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Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's 'Heart versus Head: Do Judges Follow the Law or Follow Their Feelings?'

Terry Maroney
Vanderbilt University Law School

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Response

Why Choose? A Response to Rachlinski, Wistrich, & Guthrie's "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?"

Terry A. Maroney*

I. Introduction

At a critical moment in the movie *Chicken Run*, Ginger, the provocateur behind a spectacular coop break, tries to rally the flock by declaring: "We'll either die free chickens or die trying!" After a beat, Babs—a simple bird, to be sure, but a kindly one—asks, "Are those the only choices?"¹

To respond to Rachlinski, Wistrich, and Guthrie's latest effort—*Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*²—is to play Babs to their Ginger: I am behind the effort, but question the framing. This formidable trio is helping us break away from the stifling script of judicial dispassion,³ inviting us to fully recognize the entire range of contributors to judicial decision making, including emotion. But by asking whether judges follow the law *or* their feelings, their hearts *or* their heads, they have—like good provocateurs—pushed the rhetoric just a bit too far. Fortunately, their core insights survive extraction from the narrative frame. Mostly.

* Professor of Law; Professor of Medicine, Health and Society, Vanderbilt University.

1. CHICKEN RUN (Dreamworks 2000).

2. Andrew J. Wistrich, Jeffrey J. Rachlinski & Chris Guthrie, *Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?*, 93 TEXAS L. REV. 855 (2015).

3. See generally Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011).

With the experiments they here present, Rachlinski, Wistrich, and Guthrie—herein “RWG” or “Notorious RWG”⁴—make a good start at closing three gaps in the literature. First, they take up extant scholarship on jurors’ emotions and seek corollaries in judging. Second, they engage with theories of judicial emotion and seek to test them experimentally, adding a sorely needed empirical element. Third, they expand the scope of their prior work by looking past cognition, their wheelhouse, to the “affect heuristic.” These are commendable moves.

In this brief response I identify the project’s strongest aspects and present my perspective on what one fairly can take away from it. As I go on to explain, I have a series of friendly quarrels with RWG’s characterization of the project as bearing primarily on judges’ emotions. They have shown that some iterations of the *affect heuristic* might affect judging, but have not otherwise shown how *emotion* might do so. The dichotomies they frame—head and heart, reason and emotion, law and feelings—are narratively neat, but fail to capture the richness of this important aspect of judicial behavior.

II. The Notorious RWG Oeuvre

Rachlinski, Wistrich, and Guthrie are familiar faces in the study of judicial behavior. For over a decade they have conducted clever, insightful experiments with sitting judges. They’ve shown us, among other things, that judges have difficulty disregarding evidence they have deemed legally irrelevant; can be manipulated by channeling their attention; and are susceptible to common heuristics and biases, such as anchoring.⁵

While one might expect Notorious RWG to have made themselves pariahs by continually showing up at judicial seminars, distributing pesky questionnaires, and regularly publishing results that show (among other things) that judges are pretty darn bad at math, nothing could be further from the truth. I attend many of those same seminars and have observed the delight judges take in hearing about their cognitive shortcomings. These three don’t get thrown out of the party; they get more invitations.

Rather than conclude that our judiciary is overwhelmingly populated with masochists with low self-esteem they pathologically seek to reinforce—a proposition for which there is scant evidence—I have come to believe that there is something deeply comforting in recognizing judges’ humanity. Spending so much of their time cloaked and held to superhuman standards,

4. Cf. *Notorious R.B.G.*, TUMBLR, <http://notoriousrbg.tumblr.com/>, archived at <http://perma.cc/BZ56-5F4Z>.

5. See, e.g., Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 27–28 (2007); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 787–821 (2001); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1501–20 (2009).

many judges enjoy—at least when among themselves—being seen as they see themselves: ordinary people seeking to perform a difficult job consistently and fairly, with variable levels of success.

This latest iteration of the Notorious RWG oeuvre fits this mold, perhaps delivering comfort to judges by way of demonstrating a discomforting reality. Whereas their prior work focused on those aspects of decision making generally characterized as cognitive, or going to mechanisms of information processing, here they propose to test the influence of emotion.⁶

As they observe, to get to that issue one must hurdle some steep stigma. We have inherited a deep bias against judicial emotion, one in which the relatively innocuous notion that judges should be able to perceive and care about a diversity of perspectives becomes “radioactive”⁷ by virtue of its association with all things “touchy-feely.”⁸ This radioactivity is profoundly unhelpful, in large part because judges are unlikely to silence their emotions as thoroughly as cultural scripts demand.⁹ They may say they can and do, but they often can’t and don’t. RWG withhold judgment on whether this reality is “good or bad”—I gather they have not made up their minds, as they sometimes imply the one and sometimes the other—but insist that any “honest theory of judging must take [it] into account.”¹⁰

It’s hard to be antihonesty. At least it is hard for *me*, given how strenuously I have insisted that expectations of dispassion distort our view of judicial decision making, make judges’ work harder, and encourage maladaptive emotion-regulation strategies such as suppression.¹¹ Onward with the honesty project.

6. The cognition–emotion divide is itself a dichotomy that may be exaggerated for narrative purposes. See Richard S. Lazarus, *The Cognition–Emotion Debate: A Bit of History*, in HANDBOOK OF COGNITION AND EMOTION 3, 8–9 (Tim Dalgleish & Mick Power eds., 1999). This being too large a debate to take on here, I simply note that virtually all contemporary psychologists recognize both the difference between the two and their deep interdependence. See *id.* at 10–16.

7. See Peter Baker, *In Court Nominees, Is Obama Looking for Empathy by Another Name?*, N.Y. TIMES, Apr. 26, 2010, <http://www.nytimes.com/2010/04/26/us/politics/26memo.html?r=0>, archived at <http://perma.cc/DK2W-N6GG>.

8. See *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Committee on the Judiciary*, 111th Cong. 135 (2009) (statement of Senator Lindsay Graham about empathy during the confirmation hearing of Sonia Sotomayor).

9. See Wistrich et al., *supra* note 2, at 861.

10. *Id.* at 906, 912.

11. Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99 CALIF. L. REV. 1485, 1506–07, 1536–43 (2011) [hereinafter Maroney, *Emotional Regulation and Judicial Behavior*]. See also Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1284–86 (2012) [hereinafter Maroney, *Angry Judges*].

III. The Heart-Versus-Head Experiments

Which brings us to the experiments. RWG set out to “assess whether judges’ emotional reactions to litigants influence their judgments.”¹² This is, of course, a difficult phenomenon to test, and as they note, extant empirics are scarce. Examining the artifacts of judicial decision making—what judges write, say, and do—leaves no doubt that emotion has some influence. But the sheer range of what judges and their observers might mean when describing “emotion,” coupled with the difficulty of isolating contributors within highly complex behaviors spread across a diverse legal landscape, make precise analysis of its role hard to come by.

A. *Worries Going to Methodological Staging*

Faced with this shared reality, RWG and I have divergent instincts as to the best methodological path. Rigorous study of judicial emotion is, if no longer in its infancy, in the toddler years. Qualitative methods like interviews and field observation are best suited for early-stage inquiries such as this, in which “the categories themselves are in flux” and one seeks to “discern the very shape and elements of the categories themselves.”¹³ Quantitative methods work best for assessing the distribution of discrete phenomena of interest across categories whose boundaries are clear. Luker elucidates the fundamental distinction as being between “the logic of discovery and the logic of verification.”¹⁴ In my view, the theory-building work of qualitative study is the more important investment now, as it is not clear what precisely we ought to be testing and how. This view is reinforced by my frequent talks with a wide variety of judges about the emotional aspects of their work, a process that constantly deepens my appreciation for the complexity, depth, and nuance of the questions.

Notorious RWG, of course, have a different tool kit.¹⁵ As they say, go to a baker and you’ll get bread. Their quantitative tools are nonetheless welcome: if our goal is to thoroughly understand judicial emotion, we should bring together what is best about both approaches. They frankly acknowledge the many limitations of using short hypotheticals to gauge

12. Wistrich et al, *supra* note 2, at 874.

13. KRISTIN LUKER, *SALSA DANCING INTO THE SOCIAL SCIENCES: RESEARCH IN AN AGE OF INFO-GLUT* 37–38 (2008). *See also id.* at 207 (describing an influential model introduced in BARNEY G. GLASER & ANSELM L. STRAUSS, *THE DISCOVERY OF GROUNDED THEORY: STRATEGIES FOR QUALITATIVE RESEARCH* (1967)). *See generally* *QUALITATIVE RESEARCH METHODS FOR PSYCHOLOGISTS: INTRODUCTION THROUGH EMPIRICAL STUDIES* (Constance T. Fischer ed., 2006).

14. *See* LUKER, *supra* note 13, at 39.

15. *See* Wistrich et al., *supra* note 2, at 874 (describing their methods as essentially the same ones they have used for the past decade).

highly complex phenomena that judges in real life experience over time, embedded in multifaceted settings, and with real people attached.¹⁶ Those limits do not negate their findings' value, though they create interpretive difficulties and constrain the claims RWG can make on the basis of those findings.

B. The Experiments Themselves are, at Their Best, Clever and Insightful

So how do RWG move the judicial-emotion ball forward? At their best, the experiments cleverly isolate a variable that has emotional elements and bears no clearly permissible relationship to the precise judicial decision-making task and demonstrate a non-negligible impact of that variable. They do this by framing a relatively "pure" question of law and, using a between-subjects design, presenting that question through short, written hypotheticals populated by litigants with different characteristics. Those characteristics are meant to (a) be legally irrelevant and (b) trigger different reactions. The extent to which judges decide the question of law differently when presented with the different litigants is, RWG conclude, attributable to the emotional aspect of judicial decision making.¹⁷

Perhaps the strongest aspect of this experimental design is RWG's ability to craft questions of law that appear to admit of few, if any, affective considerations. In their immigration scenario, for example, the question is whether pasting a false United States entry visa into a genuine Peruvian passport constitutes "forg[ing] an identification card."¹⁸ The medical

16. *Id.* at 900–04.

17. Not all the experiments pull this off equally well. The credit-card scenario, for example, turned on whether a debt had been incurred with knowledge of inability to pay and whether it should be discharged; the relevant independent variable was whether the debtor had spent the money on a spring-break trip or to visit her extremely ill mother. *See id.* at 887–90. RWG acknowledge that the personal responsibility shown by the "caregiver" might be relevant to determination of whether she knew she would be unable to pay. *Id.* at 901. The environmental scenario sought to isolate irrelevant bias against an out-of-state polluter. *Id.* at 894–95. RWG acknowledge that the physical distance traveled might be case-relevant and that bias could be motivated not by animus but rather a cold calculation of by whom the judge's bread is being buttered. *See id.* at 898. Because these criticisms have bite, I focus on the other experiments.

18. *Id.* at 876–77 (quoting OHIO REV. CODE ANN. § 2913.31(B)(1) (West 2006)). RWG describe a highly emotional polarization of views around immigration, as well as the sometime tension between one's policy commitments and emotional reactions to individual stories, and imply that these factors explain why "decisions in immigration cases are highly unpredictable." *Id.* at 876. They offer insufficient evidence for that implication. The study they cite, Jaya Ramji-Nogales, Andrew Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295 (2007), points to the following as likely causes of wild variations within that narrow slice of immigration law: whether the applicant had counsel; whether he or she sought relief for family members; the judge's gender; and his or her prior work experience, particularly employment with the agency seeking deportation. *Id.* at 339–49. There may be emotional elements somehow at play, but that is not obvious. Nor does the discrete issue studied speak to either RWG's larger immigration claim or their experimental scenario. Willingness to lay a highly complex

marijuana scenario asks whether a physician's affidavit of medical need satisfies statutory requirements if obtained postarrest rather than prearrest.¹⁹ A random urinalysis case poses the question of whether a ferry-terminal janitor performs a "safety-sensitive" function within the ambit of *Skinner*.²⁰ In each scenario the correct answer was at the time ambiguous. As RWG correctly assert, these are the sorts of legal determinations that admit of yes–no answers; should be rooted in such ground as analogic reasoning and canons of statutory interpretation; and ought not to vary according to litigants' personal characteristics.

They also varied litigant characteristics in ways that are indeed likely to quickly trigger different reactions. Tracking the above-described scenarios, judges were shown either (1) (a) a father who entered the United States to earn money to save the life of his critically ill daughter or (b) an enforcer looking for someone who stole money from a drug cartel;²¹ (2) (a) a teenage no-goodnik with a mild seizure disorder or (b) a middle-aged married father with painful, debilitating, soon-to-be-fatal bone cancer;²² and (3) (a) a man who smoked marijuana and had one joint in his work locker or (b) one who used heroin and had \$4,000 worth of the drug in his locker.²³

In each case, the findings are clear: to a statistically significant degree the judges' quick, pen-and-paper "rulings" varied according to litigant characteristics, such that the more immediately sympathetic litigant was more likely to receive a legal determination that favored his or her interests. Thus, RWG lend empirical support to the common understanding that conventionally appealing litigants tend (at least on the margins) to fare better than their antisocial, law-breaking, unattractive counterparts.²⁴ This is all

phenomenon at the foot of emotion is emblematic of the difficulties RWG run into with how the project is framed.

19. Wistrich et al., *supra* note 2, at 880–81.

20. *Id.* at 891 (citing *Skinner v. R.R. Labor Execs.' Ass'n*, 489 U.S. 602, 633–34 (1989)). RWG also set up a strip search hypothetical with a few twists, notably whether the suit was formally styled as a facial challenge or a class action. *Id.* at 884–85. That twist supports findings going to the availability and representative heuristics, as it directs judges' attention to typical or atypical members of the affected group. The point of interest here is the role of affect, and in that regard this experiment is substantially similar to the other three I highlight.

21. *Id.* at 877–78.

22. *Id.* at 881.

23. *Id.* at 891–92. This scenario most obviously tests whether judges' legal rulings in the Fourth Amendment arena are affected by the severity of the crimes revealed by a search. Evidence suggests they are, and the experiment buttresses that conclusion. *Id.* at 892–93. As facts going to severity also can be expected to trigger negative judgments of the defendant, this hypothetical fits moderately well within the affect-testing category.

24. This takeaway has a "no kidding" element. To their credit, RWG acknowledge that the selection of litigants who fit dominant social conceptions of all that is innocent and good is core mission for those who have the luxury (e.g., well-financed impact litigators). *Id.* at 905. Though they say they "suspect" that lawyers already know this, I suspect that they know perfectly well that everyone else also knows this perfectly well. Even "duh" findings are useful, though, because not

very nice, all very clear, all very relevant to our understanding of how judges are—like other humans—affected by social context.

IV. Testing the Affect Heuristic Versus Testing Emotion

RWG's findings, however, do not reach as far as they claim, even with their many well-placed caveats. First, it is not always clear what precisely they are testing. They refer frequently to "feelings towards litigants" as well as the opposing pairs *liking/disliking* and *sympathy/prejudice*, but they also tie in concepts of motivated cognition, political affinity, a sense of justice or equity, cultural cognition, and in-group favoritism. Intuition and emotion are also closely linked in their account. Like the early-twentieth-century Legal Realists whose legacy they invoke, RWG have a tendency to clump a heterogeneous set of ostensibly "arational" influences together.²⁵ Such clumping creates interpretive difficulties; we can see that something is happening, but it is not entirely clear what that something is.

A. RWG are Testing the Affect Heuristic, Narrowly Understood

The most plausible label with which to tag that "something" is the affect heuristic. This focus, like RWG's choice of methodology, is not surprising. The affect heuristic is the most emotionally infused member of the heuristics-and-biases universe with which they are intimately familiar. But, as I shall briefly explain, the heuristic is a relatively minor player in the universe of emotion.

Some definitions are in order. "Affect" refers to "an evaluative feeling . . . of an object, person, or event in terms of positive—pleasant versus negative—unpleasant," or *valence*, combined with "some degree of corresponding bodily reaction," or *arousal*.²⁶ In other words, it captures an embodied sense of *good* or *bad*, which we experience as *liking* or *disliking*. Affects are underlain by evaluations, which can be relatively automatic—for example, evolutionarily primed reactions to spiders or the smell of roses—or reflective of a simple sort of cognition—for example, that a person looks scary or friendly. If cognition consists of information processing, affect "introduces value in a world of fact."²⁷

every instance of collective common sense is correct. Cf. Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 869–77 (2009).

25. See Maroney, *supra* note 3, at 665–68.

26. Nico H. Frijda & Klaus R. Scherer, *Affect (Psychological Perspectives)*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES 10 (David Sander & Klaus R. Scherer eds., 2009). The term "affect" is sometimes used as an umbrella term for moods, emotions, and attitudes. *Id.* The affect heuristic presumes the narrow definition.

27. Nico H. Frijda, *The Psychologist's Point of View*, in HANDBOOK OF EMOTIONS 59–74, 63 (Michael Lewis & Jeanette M. Haviland-Jones eds., 2d ed. 2000).

The influential psychologist Paul Slovic built on these understandings when he proposed the affect heuristic.²⁸ Drawing on the pioneering work of Robert Zajonc, he proposed that a rapid, felt sense of *goodness/liking* or *badness/disliking* sometimes drives choices we then rationalize.²⁹ Highlighting the construct's close kinship with cognitive heuristics, Slovic argued that "[j]ust as imaginability, memorability, and similarity serve as cues for probability judgments (e.g., the availability and representativeness heuristics), affect may serve as a cue for many important judgments."³⁰ The utility of the construct is shown by the enthusiasm with which it has been adopted. As Daniel Kahneman has written, the affect heuristic "is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a harder question (What do I think about it?)."³¹ Thus, fast and relatively unreflective judgments of *good/like* and *bad/dislike* can influence a good number of downstream perceptions and decisions.

This, in a nutshell, is what RWG test. The survey-with-hypotheticals format forces quick reactions within a constrained universe. The ways in which litigant characteristics were varied are designed to prompt a generalized sense of liking or disliking. Those felt impressions are underlain by evaluations that are so socially ingrained as to require no overt deliberative thought—for example, people who try to take care of their families are good, people who try to kill other drug dealers are not good. Some of those evaluations reflect judgments of which judges ought to be particularly mindful because they stand in tension with the duty to rule "without respect to persons"³²—for example, judgments that certain types of people are more or less deserving of protection from the indignity of strip searches. Evaluations may also be suspect because they reflect affinities that we hope they will look beyond—for example, middle-aged husbands and fathers are more relatable to most judges than are teenage, pot-smoking lazeabouts.

RWG are quite right that judges should be aware that their tendencies immediately to like or dislike litigants—or, stated differently, to experience

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

29. *Id.* at 398 (citing Robert B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 *AM. PSYCHOLOGIST* 151–75 (1980)). The affect heuristic is similar to Haidt's "social intuitionist model." Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 818 (2001) ("[M]oral intuition can be defined as the sudden appearance in consciousness of a moral judgment, including an affective valence (good–bad, like–dislike) without any conscious awareness of having gone through steps of searching, weighing evidence, or inferring a conclusion. . . . One sees or hears about a social event and one instantly feels approval or disapproval.") (emphasis omitted).

30. Slovic et al., *supra* note 28, at 400.

31. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 139 (2011).

32. Wistrich et al., *supra* note 2, at 857 n.7 (quoting 28 U.S.C. § 453 (2012)).

reactions that range along a pleasant–unpleasant continuum—can, if unexamined, drive a tendency toward particular outcomes. Sometimes this is not desirable. The affect heuristic is, in this respect, just like its more cognitive cousins: every human tendency that is adaptive most of the time is maladaptive some of the time. Further, if judges notice and interrogate their general likes and dislikes, they might uncover valuable information about how they think, which can help them discern if they need to rethink the underlying evaluations or override their decisional tendencies.³³

If this were all RWG were to claim, I would be quite satisfied. But they anchor these well-supported claims to larger ones about emotion in judging, and that is where they bust prematurely out of the coop.

B. Emotion is Much Bigger Than the Affect Heuristic

Important as the affect heuristic is, it does not come close to dominating the territory of judicial emotion. It is true that those who write about the heuristic often use variations of the descriptor “emotional.”³⁴ But this is generally a matter of rhetoric and convenience rather than analysis of a term of art.³⁵ The problem is that the looser way in which the term is used influences understandings of the term of art.

Valence and arousal are but discrete parts of an emotion. As Nico Frijda has explained, emotions are “processes that *include* affect.”³⁶ While the precise concomitants of those processes are subject to ongoing debate, there is general consensus that in addition to valence and arousal emotions contain some mix of the following: more complex judgments, often ones that can be articulated,³⁷ consciously perceived and more finely differentiated feelings, often amenable to declarative self-labeling (e.g., “I am angry”),³⁸

33. In the “affect-as-information” model, people may discern what they think by noticing how they feel. See Gerald L. Clore, *Affect-As-Information Model*, in THE OXFORD COMPANION, *supra* note 26, at 10–11.

34. See, e.g., KAHNEMAN, *supra* note 31, at 139.

35. See, e.g., Haidt, *supra* note 29, at 814. *Emotional* contrasts nicely with *rational*, which makes for a catchy title. In Haidt’s specific account, moral emotions (though important) are not the central character the title implies; indeed, he is careful to note that his “contrast of intuition and reasoning is not the contrast between emotion and cognition.” *Id.* at 818.

36. Frijda, *supra* note 27, at 63 (emphasis added). If RWG were seeking truly to test the influence of *emotions* there are a number of targeted methods they could have chosen to do so, such as direct emotion induction. See PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES 21–29 (Paula M. Neidenthal et al. eds., 2006); Wistrich et al., *supra* note 2, at 903.

37. Richard S. Lazarus, *Universal Antecedents of the Emotions*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 163, 164–65 & tbl.1 (Paul Ekman & Richard J. Davidson eds., 1994).

38. See, e.g., Jessica L. Tracy & Richard W. Robins, *Putting the Self into Self-Conscious Emotions: A Theoretical Model*, 15 PSYCH. INQUIRY 103, 105 (2004) (explicating how emotions such as shame, pride, and guilt are consciously differentiated and labeled).

and a propensity toward action, including typified facial expressions, verbalizations, and bodily motions.³⁹ The perceptions and judgments (together referred to as an “appraisal”) underlying any given emotion may be accurate or not, fair or not, and reflect good values or not.⁴⁰ Emotion states generally have an identifiable beginning, middle, and end: they are prompted by a trigger, experienced in the mind and body, and extinguished by a change in the emotional person’s internal dialogue or in her environment.⁴¹ Emotion states differ markedly in intensity, ranging from mild to overwhelming.⁴² Different emotion states predispose one to different styles of information processing.⁴³ Moods, which may be thought of as occupying a space between affect and emotion, have such processing influences as well.⁴⁴ Finally, emotions are highly amenable to regulation through a wide array of strategies, each of which carries unique risks and benefits.⁴⁵

Emotion is therefore a far more complex set of phenomena than affect, and its influence is far broader and more diverse than the affect heuristic. Judges experience the entire universe of emotion, and it is not correct to treat the subset as diagnostic of the set.

I have written at length about judges’ emotional realities and will not rehearse those points. Suffice it here to say that judges’ work-triggered emotions range from hope to despair, anger to elation, compassion to contempt, fear to joy, and disgust to reverence. Judges’ emotion triggers include litigants, to be sure, but also lawyers, witnesses, evidence, legal commands and constraints, and working conditions. Some of their emotions are anchored firmly in relevant aspects of the case and some are extraneous to them. Judges’ emotions follow any combination of rise and latency: they may spring up quickly and fade fast, or develop incrementally and persist. The thoughts underlying this emotional palette can range from stark and simple to stunningly nuanced.

39. See Nico H. Frijda, *Action Readiness*, in THE OXFORD COMPANION, *supra* note 26, at 1; Nico H. Frijda, *Action Tendencies*, in THE OXFORD COMPANION, *supra* note 26, at 1–2.

40. See Maroney, *Angry Judges*, *supra* note 11, at 1249–60; Maroney, *Emotional Regulation and Judicial Behavior*, *supra* note 11, at 1508–09.

41. Keith Oatley, *Episode (Emotional)*, in THE OXFORD COMPANION, *supra* note 26, at 156–57.

42. Gerald L. Clore, *Why Emotions Vary In Intensity*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS, *supra* note 37, at 386–93.

43. Maroney, *Angry Judges*, *supra* note 11, at 1265–68.

44. Moods are more distinctly emotional than affects, as they are not simply pleasant/unpleasant but sad, happy, and so on. But they are more diffuse and often longer lasting than emotion states and tend to have lost their anchor to discrete, identifiable triggers. Colloquial understandings of mood also capture generalized states of irritation, anxiety, and so on that may be caused by drives such as hunger, thirst, or sleep deprivation. Nico H. Frijda, *Mood*, in THE OXFORD COMPANION, *supra* note 26, at 258–59.

45. See Maroney, *Emotion Regulation and Judicial Behavior*, *supra* note 11, at 1505–13.

As this last point makes particularly clear, it is not correct to relegate emotion to a sort of System 1 thinking.⁴⁶ Some emotional experiences, like reflexive fear when being pursued by a tiger,⁴⁷ fit that mold. An example that comes to mind is a judge's shock and anger after being spit upon in court.⁴⁸ But consider instead a judge deciding what to do at a criminal sentencing. Imagine the defendant is a drug addict who sincerely wants to recover and whose children will be sent to an underfunded foster care system if he is incarcerated. The victim of the fraud he perpetrated to get drug money is an elderly widow who lost her home, and she and her children deliver a tearful, harrowing impact statement. Drug treatment available outside is much better than that in prison. A ruling that avoids a prison term will require creative legal maneuvering that is likely to attract negative press and possibly a successful appeal. Either could implicate the judge's chances at reelection or promotion. A conscientious judge is likely to feel a complicated welter of emotions, each with its own reasons and its own pull. Coming to a decision that honors them all is a highly sophisticated enterprise. It is not like being chased by a tiger, and it cannot be collapsed to liking or disliking, pleasant or unpleasant. In this sense it is helpful to think of emotion as containing its own System 1 and System 2. Just as one can think fast or slow, one also can feel fast or slow.⁴⁹

The feeling-slow iterations of emotion are the ones for which judges have been most willing to claim (or at least demonstrate) a legitimate role. A recent example may be found in statements delivered by U.S. District Judge Carlton Reeves upon sentencing the young white men who killed James Craig Anderson, a 47-year-old African-American gay man from Jackson, Mississippi.⁵⁰ The defendants set out to brutalize black people; finding Anderson in a parking lot, they beat him and ran him over with a truck while yelling "white power."⁵¹ Reeves's statement was lengthy, erudite, and emotional. It has been described as "brehtaking" for both "the moral force

46. See Wistrich et al., *supra* note 2, at 863–64.

47. *Id.* at 866–67.

48. See Maroney, *Angry Judges*, *supra* note 11, at 1228.

49. Cf. *id.* at 1249–72 (describing complex "righteous anger" model). See also Jaak Panksepp, *Emotions as Natural Kinds Within the Mammalian Brain*, in HANDBOOK OF EMOTIONS, *supra* note 27, at 142–43 (proposing multiple levels of emotion, beginning with "reflexive affects" and ending with the "higher sentiments").

50. Kim Severson, *Weighing Race and Hate in Mississippi Killing*, N.Y. TIMES, Aug. 23, 2011, <http://www.nytimes.com/2011/08/23/us/23jackson.html>, archived at <http://perma.cc/KU59-LDNV>; National Public Radio, CodeSwitch, *A Black Mississippi Judge's Breathtaking Speech to 3 White Murderers* (Feb. 13, 2015), available at <http://www.npr.org/blogs/codeswitch/2015/02/12/385777366/a-black-mississippi-judges-breathtaking-speech-to-three-white-murderers>, archived at <http://perma.cc/AK48-KBX2>.

51. Severson, *supra* note 50.

of its arguments and the palpable sadness with which they are delivered.”⁵² No chasing tigers here; Reeves’s powerful emotion was carefully thought through and thoroughly integrated into his message.

Readers may at this point protest that criminal sentencing is unique and does not represent the sorts of “pure” legal questions RWG test.⁵³ If the point is that judges’ decisional tasks exist along a continuum of more or less space for factors such as equity, individualization, social context, and emotion, that is fair enough. But judges’ embrace of emotion is not limited to criminal sentencing, though that remains the most comfortable setting in which to do so.⁵⁴ While RWG sometimes sound surprisingly formalist,⁵⁵ suggesting the law is knowable without recourse to emotion, judges themselves have argued otherwise.

Justice Brennan, as RWG point out, boldly proclaimed the propriety—nay, the necessity—of calling on emotion to determine proper outcomes in due process challenges.⁵⁶ Brennan’s concept of law-relevant “passion” started out sounding much like affect—“the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason”—but he crucially went on to champion a rich “internal dialogue” of reason and passion, in which passion itself is subjected to “conscious deliberation and evaluation.”⁵⁷ His is a highly thoughtful, deeply rooted sense of relationship between emotion, law, and human flourishing.

While Brennan’s bold position remains unusual, it is not anomalous;⁵⁸ other judges have taken the point even further, as they have not limited themselves to due process claims. And like Brennan they reject sharp dichotomies. Justice Cardozo described a process in which “sentiment” and “reason” might work in harmony throughout the law, each reacting to and

52. *A Black Mississippi Judge’s Breathtaking Speech to 3 White Murderers*, *supra* note 50.

53. It is worth noting that RWG do include a sentencing scenario, though they make it a relatively dry one about construal of a guideline factor. Wistrich et al., *supra* note 2, at 877–78.

54. Judge Chin, whom RWG cite for the proposition that judges ought not to consider emotion in determining “what the law is,” later in that article defends a role for emotion at sentencing. *See* Denny Chin, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563, 1580–81 (2012). Determining a sentence is, of course, law. Chin also gestures toward a broader view. *See id.* at 1564 (noting “there is a place within the law for empathy and emotion,” and “empathy is an essential characteristic for a judge”). The tension in Chin’s rhetoric lessens the degree to which one should rely on his first proposition, which sounds like parroting the party line before arguing the opposite.

55. Wistrich et al., *supra* note 2, at 899 (suggesting that subject judges had “to choose between faithfully applying the law and reaching an unjust result in the particular case before them or bending the law to achieve justice,” though by design there was no clear law “faithfully” to follow).

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

57. *Id.* at 9, 11–12.

58. *Cf.* Wistrich et al., *supra* note 2, at 859 (asserting that “one searches in vain” for judges who echo Brennan).

checking the errors and excesses of the other.⁵⁹ Richard Posner has asserted that good judging requires emotion, particularly in legal determinations that admit of multiple correct answers within a zone of reasonableness.⁶⁰ He is perhaps the most radical of the bunch, opining that emotion sometimes provides answers that traditional reason cannot.⁶¹ Guido Calabresi believes a great judge must have “compassion” and “courage”;⁶² Alex Kozinski has used anger to justify and motivate behavior;⁶³ the late Edward Devitt wrote that “[i]f we judges could possess but one attribute, it should be a kind and understanding heart.”⁶⁴ Recent findings show that conservative male judges tend to rule differently in cases raising gender issues when they have daughters—likely because love for the daughter facilitates learning about the realities of women’s lives.⁶⁵ Even Justice Scalia, a supposed enemy of emotion in all its forms, has recognized that a judge’s emotional reaction to a litigant may be informed, appropriate, and relevant.⁶⁶

In many legal contexts, then, there is no such thing as “law all the way down,”⁶⁷ unless law is understood to encompass some role for emotion in all its wild variety. Different legal contexts will, and ought to, admit of more or less emotional influence. Even within the most wide-open contexts, emotion’s feeling-slow iterations are the most likely to find an embrace. That embrace will help shape what the law is, rather than just “bending” or

59. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 45 (1921).

60. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 241–42 (2001) [hereinafter, POSNER, *FRONTIERS OF LEGAL THEORY*]. See also RICHARD A. POSNER, *HOW JUDGES THINK* 86–87 (2008) [hereinafter POSNER, *HOW JUDGES THINK*].

61. POSNER, *FRONTIERS OF LEGAL THEORY*, *supra* note 60, at 242–43. Posner does not say, as RWG assert at 862, that judges “convert” emotion to rational decisions, but rather that emotion contains its own rationality. *Id.* at 226–228; POSNER, *HOW JUDGES THINK*, *supra* note 60, at 106.

62. Guido Calabresi, *What Makes a Judge Great: To A. Leon Higginbotham, Jr.*, 142 U. PA. L. REV. 513, 513 (1993).

63. See Maroney, *Emotion Regulation and Judicial Behavior*, *supra* note 11, at 1527.

64. Edward J. Devitt, *Ten Commandments for the New Judge*, 65 ABA J. 574, 574 (1979).

65. Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women’s Issues?*, 59 AM. J. POL. SCI. 37, 52–53 (2015). See also Terry A. Maroney & Philip J. Ackerman-Lieberman, “As A Father Shows Compassion for His Children”: *Ancient and Contemporary Perspectives on Judicial Empathy*, 3 J.L. RELIGION & ST. 240, 273–74 (2014); see also *id.* at 249–50 (“What, after all, would be the point of wanting a judge to perceive more perspectives if we did not also want her to care about them and allow them to guide her decisions? If empathy is a purely intellectual exercise it is pointless.”).

66. *Liteky v. United States*, 510 U.S. 540, 550–51 (1994) (“The judge . . . may . . . be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge’s task. As Judge Jerome Frank pithily put it: ‘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.’” (internal citations omitted)).

67. Wistrich et al., *supra* note 2, at 858, 858 n.14 (quoting Hon. Elena Kagan).

“softening” it from time to time.⁶⁸ A full exploration of judicial emotion must include all of this territory (which is, of course, at least a life’s work). That territory includes the affect heuristic, but it is so much more.

V. Conclusion

Rachlinski, Wistrich, and Guthrie have once again creatively deployed their empirical toolbox to show us something important about judicial behavior. Judges, like other humans, are likely to make quick like/dislike evaluations of stimuli—including litigants—and those evaluations may predispose them to choose, from among defensible legal rulings, those that favor or disfavor those litigants. This is likely true even where such likes and dislikes have no obvious bearing on the legal question and even where those reactions may reflect inappropriate social judgments. It is unclear how or whether such expressions of the affect heuristic operate in the real world of judging. However, the fact that these findings jibe with common perception suggests that they do. Judges should be aware of this tendency and be willing to interrogate it.

Notorious RWG have, however, packaged this quality product in too large and flashy a box. Perhaps reflecting the marketing aspect of writing law review articles, they have embraced a sharp dichotomy with a catchy hook that bears an imperfect relationship to their questions and findings. Along the way, they claim more than they ought, and reflect taxonomic difficulties that they did not invent but do perpetuate.

Rather than set up a war between head and heart, the right question is: Why choose?

68. *Id.* at 856, 906 n.239.