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## The Emotionally Intelligent Judge

Terry A. Maroney

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# The Emotionally Intelligent Judge: A New (and Realistic) Ideal

Terry A. Maroney

As a Supreme Court Justice once wrote, “dispassionate judges” are “mythical beings,” like “Santa Claus or Uncle Sam or Easter bunnies.”<sup>1</sup> Judges have emotions, and emotions influence decision making. These observations may seem obvious, even banal. But their implications are broad-reaching. Judicial emotion is more common than most people—certainly laypeople, and perhaps judges as well—would like to believe. Further, emotion almost certainly has a substantial impact on judicial decision making and behavior—and that is not necessarily a bad thing.

The ideal of the emotionless, “dispassionate” judge has a very long pedigree. More than three centuries ago, Thomas Hobbes wrote in *Leviathan* that the ideal judge is “divested of all fear, anger, hatred, love, and compassion.”<sup>2</sup> To a modern ear such a blunt statement sounds, perhaps, antiquated. To the extent this is so, it is because the Legal Realists of the early twentieth century largely convinced us of the importance of the person wearing the robe. Law is not certain, and judges have discretion, within which space ostensibly “alogical” or “non-rational” forces have room to operate.<sup>3</sup> As the great Benjamin Cardozo once mused, “Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.”<sup>4</sup>

In our post-Realist world, such frank acknowledgment of judges’ humanity is relatively commonplace. As other contributions to this special issue make clear,<sup>5</sup> judges are affected by factors as diverse as fatigue and life experiences, and they deploy common (but sometimes misleading) decision-making shortcuts known as heuristics. Judges are likely no better than ordinary humans at multitasking or truth-telling. An entire academic cottage industry is devoted to ascertaining the decisional influence of personal characteristics such as gender and political party.

But we still seldom talk about the *emotional* aspect of judges’ humanity. And when we do, we run into a fairly solid wall of opposition. Judicial emotion generally is seen as an unfortunate consequence of having to populate the legal system with fallible, biased, real people. Indeed, emotion traditionally has been counted among the primary sources of fallibility and bias. A Maryland judge expressed this well: “Judges, being flesh and blood, are subject to the same emotions and human frailties as affect other members of the species.”<sup>6</sup> The task of the legal system, under this contemporary view, is to systematically reduce the opportunities for judicial emotion to insert itself; the task of the good judge is to prevent emotion from exerting any influence wherever such opportunities remain.

We saw this view vividly articulated during the 2009 nomination of now-Justice Sonia Sotomayor, who some feared would have an overly “empathic” judging style. One senator implied that judges’ emotions posed a threat to liberty;<sup>7</sup> a prominent professor declared that a “compassionate, empathic judge was very likely to be a bad judge”;<sup>8</sup> a journalist noted that the mere suggestion that emotion might affect judging was “radioactive.”<sup>9</sup> Even among Sotomayor’s supporters, defense of empathy (or any emotional influence) was tepid at best. She was finally able to put the issue to rest by offering a standard post-Realist narrative: that while judges are not “robots” and do have feelings, a good judge recognizes those feelings and puts them aside.<sup>10</sup>

Certainly, judges are *not* robots, so the first half of that story is correct. But what if the latter part is wrong? What if emotion—at least sometimes—offers something of value to judicial decision making? Judge Richard A. Posner has suggested as much, writing that judges ought not try to become “emotionless, like computers,” because feelings might sometimes be necessary to good judging.<sup>11</sup> Justice William J. Brennan similarly asserted that good judgment flows from a “dialogue of

## Footnotes

Many of the ideas expressed in this article are explored in much greater depth in my prior works, all of which are available at my Vanderbilt Law School faculty website and on SSRN. See Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207 (2012); *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485 (2011); and *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629 (2011). This article is by design lightly footnoted; I refer the interested reader to the extensive citations in those longer publications.

1. *United States v. Ballard*, 322 U.S. 78, 93-94 (1944) (Jackson, J., dissenting).
2. THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., 1904) (1651).
3. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 706 (1931).
4. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-68 (1921).
5. See Pamela Casey, Kevin Burke & Steve Leben, *Minding the Court: Enhancing the Decision-Making Process*, 49 CT. REV. 76 (2013);

Eyal Peer & Eyal Gamliel, *Heuristics and Biases in Judicial Decisions*, 49 CT. REV. 114 (2013).

6. *State v. Hutchinson*, 271 A.2d 641, 644 (Md. 1970).
7. Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary, 111th Cong. 13 (2009) (statement of Sen. Orrin Hatch). See also *id.* at 17 (statement of Sen. Lindsay Graham) (a judge’s most critical qualification is “the capacity to set aside one’s own feelings so he or she can blindly and dispassionately administer equal justice for all”).
8. John Yoo, *Closing Arguments: Obama Needs a Neutral Justice*, PHILA. INQUIRER, May 10, 2009, at C3.
9. Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 26, 2010, at A12.
10. Sotomayor Confirmation Hearings, at 71, 120 (statement of J. Sonia Sotomayor).
11. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 226 (2001).

reason and passion.”<sup>12</sup> If that is so, what might that dialogue sound like?

These are questions that law need not—indeed, cannot—answer on its own. A rich and fast-growing body of literature on the role of emotion in human life offers insight and guidance. Indeed, the study of emotion is one of the fastest-growing sectors within psychology and neuroscience. This explosion in the “affective sciences” joins a resurgence of interest in the topic within philosophy, history, and sociology. The consensus from outside law is clear. Emotion’s impact on decision making and behavior can be (and usually is) positive, even indispensable. Emotion’s impact can also be detrimental, depending on factors such as intensity, duration, and—most critically—context. Drawing on these interdisciplinary insights, we can think in a coherent way about when emotion might help a judge perform her job better, when it might hinder job performance, and how a judge might tell the difference.

This short article offers the judge a roadmap for thinking about the role of emotion in judicial decision making. It first presents the limited empirical evidence drawn from judges themselves, demonstrating that coping with emotional challenges is an unrecognized aspect of judges’ work. It goes on to describe what the affective sciences teach us about emotions’ impact on human decision making and behavior. To make the discussion concrete, the article periodically applies those insights to the phenomenon of judicial anger. Finally, an analysis of emotional regulation strategies offers a concrete path by which judges can learn to maximize helpful iterations of emotion and minimize destructive ones.

### **COPING WITH EMOTIONAL CHALLENGES: AN UNDER-APPRECIATED ASPECT OF JUDGING**

Judges, particularly trial judges, often have to manage the emotions of other people. Distraught victims and witnesses have to be attended to; disruptive family members or criminal defendants must be cautioned, disciplined, or removed; angry disputes between lawyers need to be mediated or broken up.<sup>13</sup> Judges are asked to filter out emotional influences, such as disturbing evidence and provocative buttons or t-shirts worn by spectators, if there is a risk that a jury’s emotions might be manipulated or inflamed.<sup>14</sup> Indeed, trial judges may be called upon to instruct jurors about how to handle their emotions during deliberations.<sup>15</sup>

While the legal system recognizes that handling the emo-

tions of others is part of a judge’s job, it tends to ignore something just as important: the fact that judges, too, have emotions to handle.<sup>16</sup> Misbehaving lawyers and litigants can make judges angry. Disturbing evidence may affect a judge as much as it does a juror. The stories of litigants’ unhappy lives can trigger sadness. Judges might feel frustrated, even depressed, when they are unable to fix all the ills

paraded before them. As one has written, “[S]ometimes [the judge] has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn’t know what to do about it, and it makes him feel sad. . . . Sometimes he even gets angry about it.”<sup>17</sup> Litigation generally follows harm or grievance, meaning that such unpleasant emotions are nowhere in short supply.

Fortunately, judges also experience more pleasant emotions. They may feel joy when a suffering child is placed with a family, or hope when a drug-court defendant completes treatment and begins to turn his life around. Presiding over naturalization ceremonies for new Americans is an occasion for gratitude, even a soaring feeling that psychologists call “elevation.”<sup>18</sup> Crafting a tightly reasoned, well-written opinion can generate pride. Simply feeling like you are doing a good job, even under trying circumstances, can be a source of deep satisfaction. The emotions a judge feels will be as varied as the cases she hears.

Because our legal culture expects judicial “dispassion,” however, judges do not often disclose their emotional reactions or discuss how they process them. As that taboo breaks down, we may see increased space for much-needed empirical work exploring those issues. As things stand today, we must glean clues from rare moments of candor.

Those moments show that emotion infuses many aspects of judges’ work. Judges sometimes note their emotions before declaring an intention to override them.<sup>19</sup> With the proliferation of cameras in courtrooms, coinciding with the growth of social-media outlets, the public has developed an appetite for intemperate displays, gleefully referred to as “benchslaps.” In burial disputes, which often involve grisly details and vitriolic

**Because our legal culture expects judicial “dispassion,” . . . judges do not often disclose their emotional reactions . . .**

12. William J. Brennan, *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3 (1988).

13. See, e.g., Lydia Polgreen, *In Affidavit at Bail Hearing, Track Star Denies He Intended to Kill Girlfriend*, N.Y. TIMES, Feb. 20, 2013, at A9 (describing how the Olympian Oscar Pistorius broke down at his bail hearing: “Magistrate Desmond Nair called a recess to allow Mr. Pistorius, who was sobbing loudly, his face contorted, to regain his composure. ‘My compassion as a human being does not allow me to just sit here,’ Magistrate Nair said.”).

14. *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

15. *California v. Brown*, 479 U.S. 538, 542-43 (1987); *Saffle v. Parks*, 494 U.S. 484, 493 (1990).

16. ARLIE R. HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* 7 (1983) (defining sociological concept of “emo-

tional labor”).

17. *Carrington v. United States*, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) (quoting GERRY H. SPENCE, *OF MURDER AND MADNESS: A TRUE STORY*, 490 (1983)).

18. Jonathan Haidt, *Elevation and the Positive Psychology of Morality*, in *FLOURISHING: POSITIVE PSYCHOLOGY AND THE LIFE WELL-LIVED* 275-89 (C. L. M. Keyes & J. Haidt eds., 2003)

19. See, e.g., *States v. Cutts*, No. 2008CA000079, 2009 WL 2170687 (Ohio App. 5 Dist. Jul. 22, 2009) (Delaney, J. concurring) (“I am saddened by the tragic loss of life this case presents and sympathize with the families of all involved. But, when I put on the robe as judge, I must not let my feelings, my emotions . . . influence my review and application of the law.”).

**Data from two small case studies further illuminate the reality of judicial emotion.**

family dynamics, judges have voiced the “dismay,” “sympathy,” and “difficulties and embarrassment” with which they grapple.<sup>20</sup> Recently, several prominent federal judges have disclosed that they find criminal sentencing to be particularly infused with emotion.<sup>21</sup>

While trial-level work in the state criminal and family courts may provide the steadiest flow of emotion-triggering situations, no judge is immune. Highly publicized instances of intra-court animosity, including in the appellate courts, sometimes shine an unflattering light on the role of personal feelings.<sup>22</sup> Even the highly cloistered appellate environment of the U.S. Supreme Court has an emotional life. Justice David Souter reportedly cried during the process of deciding *Bush v. Gore*,<sup>23</sup> and Justice Clarence Thomas, not known for public displays of emotion, has said that “some cases . . . will drive you to your knees.”<sup>24</sup>

Data from two small case studies further illuminate the reality of judicial emotion. In the first, Australian magistrate judges answered a survey about various aspects of their work.<sup>25</sup> Much like state trial-court judges in the U.S. system, Australian magistrates handle the majority of civil and criminal actions. These judges reported expending significant effort to manage their emotions, most of which were negative. One, for example, characterized his work as “seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out.”<sup>26</sup> Another reflected thus on working with child-welfare cases:

I have a problem walking away and just erasing everything I've heard about families and the stress that they're under, the treatment children have been dished out, what will happen to them for the rest of their lives. I just find it difficult to walk away from that and go home to my own children and look at them and think “Oh, God”, you know. I usually find I try to be more patient with my own children when I go home after a day in the [family court]. So it's just the sadness; there is no good news.<sup>27</sup>

Similar sentiments were expressed by a small group of Minnesota state judges asked to reflect on victim-impact state-

ments.<sup>28</sup> The researchers described one response thus:

One judge . . . recalled a DWI case in which a young child [had] almost lost his life. His mother delivered an impact statement in which she described how she thought her son was going to die. “I remember thinking,” the judge said, “I am going to cry.” But he regained what he thought was necessary composure because “you are not supposed to cry on the bench when you are a judge.”<sup>29</sup>

Other Minnesota judges reported feeling frustration, anger, and compassion, emotions prompted both by the underlying facts and by the victim-impact statements.

Importantly, both the Australian and Minnesotan judges reported that they found the work of regulating their emotions to be difficult. One magistrate offered a particularly stark assessment:

Now, there's two things that can happen to you. Either you're going to remain a decent person and become terribly upset by it all because your emotions—because your feelings are being pricked by all of this constantly or you're going to become—you're going to grow a skin on you as thick as a rhino, in which case I believe you're going to become an inadequate judicial officer because once you lose the human—the feeling for humanity you can't really—I don't believe you can do the job.<sup>30</sup>

This perception of nothing but bad options was, unfortunately, echoed by the Minnesota judges. Some reported feeling that, as the legal system tends “to strip away emotions,” they were “working in a factory of sorts in which we are just grinding these cases out,” causing them to worry that they were becoming “insulated and numb” in the process.<sup>31</sup>

These windows into judges' experience suggest that their work often prompts an emotional response; that such responses are often unpleasant; that managing those emotions is difficult; and that these challenges have an impact on how the judge acts in the moment and on how she feels about her work in the longer term. These voices also strongly suggest that judges feel inadequately trained and supported in this aspect of their work.

Fortunately, insights from the affective sciences can help change this rather bleak assessment.

20. Heather Conway & John Stannard, *The Honours of Hades: Death, Emotion, and the Law of Burial Disputes*, 34 U. SOUTH WALES L.J. 860 (2011).

21. See Benjamin Weiser, *Madoff Judge Recalls Rationale for Imposing 150-Year Sentence*, N.Y. TIMES, at A1, A19 (Jun. 29, 2011) (interview with Judge Denny Chin); Del Quentin Wilber, *Judge Who Had 'No Passion for Punishment' Retires After 31 Years*, WASH. POST, June 1, 2012 (interview with Judge Ricardo Urbina).

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

23. Douglas W. Kmiec, *The Case for Empathy: Why a Much-Maligned Value Is a Crucial Qualification for the Supreme Court*, AMERICA MAGAZINE (May 11, 2009).

24. Adam Liptak, *Justice Thomas, 5 Years Slient: There's No Arguing with Him*, N.Y. TIMES, Feb. 13, 2011, A1 (also quoting Thomas as saying that cases can make him “morose”).

25. Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32(4) J. LAW & SOCIETY 590-614, 614 (2005).

26. *Id.* at 611.

27. *Id.* at 613.

28. Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6 LAW, CULTURE & HUMANITIES 75 (2010).

29. *Id.* at 89.

30. Anleu & Mack, *supra* note 25, at 612.

31. Schuster & Propen, *supra* note 28, at 89.

## EMOTION AND DECISION MAKING: INSIGHTS FROM PSYCHOLOGY AND NEUROSCIENCE<sup>32</sup>

The first insight the legal system would do well to internalize is that we need not ask judges to “strip away” their emotions, because those emotions offer something of value.

Contemporary scholarship outside of law has generated a consensus that emotion is an evolved, adaptive mechanism, necessary for survival, social cohesion, and practical reason. This consensus is rapidly eroding the stark division between reason and emotion that traditionally has held sway in both the sciences and in law. As I explain briefly below, emotion reveals reasons, motivates action in service of reasons, and enables reason.

**Emotion reveals reasons.** This insight flows from what psychologists refer to as the “cognitive-appraisal” theory. This theory focuses on the “aboutness” of any given emotion. Emotions are not random; rather, they are directed at objects. We love our mothers, for instance, and the specificity of that love is how we experience the concept of “love.” Further, every emotion has a basic underlying thought and belief structure—an “appraisal”—which is an important way in which we distinguish them from one another. Anger, for example, reflects a judgment that someone has wrongly threatened or damaged something or someone that we value. In contrast, we feel sad when we perceive an irreversible loss, or guilty when we perceive ourselves to have done wrong.

It is helpful to think of appraisal structure as akin to the theory of universal grammar. Human language is built of a relatively constrained set of grammatical elements—nouns versus verbs, function versus lexical words, and so on—but different cultures fill in different content, making our languages distinct. Similarly, all humans appear to have a common core of basic emotions underlain by highly similar appraisal structures, but how we fill in those structures can vary. What makes one person afraid might make another person happy. This is not because these two people have radically different concepts of fear and happiness; rather, they have radically different ideas as to what states of the world satisfy the conditions that trigger those emotions.<sup>33</sup> In the case of anger, what constitutes a perceived wrong will vary; who we consider part of the group on whose behalf it is right to be angry will vary; even the proper goal to be advanced by anger—for example, vindicating honor or broadcasting moral judgment—will vary.

Thus, emotion embodies thought, often complex and even culturally scripted thought, and those thoughts can be evaluated just like any others.<sup>34</sup> Again, the example of anger is helpful. Whether we approve or disapprove of an angry person depends on whether we think her perception of the triggering event is accurate—that is, whether the event really occurred as she believes it did—

and whether her judgments strike us as warranted—that is, whether the event really constitutes a wrong of which a person rightfully should disapprove.

Thus, emotion reveals what a person is thinking. It reveals her reasons.

**Emotion motivates action in service of reasons.** Emotions do not simply reflect passive assessment of what we perceive to be happening in the world; they prompt us to respond to that world. The idea in the sciences is that we evolved capacity for emotion in order to maximize survival chances, and we now use that capacity to propel us in the direction of a wider variety of goals. Fear provides a nice example. If you perceive that a grizzly bear is approaching, your perceptions and resulting thoughts will spur fear. Fear will focus your attention on the bear and prompt you to evaluate its relevance to your goals—for example, the desire not to be mauled or killed. Fear then enables responsive action, including patterns of bodily response (like fleeing), as well as typified facial expressions (grimacing) and verbalizations (screaming) that signal your emotional state to others. This is a rather primal example, but the same principle holds for all emotions. Feeling love toward an infant, for example, tends to motivate actions designed to keep the baby alive and thriving, and feeling guilty about having wronged a friend tends to show itself in a pained face, which can communicate a desire to repair the relationship.

Thus, emotion not only reflects thoughts; it serves as an adaptive signal that something of import to a person’s flourishing is at stake and activates a real-time response.

**[W]e need not ask judges to “strip away” their emotions, because those emotions offer something of value.**

32. The following discussion is drawn primarily from the following scientific sources: THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009); REGULATING EMOTIONS (Marie Vandekerckhove et al. eds., 2008); PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES (Paula M. Niedenthal et al. eds., 2006); HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003); HANDBOOK OF EMOTIONS (Michael Lewis & Jeannette M. Haviland-Jones eds., 2d ed. 2000); COGNITIVE NEUROSCIENCE OF EMOTION (Richard D. Lane & Lynn Nadel eds., 2000); JOSEPH LEDOUX, THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE (1996); THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS (Paul Ekman & Richard J. Davidson eds., 1994); ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS

(1988); Keith Oatley & P.N. Johnson-Laird, *Toward a Cognitive Theory of Emotions*, 1 COGNITION & EMOTION, 29-50 (1987).

33. Though evolved “biological universals link the *if* with the *then*,” individual and cultural factors “affect the *if*” by determining what circumstances are thought to constitute, for example, “a demeaning offense” (for anger) or an “irrevocable loss” (for grief). Richard S. Lazarus, *Universal Antecedents of the Emotions*, in THE NATURE OF EMOTION, *supra* note 32, at 167-68.

34. JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 12 (2008) (emotions “are on a par with beliefs and judgments, decisions and resolutions,” for they are “states that one can regard as rationally warranted or unwarranted, justified or unjustified by the circumstances in which they occur or the beliefs on which they are based”).

**Not only does reason facilitate and shape emotion, but each plays a vital role in our ability . . . to navigate the world . . . .**

**Emotion enables reason.**

Finally, one of the most cutting-edge implications of modern research is that emotion and reason are intertwined, such that the latter can't fully be realized without the former. Neuroscience, for example, has shown that people with particular sorts of brain disease and injury show a decline in both emotional capacity and substantive rationality.<sup>35</sup> Extreme

emotional deficits in such people are strongly correlated with inability to engage in vital forms of reasoning—evidenced, for example, by inability to make appropriate, self-interested choices in a simple gambling task. They become unable to suppress inappropriate actions, to understand and respond to social cues, and to advance their own interests and preferences. In other words, social and emotional competence can be devastated while more purely cognitive capacities, like logic, remain intact.

Emotion also appears necessary to moral judgment. A creative series of experiments involving the classic philosophical “trolley problem” illustrate that phenomenon.<sup>36</sup> In the trolley problem people are asked to choose between two options. The first is to flip a switch to divert an out-of-control trolley, killing a worker on the diversion track but saving five people in its original path. The second option is to push a human being off a bridge so that he lands in front of the trolley, saving the five but killing him. In either case the cold calculation is the same: save five lives by sacrificing one. Most normal people, though, think option one is moral, even necessary, while option two is immoral. The differential? Emotion. The heightened emotional salience of person-pushing accounts for an overwhelming preference for switch-flipping. Psychopathy provides another example of emotion's relevance to morality. The antisocial and amoral behavior typifying serial murderers and other psychopaths correlates at the neural level with a lack of normal emotional response.<sup>37</sup> Psychopaths' moral indifference mirrors their emotional indifference.

In short, emotion is not the enemy of reason. They are interdependent. Not only does reason facilitate and shape emotion, but each plays a vital role in our ability competently to navigate the world, including our capacity for substantive rationality and moral judgment. This is as true for judges as it is for human beings generally.

**Emotion is not always a positive force.** The prior discussion has highlighted the overall positive contribution of emotion. Given the generally negative narrative we have inherited in our legal culture, it is important to spell out the parameters of that contribution. But, of course, the negative narrative has to have some truth to it.

Indeed, it often has a lot of truth to it. Another insight from the sciences is that all human tendencies and capacities that are adaptive most of the time are maladaptive some of the time. The common decisional heuristics described elsewhere in this special issue fit into that category: quick, efficient guides to judgment that work quite well in many situations but predictably lead to error in a small set of others. This is certainly true of emotion.<sup>38</sup>

By way of illustration, recall the story of the approaching grizzly bear. Fear quickly narrows attention to sources of threat (the bear) and opportunity (escape routes), to the exclusion of other stimuli. That attentional effect is vital, but it has costs. For example, you will be far less able to perceive and remember less emotionally vivid aspects of the situation, like an important conversation you were having just before you saw the bear. The emotion needs to be intense to do its job, but as a result you might not notice the ditch standing between you and the escape route.

Similarly, different emotionally infused mood states tend to dispose us to different decisional styles, which might be disadvantageous in particular situations. Moods are experiential states that are more generalized, longer-lasting, and less object-driven than emotions: think of the difference between feeling “down” and being concretely sad about the death of a beloved pet. Because emotions and moods are so closely related, though, they often are studied together. Often what starts as a discrete emotion will morph into a mood (you are sad that your dog died, and it makes you feel down for a long time for no particular reason), or our moods predispose us to experience discrete emotions (you feel down, so you find more things to be sad about). Moods, unfortunately, can be mismatched with the decisional demands we face at any given moment. This, too, is a nice insight raised elsewhere in this special issue, in which it is noted that certain moods “are best suited for decision-making tasks that are interesting or require creativity or efficiency,” while others are “best suited for decision tasks that are effortful and/or require careful consideration and analysis.”<sup>39</sup> In an example of particular relevance to judges, people in sad moods tend to scrutinize evidence more carefully than do happy or angry people, meaning that happiness, anger, and their associated moods can sometimes contribute to blind spots. This is why Judge Posner once warned

35. S. W. Anderson et al., *Impairments of Emotion and Real-World Complex Behavior Following Childhood- or Adult-onset Damage to Ventromedial Prefrontal Cortex*, 12 J. INT. NEUROPSYCHOL. SOC. 224 (2006); Bechara et al., *Characterization of the Decision-Making Deficits of Patients with Ventromedial Prefrontal Cortex Lesions*, 123 BRAIN 2189 (2000).

36. Joshua Greene et al., *An fMRI Investigation of Emotional Engagement in Moral Judgment*, 293 SCI. 2105, 2105-07 (2001).

37. Kent A. Kiehl, *Without Morals: The Cognitive Neuroscience of Criminal Psychopaths*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT 120-49 (Walter Sinnott-Armstrong ed., 2008).

38. Paul Slovic et al., *The Affect Heuristic*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397, 397-420 (Thomas Gilovich et al. eds., 2002).

39. Kimberly D. Elsbach & Pamela S. Barr, *The Effects of Mood on Individuals' Use of Structured Decision Protocols*, 10 ORGANIZATION SCI. 181, 193 (1999).

that we ought to “beware the happy or the angry judge!”<sup>40</sup>

Finally, very intense emotion can sometimes lead us astray and even defeat our goals. Fear can paralyze; sadness can overwhelm; love can blind. This reality is so evident from our lives that it needs no further comment here.

A full understanding of emotion’s impact, then, requires us to consider both what it offers and what it might take away. Recognizing emotion’s value is critical, given how thoroughly we’ve disparaged it to date. That does not mean we should give it free rein. The capacity to *regulate* emotion is a skill every bit as critical as is the capacity to *feel* emotion.

### THE PLUSES AND MINUSES OF EMOTION FOR JUDGES

These fundamental understandings about the nature and function of emotion clearly matter to judges as people. An emotionally well-adjusted judge is likely to have better physical health, happier work-life balance, and more functional personal relationships. Like caring for the body, caring for emotional health helps us achieve more satisfying lives.

The remainder of this article, though, focuses how these insights affect judges as judges—that is, in the concrete context of judicial work settings. After extending the prior discussion to judicial emotion, using anger as the primary example,<sup>41</sup> the article goes on to explain how judges can most effectively regulate the emotions they are bound to have.

First, one benefit of an emotion for judges is that it signals seriousness, both internally and externally. Consider anger. Angering events are vivid, which sends a signal that something important is happening. Whereas some emotions have a strong withdrawal tendency—for example, disgust makes us back away—anger keeps us engaged, meaning that it focuses the judge’s attention to the offending person and situation. Anger also communicates seriousness to others. Its typical physical manifestations—raised voice, clenched eyebrows, narrowed eyes, a scowl, and tensed muscles—are extraordinarily potent communicative devices. Anger conveys power. Thus, the emotion sends important signals both *to* the judge and *from* the judge.

Second, anger motivates us to assign blame and consequences. It is tightly bound up with an urge to restore justice. Further, anger makes us more willing to take risks, in part because it is associated with optimism and feelings of being in control. Indeed, experimental studies show that people prefer being in an angry state when faced with a confrontational task, because anger helps them take on and succeed at the confrontation. It also literally heats us up, to prepare the body and mind for action—think of that telltale “boiling” feeling. Thus, anger facilitates both judgment and action.

These attributes are of obvious utility to judges—indeed, one is tempted to say they are *necessary*, or even that anger is quintessentially judicial. A judge often is asked to assign blame and

consequences, which anger can help her do. It can also help her take necessary risks. Judges sometimes have to alienate powerful interests, upset potential voters, disappoint decent people who have been wronged, and even jeopardize public safety. The late Judge John Sprizzo of the Southern District of New York, for example, once expressed fury at having to release high-level drug dealers because of fatal flaws in the indictment.<sup>42</sup> Similarly, some judges reported recently that they hesitated in sanctioning police officers who had committed blatant perjury, citing a fear of ruining careers or conferring an undeserved benefit on defendants. Anger at the officers’ abuse of the system helped them do what was right, not what was easy.<sup>43</sup>

Anger can also keep the judge’s mind in the courtroom, so to speak. Given the welter of stimuli and stressors to which judges are exposed, they may need emotion to flag possible misconduct, direct attention to it, and keep attention from sagging. Moreover, anger’s expressive benefits are strategically invaluable. Consider the difference between quietly suggesting that a lawyer stop making improper objections despite repeated instructions not to do so and smacking your hand on the bench and using a sharp tone.

Anger is not the only emotion that can serve judges well. Expressions of sorrow, for example, may demonstrate respect to present victims. A nice example from recent events: In a display remarkable enough to be extensively covered by the media, a New York City trial judge presiding over the sentencing of a serial killer cried when pronouncing sentence.<sup>44</sup> One of the things that made this moment remarkable was that the sentence made no practical difference; the defendant was already serving multiple life terms in California. The judge’s tears drove home its symbolic and emotional importance. The victims’ families reported that those tears meant a lot to them: they felt that their suffering had been acknowledged, turning a proceeding that could have been painfully *pro forma* into one that was meaningful.

If the tears-at-sentencing example shows that judicial emotion can convey compassion and respect, other emotions might instill motivation. Much of the drug-court model, for example, is premised on the idea that if the defendant feels that the judge cares about his future, he will be motivated to change. That defendant, we hope, will internalize some of the judge’s hopes for him. Judges also report reciprocal benefits; feeling such hope, at least from time to time, can make the more difficult

**A full understanding of emotion’s impact . . . requires us to consider both what it offers and what it might take away.**

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

41. Much of the discussion of anger’s psychological attributes is drawn from *INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES* (Michael Potegal et al. eds., 2010); Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker*, 19 J. BEHAV. DEC. MAKING 115 (2006); and JAMES R. AVERILL, *ANGER AND AGGRESSION: AN ESSAY ON EMOTION* 248-49 (1982).

AN ESSAY ON EMOTION 248-49 (1982).

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

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

44. Russ Buettner, *Judge Cries During Sentencing of Serial Killer Rodney Alcala*, N.Y. TIMES, Jan. 8, 2013, at A17.



**[A]nger can lead to decisions that are premature or overly punitive—or both.**

moments far more bearable.

The flip side of this coin, of course, is the danger posed by judicial emotion. Anger again provides our primary example. First, as suggested by the prior discussion of moods, anger tends to trigger shallow patterns of

thought, such as reliance on schemas and heuristics. Stereotypes are a particularly pernicious sort of schema, raising the danger that when a judge is angry she will be more prone to two-dimensional judgment of litigants, lawyers, or witnesses.<sup>45</sup> Of course, we are most worried about negative stereotypes, like racial bias, but positive stereotypes, like thinking police officers tend not to lie, are equally worrisome. The point is that to the angry judge, people may appear as types rather than as individuals.

Another shallow thought pattern typical of the angry person is quick endorsement of information that confirms the initial anger appraisal. This means that the angry judge is likely to give potentially important counter-evidence short shrift. Interestingly, angry people tend also to be disproportionately persuaded by angry-sounding arguments, regardless of whether those arguments are actually better.<sup>46</sup>

Next, anger can lead to decisions that are premature or overly punitive—or both. The heightened sense of certainty it brings can make a judge feel confident in the correctness of her decisions very quickly. That tendency confers an obvious advantage when further deliberation will be of no utility or quick action is essential. Judges frequently confront those situations—for example, a witness may start to testify about something off-limits and need to get shut down. But the tendency is just as obviously disadvantageous where information-gathering and reflection would disrupt an unwarranted assumption or uncover a previously overlooked point.

A case example illustrates this danger. In a complex civil case, a district court judge was reversed for having dismissed the plaintiffs' case with prejudice as a sanction for discovery abuse.<sup>47</sup> The lawyers' conduct was legitimately infuriating: they played games, provided misleading information, and evaded discovery orders. But the judge's anger eventually took the case down a bad road. He appeared to become predisposed to interpret every dispute in the way least favorable to the plaintiffs; possible lies became clear ones; investigation increasingly seemed futile. Things finally came to a head in a heated exchange in which a lawyer addressed the court in a way best described as snarky, and then suggested that the judge was factually mistaken about the procedural history of the matter. When the judge asked whether the plaintiff had produced certain documents, the lawyer retorted, "To them?," provoking this response:

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

telling you to produce stuff. . . . You ducked. You wove. You did everything to keep from producing 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.

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. . . . We're done. We are done, done, done. What a disgrace. . . . We're done.

In this exchange, the final straw was counsel's effort to explain that not all of the documents in question had been ordered produced four times. Though tin-eared and poorly timed, the assertion was basically true. But by that point, the judge was simply "done." And once he was "done," he went straight to the most punitive response, which left him open to reversal.

The point is not in any way to condemn the judge. Indeed, the appellate court clearly had sympathy for his understandably human reaction, and it probably is safe to say that every judge could think of at least one situation in which she has acted similarly. The point, rather, is to demonstrate how even well-placed anger can create a decisional cascade which, if not interrupted, may lead to error.

Third, judicial anger can bleed over into other situations. Being angry at one person for one set of reasons increases the odds of becoming angry at another person for another set of reasons, whether that person deserves it or not. This reality can lead to both misplaced and disproportionate blame. For example, experimentally induced, utterly 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.<sup>48</sup>

45. David DeSteno et al., *Prejudice From Thin Air: The Effect of Emotion on Automatic Intergroup Attitudes*, 15 *PSYCHOL. SCI.* 319 (2004).

46. David DeSteno et al., *Discrete Emotions and Persuasion: The Role of Emotion-Induced Expectancies*, 86 *J. PERSONALITY & SOC. PSYCHOL.* 43 (2004).

47. *Sentis Group v. Shell Oil*, 559 F.3d 888 (8th Cir. 2009).

48. 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); D.A. Small & J. Lerner, *Emotional Policy: Personal Sadness and Anger Shape Judgments About a Welfare Case*, 29 *POL. PSYCHOL.* 149 (2008).

Fourth, intense judicial anger can manifest in a grossly disproportionate way that can feel literally involuntary. Stated colloquially, judges sometimes just lose it. A quick look at the “benchslap” market—a popular feature on *Above the Law*—makes this clear.<sup>49</sup> Every major media outlet in the country reported on a Fifth Circuit oral argument in which Chief Judge Edith Jones slammed her hand on the bench and told a fellow judge to “shut up.”<sup>50</sup> Just as much media coverage descended on the Wisconsin Supreme Court when one Justice was accused of choking another during a testy exchange in chambers.<sup>51</sup> A top-trending video on YouTube (inelegantly but accurately called “Flipping the Bird to the Judge”) showed a judge at video arraignment coming down hard on a young defendant who disrespected him (he later reversed the sanctions when she apologized and explained she had been on drugs at the time).<sup>52</sup> Type “angry judge” into the YouTube search engine and you will find an astonishing array of videos showing judges screaming, throwing things, even pulling out guns. From a judge’s perspective, one of the biggest downsides of losing it is that suddenly you are the story.<sup>53</sup>

Finally, there is reason for judges to worry about the heightened sense of power that anger can engender. Because judges have actual power over actual people, we might well worry that anger could help a judge feel justified in acting like an “absolute monarch,”<sup>54</sup> or like “God in my courtroom.”<sup>55</sup>

If the previously described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. Other emotions have evident downsides as well. Contempt, in particular, presents clear dangers. Contempt is much like anger but with one crucial difference. When we feel contempt for someone we are judging them to be our inferior, not just hierarchically but as a human being.<sup>56</sup> For this reason it often is considered to be a mixture of anger and disgust. Contempt would appear to underlie the unfortunate insults judges sometimes lob at sentencing, such as “animal,” “lowlife,” or “scumbag.”<sup>57</sup> Because a judge has no claim to superiority but only to authority, contempt is likely unsuitable in nearly every instance.

And now we find ourselves on the horns of a dilemma. Judicial emotion giveth and it taketh away. Anger, our recurrent example, is necessary to critical aspects of judging, but it simultaneously has tendencies that can impair judging. The same would appear likely to hold true for most emotions, though some will tend generally to be more positive (one nomination: compassion) or negative (one nomination: contempt). We therefore are at a juncture at which judges need to call upon emotion regulation.

**[E]motion regulation refers to any attempt to influence what emotions we have, when we have them, or how those emotions are experienced or expressed.**

### JUDICIAL EMOTION REGULATION

In the psychological literature, emotion regulation refers to any attempt to influence what emotions we have, when we have them, and how those emotions are experienced or expressed. Regulation typically entails changing the emotion-eliciting situation, changing your thoughts about that situation, or changing your responses to that situation.<sup>58</sup>

These are processes in which we all regularly engage, including when at work. How we do so is heavily influenced by professional norms: flight attendants and bill collectors, for example, have to meet very different expectations as to how they feel and display emotion.<sup>59</sup> The ideal of dispassion supplies the background professional norm for judges. When judges report trying to act professionally, they are somehow engaging in emotion regulation in an attempt to experience and project neutrality. As the prior discussion revealed, not only is this not always a good goal, it is an unrealistic one. It’s particularly unrealistic to expect judges to pull off this feat with precisely no guidance as to *how*. Justice Sotomayor stated

49. <http://abovethelaw.com>.

50. Debra Cassens Weiss, *5th Circuit Oral Arguments Turn Contentious When Chief Judge Tells Colleague to Shut Up*, A.B.A. J., Sept. 26, 2011.

51. Crocker Stephenson, Cary Spivak & Patrick Marley, *Justices’ Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011.

52. <http://www.youtube.com/watch?v=LLA7dQ-uxR0> (more than 15 million views).

53. Sometime this may be what the judge is going for. This seemed to be the case with a federal district judge who gained notoriety by publicly releasing a sarcastic court order inviting lawyers to a “kindergarten party” where they would learn how “to practice law at the level of a first year law student.” It quickly went viral on the Internet. *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). It’s worth debating whether public humiliation of this sort is a legitimate tactic.

54. *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)).

55. *Gottlieb v. Sec. & Exch. Comm’n*, 310 F. App’x 424, 425 (2d Cir. 2009).

56. Dacher Keltner et al., *Emotions as Moral Intuitions*, in *AFFECT IN SOCIAL THINKING AND BEHAVIOR* 161, 163 (Joseph P. Forgas ed., 2006).

57. *In re Merlo*, 34 A.3d 932, 972 (Pa. Ct. Jud. Disc. 2011); *In re Lokuta* 964 A.2d 988, 1054 (Pa. Ct. Jud. Disc. 2008); *Milmir Constr. v. Jones*, 626 So. 2d 985, 986 (Fla. Ct. App. 1993).

58. Much of the discussion of emotion regulation is drawn from the following scientific sources: T.L. Webb et al., *Dealing with Feeling: A Meta-Analysis of the Effectiveness of Strategies Derived from the Process Model of Emotion Regulation*, 138(4) *PSYCHOL. BULL.* 775 (2012); *REGULATING EMOTIONS* (Marie Vandekerckhove et al. eds., 2008); *HANDBOOK OF EMOTION REGULATION* (James J. Gross ed. 2007); James J. Gross, *Emotion Regulation: Affective, Cognitive, and Social Consequences*, 39 *PSYCHOPHYSIOLOGY* 281 (2002); James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 *J. PERSONALITY AND SOC. PSYCHOL.* 224 (1998).

59. HOCHSCHILD, *supra* note 16.

**[R]esearch shows that emotion regulation may be pursued by way of a diverse array of strategies . . . .**

with confidence that a good judge simply puts her emotions aside. Would that it were so easy.

The good news is that while judicial emotion regulation may not ever be easy, everyone can get better at it, and its processes need not remain a mystery. The first step certainly is self-awareness, or what Justice Sotomayor referred to as recognizing your emotions.

The second step—about which we’ve displayed a remarkable collective silence—is to engage appropriate emotion-regulation techniques. Fortunately, that is something about which contemporary psychological research has a lot to say.

Such research shows that emotion regulation may be pursued by way of a diverse array of strategies, each with distinct costs and benefits. There is no such thing as a “good” or “bad” strategy: all have both occasional utility and maladaptive manifestations. However, some emotion regulation strategies tend more toward particular types of costs and benefits, not to mention paradoxical or unintended effects, and thus tend to be more or less well suited to particular contexts.

In the judging context, the ideal of dispassion has both obscured that necessary level of analysis and pushed judges toward strategies that tend to be maladaptive. Just because generations of judges may have handled emotion in a particular way—by, say, ignoring it—doesn’t make the approach effective. Poor regulatory choices can be remarkably impervious to correction through experience.

The most critical regulatory capacities for a judge, therefore, are sensitivity to her own experience, a deep bench of strategic options, and context-driven flexibility in how those options are employed. This combination allows her to exert far greater control over her emotions and how she chooses to express them.

Calling on the research literature illuminates which emotion-regulation strategies are unlikely to be helpful, are most likely to be harmful, and are most likely to be productive for judges.

**Unlikely to be helpful: avoidance.** One very common regulation strategy is avoidance. Avoidance comes in several different flavors. You can simply avoid situations because of their anticipated emotional effect; if that is not possible, you might try to modify the situation to alter its emotional salience; and if that is not possible, you might actively distract yourself. Imagine that you have a contentious relationship with your father-in-law, with whom you have to attend a big family dinner, and you know that talking with him always makes you angry. You might arrange in advance to be seated far away from him at dinner; if that is not socially acceptable, you might arrange for someone you like to be seated on your other side and engage that person in conversation whenever possible; and if you do have to talk with your father-in-law, you might pretend to listen while mentally going over your upcoming week’s schedule. Such avoidance techniques are terrifically

helpful in regular life. If you avoid or significantly block out the emotion trigger, you never have an emotion to deal with.

Unfortunately, this strategy is very seldom appropriate for judges. Judges’ ability to choose the emotional situations to which they are exposed is extremely limited. Not only do you not choose your cases, but often you can’t even choose your court or the subject matter of your docket. This is, to be sure, sometimes possible: a judge who finds family court intolerably stressful might try to switch to a commercial docket, or a state-court judge might seek appointment to the federal bench because it will entail more variety and less exposure to violent crime. But no matter the court or its jurisdictional parameters, you can’t control who comes in the door, and you are guaranteed cases that will over time cover the emotional spectrum. A judge can (and generally must) recuse herself from a specific case if she has direct emotional involvement, such as a close personal connection to a party. Otherwise, avoiding unwanted emotion generally will not justify recusal unless it is so extreme as to pose a serious threat to fundamental fairness.<sup>60</sup>

Nor can judges always modify situations in a meaningful way. Again, it is possible on the margins. You can delegate talking with an irritating lawyer to a clerk, or call breaks, or limit argument time, or otherwise tinker around with details to buy some time and relief. These small tweaks can be enormously helpful. The big emotion triggers, however, often can’t be worked around. This is so for two primary reasons.

First, part of the judge’s job is to orchestrate the exposure that other people have to those triggers. If, for example, you are deciding under the applicable rules of evidence whether to withhold autopsy photos from the jury because you worry that their emotional impact will outweigh informational value, you need to look at them yourself. Indeed, you need to both *have* and *notice* your own reaction, so it can serve as a rough barometer to what could be expected from the jury. By helping other people avoid triggers, you must face them yourself. Second, it is often the most emotionally vivid aspects of a case that demand your most careful attention. At criminal sentencing, or when setting damages in tort and mass-disaster cases, you must take close account of the precise harms caused. Even with lower-impact emotional triggers, like a particularly inept argument by a borderline-incompetent attorney, it is not professionally acceptable to literally tune out (tempting though it might be), as something important might happen. This relates to another point raised elsewhere in this special issue: judicial multi-tasking, which is one way of distracting yourself, has consequences. Not surprisingly, distracted people demonstrate impoverished recall of the situations from which they are distracting themselves—that’s the point, after all.<sup>61</sup>

Avoidance therefore is available to judges only in a marginal way—ironically, because it works too well. It helps judges handle emotional challenges only by helping them disengage from what it is about the job that makes it emotionally challenging.

**Most likely to be harmful: experiential suppression and denial.** The strategy that is most obviously harmful for judges

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

61. Gal Sheppes & Nachshon Meiran, *Divergent Cognitive Costs for*

*Online Forms of Reappraisal and Distraction*, 8 *EMOTION* 870, 871 (2008).

is to try to suppress emotion directly. Think of this as vowing as a matter of willpower not to feel what you do not wish to, or pretending—to yourself and others—that you are not feeling it. A California state judge, for example, once described his approach thus: “I’m not moved by emotion one way or the other. I’m just kind of like an iceberg, but there is no heating. I’m just here.”<sup>62</sup>

The first problem with this strategy is that it does not achieve its intended purpose. (In the universe of problems, that is a pretty big one to have.) Attempts to suppress emotional experience or thoughts of an emotional event have not been shown to have any meaningful effect on the emotions themselves. In fact, suppression raises the danger of “ironic rebound.”<sup>63</sup> Think of a rough parallel to the “don’t-think-of-a-pink-elephant” phenomenon, in which the more you try not to think of something the more you think of it.<sup>64</sup> Research shows that we are somewhat better at suppressing emotions than other sorts of thoughts, but that is a relative, not absolute, facility. Emotional suppression can be followed by a counterproductive increase in the frequency and intrusiveness of emotional thoughts. Suppression also increases the physiological concomitants of the undesired emotion, such as elevated heart rate and sweating. It may give the illusion of calming the mind, but it does not calm the body.

These rebound and reactivity effects are especially pronounced when a person is under conditions of stress and cognitive load, which describes most moments in a judge’s working life. Adding denial to the mix tends to make matters worse, because combining greater physical reactivity with conscious disavowal of its source is dangerous. It creates a reaction in search of a cause, meaning a person can easily latch onto an unrelated, and sometimes innocent, target. The combination has also been associated with impulsive decision making.<sup>65</sup>

Further, suppression and denial are highly effortful. Because of the internal resources they consume, these strategies impair memory, are associated with impaired performance on logical tasks, and lead to overly simplistic judgments.

Finally, these strategies take a toll on the judges who use them. People who regularly suppress and deny emotion can develop what psychologists call a “repressive coping style.”<sup>66</sup> That style is characterized by (among other things) rigidity and arrogance, two qualities we clearly would like to discourage. Indeed, those qualities have unique potential to erode the public’s perception of the judiciary.<sup>67</sup> People who habitually repress emotion also are far less able to handle emotion when

they do experience it. One cautionary tale may be found in a Florida Supreme Court decision removing a trial judge from the bench.<sup>68</sup> He repeatedly treated litigants and lawyers in a callous, rude, condescending, and abusive manner. His own psychiatrist testified that a repressive anger-management style had come to define the judge’s personality, such that he was in a constant state of “emotional over-control” that left him unable to “incorporate emotions into his life.” Instead, he displayed an utter lack of empathy and periodically exploded. Finally, a repressive coping style is associated with poor health outcomes, such as anxiety, hypertension, and coronary heart disease.<sup>69</sup>

**Emotional suppression can be followed by a counterproductive increase in the frequency and intrusiveness of emotional thoughts.**

Caveats about the occasional utility of all regulatory strategies notwithstanding, it is hard to say much good about emotional suppression and denial. The best that can be said is that a judge might sometimes have no choice but to use them in extraordinary situations where the emotion threatens to overwhelm the judge, there is no way to alter the situation, and a temporary effort to completely ignore the reaction is the only way to act in a professionally necessary manner. One can imagine such situations. A judge who finds herself forced into that position, though, will be much better off if she recognizes it for what it is and gives herself time and space to cope with that emotion after the crisis is over.

**Often necessary, but comes at a cost: behavioral suppression.** Fortunately, emotion is not the only thing a judge can suppress. Another common strategy is to suppress only its external manifestation. Behavioral suppression involves inhibition of facial expressions (e.g., grimacing), verbalizations (e.g., groaning), or bodily movement (e.g., cringing). One masks the true emotional state with an expression reflecting either neutrality (as with a “poker face”) or a desired one (as with a fake smile). All judges likely spend a good deal of their time doing exactly that—and for some very good reasons. However, behavioral suppression takes a toll of its own.

The reasons why a person sometimes needs to hide emotion are rather obvious, particularly to judges. Selectively displaying

62. *People v. Carter*, No. C053369, 2009 WL 626113 (Cal. App. 3 Dist. Mar. 12, 2009).

63. Daniel M. Wegner, *How to Think, Say, or Do Precisely the Worst Thing for Any Occasion*, 325 *SCI.* 48-50 (2009).

64. DANIEL M. WEGNER, *WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL* 122-24 (1989).

65. Renata M. Heilman et al., *Emotion Regulation and Decision Making Under Risk and Uncertainty*, 10 *EMOTION* 257 (2010).

66. Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 *COGNITION & EMOTION* 4, 6 (2009); Lynn B. Myers & Nazanin Derakshan, *To Forget or Not to Forget; What Do*

*Repressors Forget and When Do They Forget?*, 18 *COGNITION & EMOTION* 495 (2004).

67. *McBryde*, 264 F3d at 66 (“Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt.”).

68. *In re Sloop*, 946 So.2d 1046 (S. Ct. Fla. 2007) (per curiam).

69. Josh M. Cisler et al., *Emotion Regulation and the Anxiety Disorders: An Integrative Review*, 32 *J. PSYCHOPATHOLOGY AND BEHAV. ASSESSMENT* 68, 75 (2010); Richard Chambers et al., *Mindful Emotion Regulation: An Integrative Review*, 29 *CLINICAL PSYCHOL. REV.* 560 (2009).

**Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.**

emotion can be highly strategic. A judge might want to keep an obnoxious attorney from knowing he has gotten to her, so as to discourage the behavior by refusing the attorney satisfaction. (Conversely, the judge may believe that a flash of anger might shut the behavior down, in which case she would opt for a controlled

display.) She may need to model calmness and decorum to others, such as disruptive family members, which will make her courtroom management duties easier. She may need to prevent a jury from perceiving what she thinks of a witness, party, or attorney so as not to influence the jury's independent evaluation. She may want to prevent other observers, including the public, from being able to guess what she thinks, lest it improperly broadcast an outcome. The good news is that inhibiting the outward signs of emotion is relatively effective, particularly if you are well practiced in doing so. Judges often can keep others from perceiving what they feel.

Unfortunately, behavioral suppression is not very effective as an internal matter. It, too, is effortful, so it has some negative effects. Behavioral suppression impairs memory for information presented during the suppression period. Other cognitive capacities, like logical reasoning, also suffer.<sup>70</sup> Those effects may not be as pronounced as with suppression and denial, but they remain significant; indeed, they are equivalent to those attending avoidance. As stated bluntly to this author by a prominent scholar, behavioral suppression makes a person temporarily "stupider."

Further, keeping an emotion from showing does not keep a person from feeling it. Again, the profile is less extreme than with experiential suppression. Controlling your facial and bodily movements generally will blunt, but not eliminate, positive emotions. Interestingly, it has no such effect for negative ones. That is, suppressing a smile can make you a bit less happy, but suppressing a frown is not likely to make you less angry. Judges tend to be most concerned about displaying emotions such as sorrow, contempt, disgust, and anger, but it is not at all clear that behavioral suppression will have any effect on this cluster of feelings. Finally, suppressing expression does not lessen emotion's physiological concomitants, and it may in fact increase them.

Judges can take some comfort that behavioral suppression is usually going to work in terms of how you are perceived. However, it is important to be aware that controlling outward signs of emotion comes at a cost and is not doing any work in terms of dealing with the emotion itself.

**Most likely to be helpful: cognitive reappraisal and disclosure.** Thus far the analysis has looked to one strategy (avoidance) that is seldom available; one (suppression and denial) that is counterproductive, even dangerous; and one (behavioral suppression) that is often necessary but generally costly and ineffective. Fortunately, two other strategies have a more positive profile. If the judge can neither avoid, alter, nor ignore an emotional situation, she may change how she thinks about it. She also can choose to enlist the perspectives of others by selectively disclosing her experiences. This final section takes up these approaches in turn.

**Cognitive reappraisal.** Recall that an "appraisal" refers to the thought structure that underlies any given emotion. A "reappraisal" therefore refers to a change in those thoughts, which then leads naturally to a different emotional response. If, for example, a person comes to believe that a harm was inflicted accidentally rather than deliberately or negligently, she has no more reason to be angry and may instead be simply sad.

The first way in which judges can leverage the power of reappraisal is by examining the reasons behind their emotions, so as to determine whether they represent a correct and appropriate response. The judge in the viral YouTube video, for example, may have reacted much less angrily had he considered the high probability that the defendant was under the influence of drugs. Her behavior would have been equally offensive to decorum, but would not have represented a personal insult. In contrast, it may be entirely appropriate to be angry at a defendant who uses sentencing as a forum to insult and taunt his victims.<sup>71</sup> Reasons matter. Self-aware judges can learn to do quick gut-and-brain checks not only on what they are feeling, but on why they feel it.

While reappraisal may be engaged in real time, a good deal of thought realignment can happen during times of reflection. Consider trying the following exercise. Think about situations in which people you encounter at work—lawyers, litigants, witnesses, and colleagues—have made you mad. Any given judge's anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, abusing others, disrespect, sloppiness, and so on. Then think about why those particular things make you angry. Finally, think about whether those reasons justify anger, taking care to examine why or why not. In a light-hearted but revealing article reflecting just such an exercise, a Los Angeles state-court trial judge identified reliable triggers for his anger, including "lack of civility," tardiness, cell phones going off in court, "attorney incompetence," and the "herding cats" work of trying to get everyone in the courtroom at the same time.<sup>72</sup> He concluded that he would be much happier if he let some of those go—for example, by reminding himself that he is sometimes late, decent people sometimes forget to turn off their cell phones, and so forth.

Attorney incompetence, in contrast, is legitimately anger-

70. Jane M. Richards & James J. Gross, *Personality and Emotional Memory: How Regulating Emotion Impairs Memory for Emotional Events*, 40 J. RES. IN PERSONALITY 631 (2006); Jane M. Richards, *The Cognitive Consequences of Concealing Feelings*, 13 CURRENT DIRECTIONS IN PSYCHOL. SCI. 131 (2004); Jane M. Richards & James J. Gross, *Emotion Regulation and Memory: The Cognitive Costs of Keeping One's*

*Cool*, 79 J. PERSONALITY & SOC. PSYCHOL. 410 (2000).

71. Jennifer Preston, *Teenage Gunman in Ohio Mocks Victims' Families*, <http://thelede.blogs.nytimes.com/2013/03/19/teenage-gunman-in-ohio-mocks-victims-families/> (Mar. 19, 2013).

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

ing. This is an important conclusion to reach, too, but not because it changes the underlying emotion. Rather, deliberately accepting the underlying thoughts puts the judge at just enough distance to evaluate her possible responses, and to choose the most fitting one. The judge in Los Angeles learned to choose different patterns of response to unprepared or unskilled attorneys—typically by being direct, courteous, and brief—by focusing on what was within his power to change. Chief Judge Alex Kozinski describes engaging in a similar mental exercise after a prosecutor lied to him about a matter of consequence. After reflection, he concluded that anger was precisely the right response, and he therefore chose to name the prosecutor in a harsh written opinion so as to maximize the deterrent message.<sup>73</sup>

The second cognitive appraisal technique that holds great promise for judges is committing to look at situations through a professional “lens.” This is best explained with an analogy to being a doctor. Like judges, doctors regularly encounter stimuli that naturally provoke strong emotions, like festering wounds. An important part of learning to be a doctor is learning to regard that festering wound as professionally relevant.<sup>74</sup> It represents a source of information about what is wrong with the patient and an opportunity to display professional competence. The doctor thus learns to regard it without disgust, not by suppressing disgust but by thinking about the wound in a way that fails to satisfy the appraisal structure of disgust.

Judges have their own festering wounds to confront. Sometimes that is literally true—recall the example of the autopsy photos—but more often it is figuratively true. Courtrooms can be a theater for much that is broken and disturbing in our world and how we treat one another. For many judges, the most effective way of approaching that reality will be, when possible, to treat vivid stimuli as professionally relevant rather than personally provocative. Such a precommitment helps the judge stay focused on specific goals—for example, discerning the informational value of that autopsy photo, since she is the only one empowered to make that judgment call. That professional lens can dissipate the emotional salience of the stimuli.

Judges would likely report that when this works, it works well. The experimental literature shows that even laypeople can deliberately call on such a neutral-observer approach—tellingly, by pretending briefly to be doctors—with good results. When asked to look at disturbing images as a doctor would, and to think about them “objectively and analytically

rather than as personally, or in any way emotionally relevant,” they feel less emotion; show less emotion; display enhanced, not diminished, memory; and show decreased physiological reactivity.<sup>75</sup>

Of course, labs are labs. What an experimental subject can pull off for a short period of time, in a controlled environment, with an anticipated stimulus and explicit instructions, is instructive. To be pulled off by real judges in real situations, this species of reappraisal must be trained and practiced.

Reappraisal, in sum, is of enormous value to judges because it asks them to think differently, instead of simply commanding them to feel differently.

*Disclosure.* As the above discussion reveals, some amount of emotion is inevitable, no matter how skilled a judge is at regulation. Some situations cannot be avoided; behavioral suppression leaves emotions largely intact. Even cognitive appraisal has limits, for not every situation can be rethought. Sometimes the elderly person really did lose her entire life savings to a fraud, or that parent really did brutally rape his child, or the defendant really does spit in your face.<sup>76</sup> Nor would one want to rethink every situation. The warm glow that comes from helping families heal, for example, should be savored for what it is. And the professional lens sometimes will simply crack. No judge has truly seen everything, and everyone will be thrown from time to time, just as doctors are. The only way to prevent such moments is to become closed off and jaded—to grow that “rhino skin” feared by the Australian magistrate.

One highly effective strategy for coping with and learning from those inevitable emotions is disclosure. Disclosure, also known in the literature as “social sharing,” is the act of thinking and talking about your emotions and the experiences that triggered them.<sup>77</sup> To be productive, it must be selective: a judge should not, for example, indulge in highly public expressions of vitriol against a colleague.<sup>78</sup> But when done thoughtfully and with a prosocial motive, judicial disclosure of emotion can be invaluable.

This is not because social sharing eventually dissipates the

**Reappraisal . . . is of enormous value to judges because it asks them to think differently, instead of simply commanding them to feel differently.**

73. 30 United States v. Kojayan, 8 F3d 1315 (9th Cir. 1993). The judge omitted the individual's name once he was satisfied the message had been heard.

74. Daisy Grewal & Heather A. Davidson, *Emotional Intelligence and Graduate Medical Education*, 300 J. AM. MED. ASS'N 1200 (2008); Jason M. Satterfield & Ellen Hughes, *Emotional Skills Training for Medical Students: A Systematic Review*, 41 MED. EDUC. 935 (2007); Vanda L. Zammuner & Cristina Galli, *The Relationship with Patients: “Emotional Labor” and Its Correlates in Hospital Employees*, in EMOTION IN ORGANIZATIONAL BEHAVIOR 251-283 (C. E. J. Hartel et al. eds., 2005); Allen C. Smith III & Sheryll Kleinman, *Managing Emotions in Medical School: Students' Contact with the Living and the Dead*, 52 SOC. PSYCHOL. Q. 56 (1989).

75. These results, consistent throughout the psychological literature, recently were confirmed in a meta-analysis. See Webb et al., *supra* note 58.

76. *How to Piss Off the Judge*, YOUTUBE (Aug. 13, 2009), <http://www.youtube.com/watch?v=uCN04ky6GXE>.

77. Much of this discussion is drawn from Bernard Rimé, *Interpersonal Emotion Regulation*, in HANDBOOK OF EMOTION REGULATION, *supra* note 32, at 466-85; PSYCHOLOGY OF EMOTION, *supra* note 32, at 185-89; and the work of the James Pennebaker lab, <http://homepage.psy.utexas.edu/HomePage/Faculty/Pennebaker/Home2000/JWPhome.htm>.

78. Crocker Stephenson et al., *Justices' Feud Gets Physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011.

**The emotionally intelligent judge is self-aware and is able to think coherently about her emotions . . .**

emotion, as if you were emptying a bag. To the contrary, it tends to reawaken the emotion, often quite vividly. Chief Judge Kozinski, for example, recounted to this author a story more than four decades old of his son nearly being run over, and he reported feeling as terrified, guilty, and shaken as

if it had happened yesterday. Paradoxically, though, disclosure is a basic impulse that people overwhelmingly experience as a net positive. Why?

First, disclosure enhances self-knowledge. By talking or writing about emotional experiences, we help create a detailed internal data bank of those experiences. That data bank allows us to judge our reactions more coherently and consistently. This sense of heightened self-knowledge and control can help us live with emotion more comfortably, for we come to experience those emotions as an integrated aspect of the self.

Second, disclosure enlists insight and support from others. This is particularly true when we share emotional challenges with people who face similar circumstances. Imagine the exercise proposed earlier, in which you identified persistent anger triggers. Now imagine showing your list to another judge. That judge would be well-positioned to help with any necessary reappraisal by explaining whether and how she believes you are off base, overreacting, or right on the mark. Your spouse, friends, and other close confidants can serve a similar function. Perhaps most importantly, communicating with others helps us feel understood and supported. Numerous judges have reported to this author that they wish they could have this sort of communication with their colleagues but feel nervous about doing so, largely because of stigma. The more judges were to act on that impulse to disclose, the less stigmatized it would become.

Finally, public disclosure of judicial emotion also can be productive (and would go a long way toward dissolving the stigma). When the public sees the human underneath the robe, it has a better understanding of how a judge is doing her job. Disclosing emotion makes transparent an otherwise hidden input to judicial decision making and invites evaluation thereof. As the tears-at-sentencing example showed, the reaction can be quite positive, even enhancing respect for the judiciary. A rather different sort of public disclosure would be to write about it in an opinion, article, or book. For example, Chief Judge Kozinski wrote a law review article about a criminal sentencing that unexpectedly triggered those feelings he had when he inadvertently placed his son in danger, prompting him to show the defendant mercy. Once on the table, the propriety of such a motivation was open for debate.<sup>79</sup>

Disclosure thus can help judges feel more comfortable with

their emotions, and helps ensure that those emotions influence decision making in a deliberate, thoughtful, and transparent way.

## CONCLUSION

Within law, we have inherited some hefty cultural baggage, weighted down with the belief that a good judge is emotionless. This article has unpacked that baggage and suggested that it is that belief, not emotion, that should be put aside. We need a new ideal: that of the *emotionally intelligent judge*. The emotionally intelligent judge is self-aware and is able to think coherently about her emotions and to be in control of their expression. She is willing to seek the opinions and support of others and approaches the emotional challenges of the job with openness and flexibility.

In attempting to thus shift our ideal, we are not alone. More than a decade ago pioneers in medical education came to realize that, by acculturating doctors to a similar ideal of dispassion, they inadvertently were training them to suppress and deny emotion, with bad results. Medical students lost empathy for patients with each year of training; many showed performance-impairing levels of emotional disengagement.<sup>80</sup> These pioneers now are seeking to train medical professionals to improve their emotion-regulation skills. So far, all results are positive: among the important findings is that clinical performance improves as measures of emotional intelligence rise.<sup>81</sup>

Even with these advances, the general pattern unfortunately persists. Describing her recent studies of the impact of emotion on Canadian oncologists, a health psychologist has emphasized the importance to doctors of acknowledging their feelings, especially grief:

Not only do doctors experience grief, but the professional taboo on the emotion also has negative consequences for the doctors themselves, as well as for the quality of care they provide. Our study indicated that grief in the medical context is considered shameful and unprofessional. Even though participants wrestled with feelings of grief, they hid them from others because showing emotion was considered a sign of weakness. . . . The impact of all this unacknowledged grief was exactly what we don't want our doctors to experience: inattentiveness, impatience, irritability, emotional exhaustion and burnout. . . . Even more distressing, half our participants reported that their discomfort with their grief over patient loss could affect their treatment decisions with subsequent patients. Oncologists are not trained to deal with their own grief, and they need to be.<sup>82</sup>

If we were to replace the words "oncologists" and "doctors" with "judges," I daresay most judges would nod in recognition. Whether in medicine or law, cultural baggage this heavy is not easily shed.

Fortunately, the psychology of emotion has done much of

79. Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217 (1997).

80. Myrle Croasdale, *Students Lose Empathy for Patients During Medical School*, AM. MED. NEWS, Mar. 24, 2008.

81. Satterfield & Hughes, *supra* note 74; Grewal & Davidson, *supra* note 74.

82. Leeat Granek, *When Doctors Grieve*, N.Y. TIMES, May 27, 2012, at SR12.

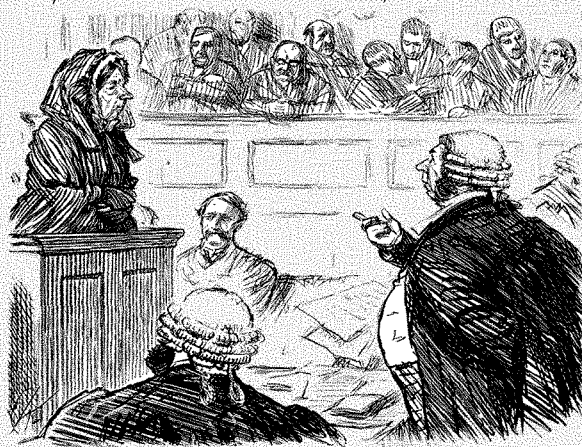
the heavy lifting already. There is much we still need to learn about judicial emotion, but we know more than enough to get started. Judges can learn to prepare realistically for, and respond thoughtfully to, the emotions they are bound to feel. It's time we integrated those lessons into how we train and support our judiciary.



*Terry A. Maroney is a Professor of Law and Professor of Medicine, Health, and Society at Vanderbilt University in Nashville, Tennessee. Her academic focus is on the role of emotion in law, with a particular focus on emotion in judicial decision-making. Professor Maroney is frequently invited to speak with federal- and state-court judges about better recognizing and coping with emotion on the bench. She also teaches and writes about criminal law, juvenile justice, and wrongful conviction. After earning a B.A. from Oberlin College and a J.D. (summa cum laude) from New York University School of Law, Professor Maroney clerked for the Hon. Amalya L. Kearsse of the United States Court of Appeals for the Second Circuit; served as a Skadden Public Interest Fellow at the Urban Justice Center; and practiced with the law firm of WilmerHale.*

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