICS).