

Dispassionate Judges Encountering Hot-headed Aristotelians

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Abstract

Traditionally, it has been assumed that a judge should pass her judgement in an entirely dispassionate state of mind. More recently this traditional assumption has been challenged by authors who claim that emotions as compassion, indignation or anger are not only indispensable, but can even play a beneficial and important role in judicial decision making. Thus the old ideal of the impassionate judge is challenged by the new ideal of rightly compassionate, rightly indignant or even rightly angry judges. Some supporters of this new ideal of an emotionally engaged judge invoke Aristotle for the idea that a judge should feel the right emotions in the right way. The paper argues that, although there are passages in Aristotle that might be understood as implying such views, Aristotle's account of the right emotions of a virtuous person does not lend support to ideal of passionate judges. On the contrary, the paper will point to contexts in which Aristotle seems to be rather concerned about the possibility of judges who pass their judgement in an emotional state. It is thoroughly justified, though, to regard Aristotle as an ally in the promotion of the idea that emotions, rather than being blind, obstructive impulses, are intrinsically connected with our thoughts,

judgements and wishes. However, the impact of these ideas must be assessed against the background of Aristotle's account of character virtues.

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Reviews

1. An amateurish case for the ideal of dispassionate judges

It might be in order to begin this paper with an admission of the author's completely pedestrian convictions on legal issues. In case I am ever brought before the court I ardently hope that the jurors or judges I meet there won't have negative feelings for me. At least I hope that, in case they do have such feelings, I won't be judged and sentenced on the basis of them. In fact, I even assume that I have a sort of right to have the decision making of the jurors or judges not be driven by their personal feelings, as this could violate my right for an impartial treatment. Admittedly, there might be situations in which I hope for the jurors' and judges' *favorable* feelings and for their compassion or empathy, for example when I plead for mercy. These favorable feelings seem to add the proverbial 'human touch' to the allegedly 'sterile' legal system, so that I am more inclined to accept such favorable feelings in the law court than the negative ones. On reflection, however, I would not want to endorse a system in which jurors and judges are generally expected to form favorable judgements in accordance with their favorable feelings, since, after all, I would not like the opposing party benefiting from the jurors' or judges' feelings; nor would I like to see compassionate, favorable sentences for culprits who do not deserve them. All things considered then, I expect to be better off with dispassionate jurors and judges and am relieved to find myself in agreement with a longstanding tradition of legal theory.¹

As a legal philistine I was thus nonplused to learn that this same longstanding tradition has recently come under pressure. It is being challenged by a trend that has already pervaded much of the humanities and the social sciences. This trend is centered on the idea that for a long time the emotions have been systematically neglected and underestimated, as they were mainly taken to be strong, mysterious, and irrational impulses that have nothing but distorting effects on our lives. However, more recent research in different fields converges in saying that emotions are intimately connected with our thoughts, are directed at objects and are apt to express our evaluative judgements. For this reason, or so the founding story of this movement goes, it is high time that we reconsider and reassess the role of emotions in all fields that have been oblivious to their emotional dimension. From the outside it seemed

that law schools were like a calm resilience to this movement, but recent juridical publications with titles such as 'The Passions of Law', 'Emotion and the Law', 'Angry Judges', etc. clearly indicate that times have changed.²

2. The emotional approach in legal studies

It is the juridical side-branch of the general *emotional turn* that this paper will be concerned with. In general, scholarship on the relation between law and emotion has a wide range of possible topics. It can deal, e.g., with the public emotions that are evoked by legal decisions or with the emotions of the litigants during a judicial hearing. Or it can deal with the emotions by which a culprit was motivated to commit a crime; often such emotions have to be acknowledged as mitigating factors. Also, the law & emotion scholarship can deal with the emotions of the victims; in some cases they are crucial for defining the type and severity of a crime. All this is certainly interesting and pertinent;³ however, this paper will focus on the more specific question of whether it is acceptable for the emotions of jurors and judges⁴ to play a role or not. Due to intuitions like the ones already mentioned in section (1.) above, one might tend to think that the forensic decision makers should ideally pass their judgements in an entirely impassionate state of mind. However, it has recently been objected that judges will inevitably become emotionally engaged. Also, since emotions are directed at objects and are dependent on thoughts, they can be directed at appropriate or inappropriate objects and can derive from true or mistaken thoughts; accordingly emotions can be assessed as appropriate or inappropriate, so that the traditional ideal of the impassionate judge might be understood as recommending the exclusion of only inappropriate feelings. Finally, if emotions are like judgements or are intimately connected with judgements, certain emotions might even support the decision making of the judge. If compassion, for example, is seen as a kind of awareness of mitigating factors, it might help the judge to take account of such pertinent factors in her sentence.⁵ Or take anger: if it is always directed at persons who have voluntarily caused harm to someone else, one might think that it is often appropriate for judges to feel anger when dealing with criminals who actually have inflicted harm on innocent people. The idea might be, then, that it is not only acceptable for a judge to feel and express the due amount of anger, but that her anger, being directed at harms and acts of injustice, actually helps her arrive at a correct judgement.⁶

This is, roughly, the set of ideas that is put forward by legal scholars in order to challenge the traditional ideal of the dispassionate judge.⁷ My attention was excited by the idea that there are (among other things) philosophical reasons, most notably suggestions made by the Greek philosopher Aristotle, that urge us to think that the old ideal of the dispassionate, emotionally neutral judge must be overcome. And this is the claim that will be discussed in the course of this paper: Does it actually follow from Aristotle's account of emotions or from anything else that Aristotle says that an (appropriately) angry or otherwise emotional judge is better than a dispassionate one? This is, I take it, a crucial question, since leading supporters of the current attack on the old ideal of dispassionate judges present themselves as Neo-Aristotelians who are merely applying uncontested premises of Aristotelian philosophy to the contemporary legal debate. One could have the impression, then, that it is above all Aristotle's philosophy that lends support to the ideal of the 'emotional judge'. It will be argued that, although Aristotle is justly mentioned as a predecessor of the current rehabilitation of emotions in general, and although Aristotle's ethical theory actually distinguishes between appropriate and inappropriate emotions, the status of the judge or juror is not really comparable to the situation of a virtuous agent in Aristotle's moral philosophy. Admittedly, there is room for scholarly disagreement about the relation between reason and emotions in Aristotle's moral

psychology. The idea, however, that Aristotle would favor an emotional judge over a sober, emotionally neutral and deliberate decision maker would require an extreme and, to my mind, implausibly anti-intellectualist reading of some of his main tenets. It seems that, in spite of all current enthusiasm about Aristotle's account of emotions, Aristotle wants to assign a more restricted role to the emotions. At any rate, it is not an uncontested fact about the history of ancient philosophy that Aristotle would favor the idea of emotional judges. It rather takes -- or this is my claim -- hotheaded Aristotelians to find support for this kind of thesis.

3. Judges getting angry

Let us suppose that, contrary to a long standing tradition that has tended to denounce emotions, emotions are not just mysterious, irrational, distorting impulses, but are crucially connected with our thoughts, beliefs, judgements or evaluations. Let us further suppose that it is in general good for human beings to have emotions and not to suppress or ignore them. Further, let us suppose that due to their relation to thoughts, beliefs, judgements or evaluations, the emotions we have might be either appropriate or inappropriate, and that there is nothing wrong with having emotions of the appropriate sort. Finally let us suppose or rather emphasize that jurors and judges are also human beings⁸. It seems to follow quite naturally, then, that there is nothing objectionable in the idea that jurors and judges, being themselves human beings, should feel the emotions that are connected with the judgements they pass. In particular, there is nothing objectionable about this idea, if we are speaking of emotions of the appropriate sort. A quite candid development of such views has been given by Terry Maroney in a series of papers. The present paper will take her claims as paradigmatic of Neo-Aristotelian approaches to the question of the emotions of a judge. In the present section I want to specify some of her claims.⁹

Maroney points out that judicial anger is ubiquitous and inevitable. The focus on anger is not meant to exclude other judicially salient emotions, but anger is the "quintessentially judicial emotion". Maroney sketches several different circumstances in which judges tend to get angry. They are not only angry at criminals and litigants, but also at lawyers, witnesses, colleagues, etc. If judicial emotion is inevitable, the traditional ideal of the dispassionate judge seems to be misguided. Indeed she calls this old ideal a "dangerous myth"¹⁰. Quite generally, Maroney concludes from this inevitability that judges should not exert themselves trying to avoid or suppress their emotions, but should rather work on their emotion regulation, which includes the distinction between appropriate and inappropriate emotions as well as the correct way of dealing with the effects and articulations of one's anger. Indeed, her papers offer practical tools for the successful regulation of judicial anger. The new model she wants to suggest is the model of a *righteously angry judge* (RAJ), who is angry for good reasons and expresses her anger in an agreeable way. Righteously angry judges, she says, deserve our approval rather than our condemnation.¹¹

That judges have many occasions in their professional lives to get angry with good reasons, and that they may therefore welcome any profound guidance for dealing with this anger, sounds very plausible. That judicial anger is a literally ubiquitous and inevitable phenomenon is a different claim; but this might be an empirical matter. From a philosophical point of view the decisive question is whether the emotionally made judgements are actually thought to be good or even better and whether the emotional judge is actually a better judge than the dispassionate one. And if this claim is actually made, the philosopher would be interested to know why this is so: What are the advantages of emotions in judicial judgements? How can emotions help the judge to form better judgements?

Maroney is actually quite cautious with regard to this latter sort of claim. The main interest of her RAJ model seems to lie in the careful exposition of factors that can

make judicial anger inappropriate, irrelevant and thus objectionable. This seems convincing, since whoever wants to become a righteously angry judge, has to exclude these disqualifying aspects of her (judicial) anger. Also, this kind of rational assessment of instances of emotional reactions actually seems to derive from the Aristotelian take on emotions. But once again: Is it better to be an angry judge than a dispassionate one? It seems that Maroney would answer this question in the affirmative. For example, she repeatedly says, as already quoted, that the righteously angry judge deserves our approval. She also says that the judge *must not* deny or suppress her anger.¹² Indeed, there seems to be no reason to suppress anger, if “to act on anger is in large part to act on reasons”¹³ and if emotions are “critical to substantive rationality”¹⁴. The attempt to extinguish emotions would “needlessly consume cognitive resources.”¹⁵ Anger is indeed said to be “a legitimate basis for judicial action”¹⁶. It seems, then, that Maroney would favor an angry judge (provided that she is angry for good reasons and in the right way). But why is it that such an emotional judge would be favorable?

Apart from the fact that emotions are human and inevitable and that it is therefore of little use to attempt to avoid or to extinguish them, Maroney mentions several benefits of the RAJ model. As she sometimes takes the perspective of practicing judges, she also includes benefits *for the judges* themselves; e.g. that disclosure of one’s anger makes it far easier to live with it.¹⁷ This sounds plausible again, but is not the kind of advantage or benefit we are looking for, as we are looking for reasons of why judgements that are informed by emotion are supposed to be the superior ones. In another context Maroney mentions the thoroughly convincing point that judges can draw lessons from the previous experience of anger, for example by identifying recurrent triggers and by evaluating their relevance for their work.¹⁸ This is not a personal benefit for the judge, like the previously mentioned one, but a benefit that aims at the improvement of a judge’s professional performance. Analyzing the reasons for previously experienced anger a judge can improve her future judgements. I am fine with this. But is there also an advantage for a particular judgement, if it is conducted in a state of righteous anger? Here are some hints provided by the RAJ model that might help to answer this question:

(i.) Anger facilitates judgement.¹⁹

(i.a) Anger facilitates judgement by narrowing and focusing attention.²⁰

(i.b) Given the wearying nature of the job, anger helps the judge to stay attentive.²¹

(ii.) Anger motivates responsive action.²² / Anger facilitates actions necessary to carry out the desire to assign punishment.²³

(iii.) Anger carries expressive benefits; it is a potent communicative device.²⁴ Its expression communicates with unusual clarity, conveying the underlying judgement and underlining its seriousness.²⁵

(iv.) More generally, emotions signal that an event is of particular importance.²⁶

This is meant to be a fair compilation of ideas I found in Maroney’s texts. Do they help us to understand why the judicial judgement improves under the influence of anger?

4. Some quick & dirty comments

Frankly, I cannot find a particularly strong reason among (i.) to (iv.) for thinking that the judgement that is formed under the influence of anger is the better one. To begin with, I cannot really see from Maroney's argument in what sense anger *facilitates* the judicial judgement (i.). In fact, the only support explicitly given for this claim is (i.a), i.e. that anger narrows and focuses our attention. Well, this is certainly right. If anger helps us to focus our attention on the pertinent points, this might be an advantage. But why do professional judges need this kind of support? Is it only through anger and other emotions that we can focus our attention? This would be weird. If the mathematics professor grades her students' papers she passes judgements on her students' work and must focus her attention on the particular calculations, but cannot rely on any particular emotion. Why, then, does the judge need this emotional support? One kind of support is explained in (i.b): the judges' job is wearying; anger helps them "to keep attention from sagging"²⁷. I am unsure what that means. That anger helps them not to fall asleep? Why can't they do with a cup of strong coffee? And isn't it particularly tiring to indulge in one's anger? Or is this meant to say that anger helps them not to become cynics? I take *this* point. That they still get angry indicates that they have not yet surrendered or that they are not mentally retired. However, this again would be a benefit for the judge's own person, not for the particular judgement.

Idea (ii.) draws on the generally accepted view that emotions are apt to motivate certain actions. As anger is connected with the wish to impose punishment or to get restitution, anger may well be said to motivate us to carry out the actions that are required for punishment. I am not sure, however, whether the point is that anger motivates the judge to pass a judgement or whether it is that anger motivates us to go beyond the mere judgement and to carry out actions that actually lead to the required punishment. In the latter case, the benefit would not concern the judgement itself, but only certain consequences that could follow from the judgement. Also I wonder what other actions a judge has to take. Isn't it the judge's first and foremost task to arrive at a sentence? In both the former and the latter cases one could wonder why the judge is expected to need this additional boost. Take the example of a bus driver. As a bus driver, she is most probably motivated to perform the inherent goals of her profession, i.e. bus driving, well. Or take the math professor again. As a math professor she will certainly be motivated to perform the inherent goals of her profession, i.e. teaching math or carrying out research, well. If one of them occasionally happens to lack the required motivation for the inherent goals she may remind herself of, as it were, external incentives, e.g. the approval of her colleagues, the monthly payroll, etc. Why is it that of all different professions it is the judge who needs additional anger-based motivation for doing what she is supposed to do?

Idea (iii.) concerns communication and how a judge gets across her assessments and decisions. Again, I think the point is well taken. However, it is not about the quality of the judgement itself. Also, if a judge happens to be a skilled actor, feigned anger and indignation could do the same job (think of all the gifted TV judges, whose feigned anger has as much impact as the sincerely felt anger of hard working real life judges).

According to idea (iv.) emotions signal importance. Right. Still, this is not sufficient to justify the claim that the quality of a judgement might be improved by the impact of anger, as emotions in general only signal what is important *for us*, which would render an emotionally formed judgement as partial. It might be more important for a particular judge to sentence convicted rapists than convicted robbers, but this difference in personal preferences shouldn't lead to disproportionate attention or unequal treatment.

Reviewing these ideas I haven't come across a really good reason for thinking that a judicial judgement that is formed by righteously angry judges is somehow superior (although there were reasons for thinking (a) that judges who adhere to their anger are better off and (b) that there are beneficial concomitants of angrily formed judgements). Perhaps the chief point of the RAJ model is to say that, since emotions are inevitable, judges should accept that they find themselves in emotional states of mind, and so should not attempt to get rid of their emotions, but sincerely try to make the best of them. Still, one cannot help but thinking that there is a more ambitious project in the background – and that this has to do with the appearance of good old Aristotle.

5. How Aristotle comes in

Aristotle is mostly invoked in support of the two following ideas: first, emotions can and, indeed, should be defined with reference to the objects they are directed at, and second, it is not bad to have emotions, though one should avoid having inappropriate emotions. Important early representatives of the philosophy of emotions actually drew on some of Aristotle's ideas.²⁸

It is, above all, Martha C. Nussbaum who carries a considerable responsibility for the presence of Aristotle in parts of the current legal debate. Nussbaum has published widely and profoundly on ancient accounts of emotions; in particular, she often compared the Aristotelian and the Stoic account of emotions. In principle, she seems to appreciate both camps for their acknowledgement that emotions are deeply entangled with beliefs or judgements, but in the end she favors Aristotle's more permissive and welcoming attitude to emotions. In Nussbaum 2001²⁹ she formulates an 'Aristotelian account' of emotions that derives from exegetically plausible claims about Aristotle, but also goes (partly intentionally) beyond Aristotle in one or another respect. As a successful author and publicly visible intellectual she contributed immensely to the dissemination of the ancient philosophers' contributions to more complex and more ambitious accounts of emotions. As a professor of law she also managed to implement her 'Aristotelian account' of emotions into certain debates within legal studies. In various publications (e.g. Nussbaum 2001 and 2004³⁰) she makes a case for the presence of certain emotions in public life and in law, while denying a legitimate place for certain other emotions, like disgust, in the same realm. If one understands Aristotle's account of emotions along the lines of Nussbaum's 'Aristotelian account', it is tempting to invoke Aristotle for defending the phenomenon of judicial anger and for motivating the RAJ model. When Maroney in the above mentioned papers tries to articulate criteria for good reasons for anger and for the correct manifestation of anger in our behavior she again and again refers to "Aristotle's counsel" that one ought to be angry "at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way."³¹ She is aware that Aristotle's counsel was directed to human beings generally and not to judges specifically.³² But, as judges are human beings too, she takes herself to be on the safe side when applying this counsel also to judges. According to Aristotle, she points out, a judge is not only justified to being angry at certain crimes or affronts, but a judge is in fact obligated to be angry.³³ She also points out that in the 'Aristotelian account,' appropriate or virtuous anger is equivalent with justice; she even dares to say that "in the Aristotelian view" anger *is* justice.³⁴ She recommends seeing judicial anger "through the lens" of Aristotle's theory of virtue, which seems to imply that the righteously angry judge judges in the virtuous way. And since virtuous judging is certainly preferable to vicious judging it seems to follow from Aristotle's account that it is preferable to form judicial judgements in states of (righteous) anger. In this general picture, driven by a somehow hotheaded version of Aristotelianism, it

seems to be suggested that the deeper reasons for why righteously angry judgements are preferable to dispassionate ones (the kind of reasons we were unable to find during the discussion of section (4.) above) are to be found in Aristotle's philosophy. We will examine this suspicion in the following sections.

6. Aristotle and angry judges: a mismatch?

Before we start browsing Aristotelian philosophy for hints to the ideal of the angry judge, it might be useful to address some preliminary concerns.

To begin with, the formula that according to Aristotle the judge should feel anger for the right reasons and should deal with her anger in the right way (see section (5.) above), bears a significant ambiguity. Aristotle himself, to be sure, never applies the formula of having emotions in the right way etc. to judges in particular. In any case, leaving aside this minor mismatch, the formula applied to judges could either mean (a) that whoever acts as judge should feel anger at the case at hand and should feel it for the right reasons and in the right way, or it could mean (b) that *if* a judge happens to feel anger, it should be for the right reasons and in the right way. As we will see below in section (7.), Aristotle's account of virtues, from which this formula is taken, provides a rationale for the claim given in reading (b), while it is much more difficult to find an Aristotelian theorem that would correspond to claim (a). If, however, one wishes to ground a preference for angry judgements in Aristotelian virtue ethics, one would need to presuppose reading (a), not (b).

A related point is this. Maroney's account is based on the claim that judicial anger is ubiquitous and inevitable. Reading (a) in the previous paragraph would square well with this ubiquity claim, while the claim in reading (b) is much more limited. Frankly speaking, I find it hard to imagine that Aristotle thought of emotions as a ubiquitous phenomenon. For example, Aristotle says that young people usually follow their passions or emotions and are at this stage not able to follow reason. (*EN*³⁵ 1095a4-9) This sounds to me as if the emotion-driven stage of life is something that we should overcome rather sooner than later. Once we are grown up, we should be able to structure our lives in accordance with reason and should no longer follow emotional impulses. Here is another example: Aristotle clearly thinks of emotions as episodes that involve extraordinary bodily changes. (*DA*³⁶ 403a5-6, 16-8, 31f) Anger, he thinks, is connected with the boiling of the blood in the region around the heart. Such bodily conditions are exhausting and thus have definite limits in time. (*Rhet.*³⁷ 1382a7) On this account, a job in which we are expected to produce episodes of anger on a regular basis would be extremely unhealthy. Aristotle once reports a case in which people who poured all their anger in into the sentencing of culprit A on the one day, were too exhausted to be angry with culprit B on the next. (*Rhet.* 1380b10-4) These are not decisive reasons, but together they suggest a picture in which the experience of anger and other strong emotions is rather limited to very specific situations.

Another preliminary worry. *Human beings should have emotions in the right way. Judges are human beings. Judges should have emotions in the right way.* This sounds like a safe conclusion. Nevertheless we never find anything like this in Aristotle. Why is this so? Well, when Aristotle speaks about the conditions under which a person is thought to be virtuous, his paradigm case is a moral agent who makes decisions concerning her own life and then acts on them. (for example *EN* 1105a28-33) What is decisive is the good practical decision (*prohairesis*), which involves both practical reason and the virtues of the non-rational part of the soul (which, on Aristotle's account, is also responsible for the emotions). It is due to the latter part that the virtuous persons desire the right virtuous goals. The *prohairesis* is always directed at things that are possible for the agent to do and that lie in the future. If the *prohairesis* is good, it singles out the option that makes the best

contribution to the agent's life as a whole. A judge, by contrast, does not make decisions that are expected to concern her own life or her own happiness directly. For the most part she has to deal with questions concerning other people and what they have done in the past. If she tries to convict someone of a crime, she mostly has to deal with factual questions of the past. Whereas in the decisions of moral agents the non-rational part of the soul determines the goals of the virtuous conduct, there are no practical goals that the judge as judge could realize. Therefore the judge does not make *prohaireseis*, practical decisions in the technical sense, and hence does not have to rely on the non-rational part of soul – at least not in the same way in which the paradigmatic moral agent does. Since the judge is not herself about to undertake certain actions (apart from the formation of the just judgement or sentence), the question of her motivation does not occur. In all these respects the situation of the judge is different from the moral agent who makes practical decisions and who is the subject of Aristotle's formula that one should have emotions in the right way.

Furthermore, Aristotle's reflections on the role of judges are deeply influenced by the Athenian legal system of his time, in which it was common not to have a single (professional) judge, but some hundred democratic jurors. This is the kind of judge that the litigants of Aristotle's time were facing. Thinking of an assembly of, say, five hundred jurors, Aristotle was not worrying about whether all of them were virtuous or not. For Aristotle, virtue is a difficult thing to achieve; examples of virtuous people are rather rare, they certainly do not show up in groups of five hundred. When Aristotle speaks in his *Rhetoric* about the judges or jurors that are to be addressed by a judicial speech, he takes it for granted that they are uneducated, easily distractible, and unable to follow complex arguments. He hence favors a legal system in which they have to decide as little as possible. That the majority of the democratic judges could or should be virtuous in the sense of his virtue theory would be an unrealistic idea for him.

The next worry concerns the "quintessential judicial emotion" of anger itself. Aristotle defines anger as a desire, accompanied by pain, for revenge (or what we take to be revenge) for an undeserved insult (or what we take to be an undeserved insult) that was directed against oneself or those near to one. (*Rhet.* 1378a31-3) The Greek word that is translated by "insult" implies acts of contempt, spite or belittling; such acts manifest someone's opinion that the affected person is worthless. Sometimes an injustice or harm can be meant to belittle or humiliate the victim; but in general the pertinent kind of insult is not the same as injustice. Very often acts of belittlement have little to do with justice or injustice; for example, Aristotle takes forgetfulness about names as a type of insulting behavior. (*Rhet.* 1379b34-7) Such behavior hurts because it aims at violating our self-esteem. Our anger reflects the fact that we think of ourselves as valuable persons who deserve to be treated with the due respect. This is also Aristotle's justification of anger: it is legitimate, as it is legitimate to have the appropriate amount of self-esteem; and if someone tends not to get angry when being insulted, this can indicate a lack of self-esteem (which may have other negative consequences, as Aristotle thinks). This is the Aristotelian notion of anger. When, by contrast, someone somewhere suffers a harm or injustice, that won't affect our self-esteem. This is why Aristotelian anger cannot be the quintessential judicial emotion that is required by the RAJ model. In a monograph that explores our emotional attitudes to justice, Robert Solomon writes:

Aristotle tells us that anger takes as its occasion a sufficient offense to oneself or one's friend. I think that we can safely expand that to include any offense to a person or persons with whom we can empathize.³⁸

Maroney³⁹ refers to this remark approvingly. Of course, one can expand or replace Aristotle's quite narrow notion of anger. The only problem is that this expansion or replacement results in a notion of anger that is no longer Aristotle's notion and that,

hence, cannot be justified by reference to Aristotle or by the strategy that Aristotle adopts. Aristotelian anger is not concerned with all sorts of injustice. In general, it seems to me that Aristotelian *indignation* would be the better candidate for accounting for the judges' emotional experience, as indignation is more generally directed at wrongdoing and injustice of all kind. Still, Aristotle's notion of indignation would also be too narrow, as it is only aroused by the well-being of wrongdoers.⁴⁰

Accordingly, the connection between anger and justice that the RAJ model presupposes cannot be mapped onto the Aristotelian theory. If we look more closely into Aristotle's account of character virtues it is remarkable that only a few virtues are defined by reference to emotions (e.g. courage, mildness), whereas other virtues are determined without any reference to particular (named) emotions. (*EN* 1107a27 ff.) Justice is not among the virtues that are defined by emotions. The fifth book of Aristotle's *Nicomachean Ethics* is entirely dedicated to justice, but makes no attempt to identify the specific emotions connected with this virtue. Anger does not play a role at all.

7. Aristotelian emotions and virtue theory

It is quite common to appeal to Aristotle for the idea that it is by no means wrong or bad to have emotions, but that it might even be good or required to have them, provided that they are the right or the appropriate emotions. This is often tentatively contrasted with the view of the Stoics who take *apatheia*, the absence of affections or emotions as an ideal and hence tend to think that it is always bad to have (these particular) emotions. All these elements are also crucial for the model of the righteously angry judge. The main impact of the Aristotelian account hence seems to be the distinction between appropriate and inappropriate emotions, and this distinction leads us into the ambit of Aristotle's theory of virtue, for it is the virtuous person who is expected to have the right emotions.

For Aristotle, a character virtue is a relatively stable trait or disposition of the non-rational part of the human soul. In order to acquire them, it is helpful if people live in well-ordered cities with good laws (for example *EN* 1796b31-2); it is also crucial that parents, teachers or parental friends make them do the right things, because it is through doing the right things and getting accustomed to it that people become virtuous.

Long term dispositions of our character can be good or bad. Virtues are the good or right type of character traits; once we have them, they help us getting things right, i.e. to do the right things and to have the right emotions. Both right actions and right emotions flow from the same attitude or disposition the character virtues consist in. A disposition that brings about bad actions and inappropriate emotions could never be called a 'virtue'. It is crucial, then, for the virtue theorist to focus on the good sort of character disposition.⁴¹ How are *good* or *right* character dispositions to be distinguished and defined? Well, these are the dispositions by which we do the right actions and have the right feelings. But how should 'right actions' and 'right feelings' be defined? Well, they are the ones that are not failures – and wherever there is a continuous scale, Aristotle says, failure can come in two forms, either as deficiency or as excess. Hence the range that defines the right actions and feelings must be somehow in between, i.e. between actions and feelings that fail in the direction of deficiency and actions and feelings that fail in the direction of excess. This is why Aristotle calls virtue of character a mean (*mesotês*). It is a disposition for getting things right, which is equivalent to saying that it is a disposition for hitting the mean between the failure of the deficient and the failure of the excessive kind. Essentially the same idea can be expressed in the following way. Getting things right, i.e. doing the right things and having the right emotions, is a quite demanding undertaking: we can fail to get things right, when we do something in the wrong place (taking care of

one's personal hygiene: in principle, right / doing it in the classroom, wrong) or at the wrong time (personal hygiene again: in principle, right / during office hours, wrong) or with the wrong persons (sexual reproduction: in principle, right / with the neighbor's spouse, wrong) or with the wrong instruments (playing cops and robbers: in principle, okay / using real guns, not okay) or in the wrong way (helping an old lady cross the street: in principle right / doing it violently, wrong), etc. If we want to do an action right having the right emotions, we must succeed with respect to each of these parameters. Doing something at a time when we should not is a failure of the excessive kind; not doing it when we should, is a failure of the deficient kind. Doing something with a person with whom we should not, is a failure of the excessive kind, not doing it with a person with whom we should, is a failure of the deficient kind, etc. All this is summed up by Aristotle with respect to emotions in the following famous formulation:

For instance, both fear and confidence and appetite and anger and pity and in general pleasure and pain may be felt both too much and too little, and in both cases not well; but to feel them at the right times, with reference to the right objects, towards the right people, with the right aim, and in the right way, is what is both intermediate and best, and this is characteristic of excellence.(EN 1106b18-23, (trans. W.D.Ross/ revised by J.O.Urmson)⁴²

Once again, this quotation shows that the famous 'doctrine of the mean' is not different from the requirement that we should have the emotions at the right time, with reference to the right objects, etc., but that these latter requirements are just a way of spelling out what it means for an emotion to be right or appropriate, and that the virtue is a mean or hits the mean precisely in that it brings about these right or appropriate emotions (and the corresponding actions).

In the contemporary movement of virtue ethics it became a commonplace that the virtuous person does the right things with the right motivation and that this idea derives from Aristotle. We are now in a position to rephrase this commonplace by saying that for Aristotle a virtuous person does the right actions with the right motivation because it is due to her virtuous disposition that she does the right actions. And it is the same firm virtuous disposition that brings about the right emotional responses. This is not to say that the virtuous person is always motivated by emotions; it only says that if we do the right action and have the right emotional attitude towards this same course of action, this derives from the same virtuous attitude or disposition. If a person does the right thing, while having adversary desires or while feeling reluctant to do this right thing, this is an indication that the person has not or not yet acquired the kind of disposition that is definitive of a character virtue.

Let us now briefly address some possible ramifications of the sketched account:

1. Does the virtuous person always have *moderate* emotions? No. This is a later theory (called '*metriopatheia*'), probably deriving from a misinterpretation of Aristotle's doctrine that the virtue is a mean. What Aristotle says and requires is that the virtuous person has the *right* or *appropriate* emotions.
2. Are all actions accompanied or even motivated by emotions? No, sometimes (perhaps, often) the required appropriate emotion in a given situation might be a zero-emotion, i.e. it might be appropriate not to have any emotion. (Correspondingly, there might be situations in which it is appropriate to have maximally strong emotions.) Not even virtuous actions are always motivated by emotions. The requirement is that the virtuous person acts for non-contingent reasons and that she does not have competing desires, i.e. desires that would conflict with the aim of the virtuous action.
3. Is it, according to Aristotle, in general good or beneficial for an agent to decide and to act in accordance with the appropriate emotions? Of course, this is better than deciding and acting in accordance with inappropriate emotions. However, Aristotle's point seems to be a weaker one: *if* we undergo episodes of emotions or *if* we find ourselves in situations that usually trigger our emotions, we should have the appropriate, not the inappropriate ones.

4. Does Aristotle's theory aim at the regulation of emotions? In one sense *yes*, in another sense *no*. On the one hand the virtuous person has appropriate or, if you like, perfectly 'regulated' emotions. On the other hand, if we associate 'emotion regulation' with the curing of symptoms, this notion would not match the core issue of Aristotle's account, for the appropriate emotions are rather thought to be an effect of the good and virtuous state of this particular part of the soul. Aristotle does not aim to offer tips for how to deal with inappropriate emotions.

5. Here is another, related point. A virtuous person is likely to have the appropriate emotions in different kinds of situation. She can rely on her emotional responses without 'controlling' or 'regulating' them, as her emotions flow from a firm character disposition. By contrast, a non-virtuous person can never rely on having the right emotions. For her, having the right emotions is, of course, still better than having the wrong ones. However, since she cannot rely on having the appropriate emotional responses, she cannot just follow her emotions, but has to rationally check or control her impulses. In sum, Aristotle is not interested in good or bad emotions as such, but only in the good emotions that indicate and flow from a good character.

How does all this relate to the RAJ model? Aristotle's interest in appropriate emotions cannot be separated from his interest in character virtues. Without this framework the "Aristotelian counsel" that one should have emotions for the right reasons and in the right ways makes little sense. From the point of view of Aristotle's virtue ethics, it is by no means required that everything we do or judge, must be accompanied or driven by emotions; it is only required that the virtuous person must not fail with respect to her emotional reactions. Also, occasionally having the right emotions does not make someone virtuous; it is the other way around, that being virtuous makes someone reliably have the appropriate emotions. If one has to regulate or to alter one's emotional reactions in a particular situation (as the judge in the RAJ model does) this would be a clear indication that one has not yet acquired the corresponding virtues.⁴³ Further, not virtue-based, but occasionally appropriate emotions are not a real relief of burden; they provide no reliable, reason-independent guidance for the judge, as one would have to make sure from case to case (by rational – emotionless – examination, I suppose), that one's emotions are actually appropriate. Requiring, on the other hand, that all judges become virtuous persons in the Aristotelian sense would be an over-demanding and unrealistic move. This would also include a holistic approach, according to which one could not be a good judge without being a fully virtuous person in one's private life. This is a consequence, I suppose, that would not even be welcomed by the Neo-Aristotelians among law theorists.

8. Aristotle and the alleged rationality of emotions

As we have seen in the earlier sections of this paper, the RAJ model rests on the assumption that became part of the predominant contemporary view that emotions are not just opposed to reason, but are themselves 'cognitive' or 'rational'. According to an influential interpretation of Aristotle this is a view that Aristotle would share.⁴⁴ In his *Rhetoric* he acknowledges that persuasion is not always and exclusively a matter of providing conclusive arguments, but can also be a matter of the emotional state that the audience happens to be in. Hence, he decides to consider how one can modify the emotional state of an audience, as this may make a considerable difference in how people judge and how they respond to an argument. In the second book of the *Rhetoric* Aristotle therefore introduces about fourteen different types of emotions. He introduces each emotion by giving a general definition and then goes on to explicate for what reason, with which kind of people and in which state of mind we feel emotions of this type. The aspiring orator who uses Aristotle's book is obviously expected to use this material in the following way. If he wants to bring his audience into a state of fear or anxiety (for example, if he wants an assembly to

spend more money on military buildup), he has to convince the audience of the existence of real threats or dangers, e.g. that there are well-armed enemies and that they are about to attack them. Also he has to point out that they are in a state in which they have reasons to be anxious, e.g. in the state of being unprotected and vulnerable, etc. In sum, orators try to alter the people's thoughts and beliefs in such a way that they will be prone to a particular kind of emotion. Aristotle does not tell us very much about the philosophical background theory he adopts; nor does he claim that emotions always include beliefs or full-blown judgements. However, it is clear that he presupposes something like a strong covariance between our thoughts or beliefs on the one side and our emotions on the other.

All this makes Aristotle a natural ally in the attempt to overcome the picture that emotions are just irrational and destructive impulses. If emotions are thought to be responsive to certain thoughts, beliefs or judgements and if the latter are thought to be cognitive efforts or, generally speaking, efforts that require our capacity for reasoning, one might think that emotions themselves have to be regarded as 'cognitive' or, in a sense, 'rational'. This is how philosophers came to speak of 'cognitive' theories or accounts of emotions. And indeed, it seems much more challenging and worthwhile to explore emotions if we think of them as 'cognitively rich' phenomena that are intimately connected with our thoughts and convictions. Since Aristotle was the first to systematically demonstrate how different emotions are connected with different thoughts he might well be seen as the originator of the family of 'cognitive' accounts of emotions and as the initiator of this more challenging research program for the exploration of emotions. Adopting such a cognitive theory of emotions one might indeed think that it is somehow misleading to see a sharp contrast between emotions and reason. And this is indeed what approaches like the RAJ model need and what they can find in Aristotle.

All this is correct as far as it goes. However, from an Aristotelian point of view it is in a sense ambiguous to say that emotions are 'cognitive' or 'rational' and to say that they are no longer opposed to reason. We came to label such accounts of emotions as 'cognitive' because they rely on the idea that emotions are somehow dependent on certain cognitive or intellectual efforts. This does not mean, however, that the emotions themselves become rational in the sense that it is rational to have such an emotion. For example, an episode of fear in a dark cellar might derive from the (irrational) thought or belief that this cellar is inhabited by undead souls; but the connection of this emotion with a thought does not render it rational. Or an episode of anger can derive from the judgement that we have not been treated with the due respect. Again, the judgement, albeit an intellectual effort does not render the emotion rational, as it might simply be wrong to think that we actually deserve this kind of respectful treatment. One might distinguish hence between 'cognitive' and 'rational'. An emotion might be called 'cognitive' as it comes about through certain cognitive or intellectual efforts and has an impact on other cognitive achievements, but this does not yet imply that such an emotion is 'rational'.⁴⁵

Also, the parlance of the 'cognitive' character of emotions is sometimes misleading in another sense, for emotions are often connected with evaluative but not discerning or recognizing judgements. Evaluative judgements may also involve a considerable intellectual effort: evaluations might be simple or complex; often it takes the consideration of multipole aspects to reach at a decent evaluation. However, in evaluative judgements we do not claim to know what a piece of reality is objectively like; we rather state our attitude towards or our appraisal of this piece of reality. So even if emotions are seen as 'cognitive' or as 'judgements', this does not yet imply that they tell us what the world is like, but rather tell us how we and other people see and assess the world.

Aristotle would endorse this caveat, since after all, he assigns emotions to the non-rational part of the soul. (*Pol.*⁴⁶ 1254b8) In my understanding this does not preclude

the possibility of collaboration, as it were, between the non-rational and the rational part of the soul. Aristotle often emphasizes that there is a non-rational part of the soul that is able to 'listen' to what the rational part of the soul says, so that the non-rational part of the soul must in a sense be responsive to reason and to the reasons that the rational part of the soul provides. Furthermore, Aristotle often refers to the phenomenon that emotions can impair our judgements and bring about irrational effects. (for example *Rhet.* 1354a24-6, b10-1) For example, emotions do not follow the same principles of mutual exclusion as judgements do; we cannot be angry with one person, Aristotle says, (*Rhet.* 1387b14-5, 1380a31-3) and feel pity with another person at the same time, although it would be possible at the same time to hold the opinion that the one person has insulted us and the opinion that another person deserves our pity. For Aristotle, emotions are intrinsically connected with extraordinary bodily alterations. The resulting bodily conditions may continue even after the occasion or reason for a particular episode of emotion is gone; in other cases our body may not be in the condition to undergo the physiological alterations that are typically connected with a type of emotion. Also, we can form judgements and initiate episodes of thinking whenever we fancy, but we cannot decide here and now to have a certain emotion; for example, we can form the judgement that a certain challenge is not too difficult to handle, but whether or not we feel the corresponding emotion of confidence depends on our character traits, i.e. on whether we became accustomed in the long run to handling situations of this type, on whether our experience with such challenges were pleasant or unpleasant, etc. There are many reasons, then, for thinking our rational judgements and our emotions may differ, even though emotions are in principle covariant with our thoughts and judgements.

These latter, deflationary remarks are not meant as a direct argument against the RAJ model (as this model does not claim that *all* occurrences of anger are equally rational); but they are meant to explain why Aristotle might have been less enthusiastic than certain Neo-Aristotelians about the alleged 'rationality' of emotions and, in general, about the idea of transferring genuine tasks of reason and reasonable judgements to the emotions. If, on this account, our emotional reactions are rational it is because they have been trained to be in line "with what reason says". Well-trained emotions motivate us to do the things that rational deliberation takes to be good, they can push us in the right direction when there is no time for deliberation; but reason remains the ultimate authority. To present the RAJ model in its strongest form, one would have to claim that there are elements in the judicial judgement (in the judgement itself and not only in its concomitants) that either can *only* be handled by the emotion of anger or can *better* be handled by anger than by reason. In its strongest form it would require anger to be a sort of "feeling for injustice" that is able to detect injustice even in regions where rational examination would remain insensitive. Some of the appeals to Aristotle (see section (5.) above) seem to attribute such views to him, but that would certainly ask too much of Aristotle's account of emotions.

9. Angry judges in Aristotle's Rhetoric

The discussion of the previous sections suggested that there are certain mismatches between Aristotle and the RAJ model. However, this might be due to the kind of evidence that we have considered so far. Perhaps Aristotle's *Rhetoric* is a better source for RAJ-related themes, as it includes plenty of material on the emotions. A special section of the *Rhetoric* is dedicated to the judicial speech, which is meant to address judges or jurors. We have good reasons to expect, then, that the *Rhetoric* will include pertinent material.

The first chapter of this book, however, starts with a great disappointment for the supporter of the RAJ model. For Aristotle claims here straightforwardly that

... one must not warp the judge by leading him to anger, envy or pity; for that would be similar to someone who is about to use a straightedge, but crooks it beforehand. (Rhet. 1354a24-6, trans. G.A. Kennedy)⁴⁷

The crooked straightedge or rule is a strong image. It means that the judge is supposed to be like the straightedge for justice and injustice. By arousing emotions like anger (!), envy or pity in the judge, however, one deprives the judge of just this function, i.e. of her status as authority in discerning and measuring justice and injustice. This implies in turn that it is in virtue of one's emotionally unimpaired reasoning capacity that the judges perform their function well. It seems, then, that Aristotle's statement amounts to a view that is straightly opposed to the RAJ model. True, Aristotle obviously is thinking of non-pertinent emotions and not of the righteously felt anger of RAJ; still he makes a general claim and does not provide an exception for righteously felt emotions (which could be used as an *argumentum e silentio*: Had he been interested in acknowledging the possibility of righteously emotional judges, this would have been the right place to mention it).

Some commentators tend to downplay this passage and treat it as something like a unique outburst on Aristotle's part.⁴⁸ I don't think that this is a tenable move, as this passage squares very well with some other tenets that seem to be important for him. For example, he several times alludes to the question of whether it is better to be ruled by laws or by a personal ruler. A point that he makes in favor of the 'rule of law', is that laws, as opposed to human beings, have no passionate part of the soul. (*Pol.* 1286b17-8) In a similar vein he says that the rule of law is like a divine and or well-reasoned governance, while someone who wants particular human beings to rule, also accepts that a brutish element gains influence, as *thumos* – meaning rage, temper, anger – seduces even the best human beings. (*Pol.* 1287a28-32) When it comes to laws, justice and judicial judgements, Aristotle wants to be on the safe side and, hence, tries to diminish the risk of emotionally colored decisions.

This is not quite encouraging for the friends of RAJ. Here is a possible move they could make to get Aristotle on their side. Although Aristotle in *Rhetoric* I.1 criticizes other rhetoricians for focusing on the arousal of passions or emotions in their audience, he later acknowledges that the arousal of emotions can be a useful means of persuasion. At first glance this does not seem to be reconcilable with the idea that emotions corrupt the judges' judgements and with the criticism of previous rhetoricians. This tension provides material for an almost endless scholarly debate, and it seems that more than one solution is feasible. For example, it has been suggested that the orator only deals with the emotion of the audience in order to calm down already existing excitements. Or it has been argued that emotions in the rhetorical context are innocuous whenever they are aroused in the right way, e.g. by referring the audience to actually outrageous characteristics of the case at hand. The defender of the RAJ model would have to argue that Aristotle recommends that the aspiring orator only arouse *righteous* emotions in the *right* way, so as to improve the judgements of the jury. This is not a completely implausible suspicion. However, it is

not very likely that this is Aristotle's main concern. Here are a few hints to the effect that the *Rhetoric* does not really care about the righteousness of emotions.

In the *Rhetoric* Aristotle never mentions the difference between righteously felt and corrupting emotions; he deals with emotions like anger and fear that can be appropriate and inappropriate, but he equally equips the orator with material for arousing envy, which Aristotle thinks can never be good. He says that the art of rhetoric is merely concerned with what is persuasive and he gives hints to the effect that emotions are to be included, since the persuasion of a public audience does not only depend on arguments, but also on the emotional state the audience happens to be in. He seems to be proud that his technique allows bringing

those who through anger or enmity are on the other side of the case over to whatever feeling he chooses" (Rhet. 1382a18-9, trans. G.A. Kennedy).

Hence, the general purpose of the rhetorical arousal of emotions is probably not to arouse the *appropriate* emotions of a *virtuous* person – after all, Aristotle is, as already indicated (see section (6.) above) not very optimistic about the moral excellence of a public mass audience. Aristotle just noticed that certain emotions make it more likely that an audience will accept a certain position, thesis or sentence: If one happens to be in a favorable mood, then he or she will be more inclined to come to a favorable judgement or to assent to a favorable proposal, whereas if one is in a hostile mood, then one will rather assent to an unfavorable proposal or sentence, etc. Aristotle's comments on the purpose of the rhetorical arousal of emotions actually do not go much deeper than that. When the Aristotelian rhetorician arouses the emotions in the audience, he will do so in order to make it more likely that the audience will accept the conclusion he suggests. End of story. By contrast, one will look in vain in the *Rhetoric* for hints to the effect that the angry juror will make better judgements.

10. Conclusion

Don't get me wrong. This paper is not meant to censure an incorrect or pretentious use of an elevated historic philosopher. If scholars make use of ancient philosophers in order to come up with interesting new ideas or even with innovative research programs, these new ideas, theories or research programs should be assessed as independent projects and not as exegetical contributions.

What I am interested in is rather the phenomenon that from time to time certain readings of ancient philosophers – often readings that were originally shaped by certain modern debates and interests – get somehow canonized as 'standard readings' and then exert a considerable influence on ongoing debates. For a certain period of time it becomes even difficult to voice concerns about these standard readings or to differentiate them – although the ancient texts might not be as straightforward as the new 'standard reading' suggests. The canonized idea that underlies the Neo-Aristotelian approach to law theory consists roughly in the thought that since Aristotle assigned all these wonderful attributes to emotions he can be used as a patron for all sorts of emotion-friendly accounts. Before the emotional turn had reached the classics and philosophy departments Aristotle was not seen like this. When e.g. Robert C. Salomon, one of the great initiators of the new philosophy of emotions, in 1977⁴⁹ started to dispel what he called the myth of "reason versus the passions", he still mentioned Aristotle as one of the bad guys, i.e. as an originator of the objectionable myth that reason and passion are opposed. And there is some truth in his intuition. But as long as people are under the spell of the new and fashionable standard reading they tend to ignore all aspects that could threaten the current standard view.

There is something else that is somehow trivial to note, but still strikes me as pertinent. If Neo-Aristotelians say things like “this is, after all, what Aristotle said” or “this is Aristotle’s counsel”, they use Aristotle as an authority. Of course they don’t do it the naïve and indiscriminate way in which e.g. some medieval Aristotelians made use of him. They rather refer to selected aspects of his philosophy and to smart contemporary (‘standard’) readings. Still, saying that *Aristotle said it is per se* never a good argument (especially if he did not even say it). Often such references have the purpose to cover gaps in one’s own argument. And revealing such gaps is always a worthwhile rational endeavor.

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¹ In the United States of America, I take it, the support of ‘emphatic’ or otherwise emotion-guided decision-making of judges is sometimes (misleadingly) associated with a certain political position; this became obvious during the Judiciary Committee hearings on the nomination of Sonia Sotomayor for the Supreme Court in July 2009. The political debate may have intensified the corresponding scholarly debate. The author of this paper does not connect his position with any political affiliation. ‘Empathic politics’, if one likes this expression or the corresponding denotatum, can be implemented by both detached and emotionally engaged decisions-makers.

² See Bandes, *The Passions of Law.*; Bandes and Blumenthal, “Emotion and the Law.”; Maroney, “Angry Judges.”

³ For a state-of-the-art article on this subject see Bandes and Blumenthal, “Emotion and the Law.”

⁴ I include jurors to accommodate different legal systems. At any rate, my interest is in those participants of a trial that are supposed to make judgements and verdicts.

⁵ See Nussbaum’s plea for compassion in Nussbaum, *Upheavals of Thought*, chap. 8., and in Nussbaum, *Hiding from Humanity Disgust, Shame, and the Law*, 20-2-9-6.

⁶ This overview is inspired by ideas that Maroney put forward in Maroney, “Judicial Emotion as Vice or Virtue: Perspectives Both Ancient and New.”, published on this website.

⁷ I use this formula of the “impassionate judge” with reference to Maroney, “The Persistent Cultural Script of Judicial Dispassion.”

⁸ Need a reference? See Maroney, “Angry Judges.” at 1210: “One of the most enduring lessons of the early-twentieth-century legal realists, though, is that judges are human first.”

⁹ The following discussion is mainly based on Maroney, “Angry Judges.” Although the main purpose of my current paper is a critical discussion of some of her views (insofar as they make use of the alleged evidence from Aristotle), I hasten to acknowledge that my paper is also parasitic on her work, as it is the primary source for my knowledge of the pertinent legal debate.

¹⁰ See Maroney, “Angry Judges.” at 1213.

¹¹ See *Ibid.* at 1215.

¹² *Ibid.* at 1284.

¹³ *Ibid.* at 1223.

¹⁴ *Ibid.* at 1216

¹⁵ *Ibid.* at 1279.

¹⁶ *Ibid.* at 1214.

¹⁷ *Ibid.* at 1277.

¹⁸ *Ibid.* at 1277.

¹⁹ *Ibid.* at 1262 and 1272.

²⁰ *Ibid.* at 1262 and 1272.

²¹ *Ibid.* at 1264.

²² *Ibid.* at 1262.

²³ *Ibid.* at 1209.

²⁴ *Ibid.* at 1263

²⁵ *Ibid.* at 1272

²⁶ *Ibid.* at 1216.

²⁷ *Ibid.* at 1264.

²⁸ See e.g. Kenny, *Action, Emotion and Will*. and Lyons, *Emotion*.

²⁹ See Nussbaum, *Upheavals of Thought*, chap. 8. And Nussbaum, *Hiding from Humanity Disgust, Shame, and the Law*, 20-2-9-6.

³⁰ Maroney, "Angry Judges."

³¹ See *Ibid.* at 1250.

³² See *Ibid.* e.g. at 1210.

³³ See on this website Maroney, "Judicial Emotion as Vice or Virtue: Perspectives Both Ancient and New."

³⁴ See Maroney, "Angry Judges." e.g. at 1221 and 1284. The source of this idea remains obscure to me. She quotes Potegal and Novaco, "A Brief History of Anger." for the claim that "the idea of justified anger becomes commingled with, if not equivalent to, justice itself." The mentioned authors make such a claim in a section that is dedicated to "Aristotle and afterward", but they do not claim to quote or to interpret Aristotle by saying this. Rather they refer to a rhetorical trope that is used in "classical Athens". And not even the reference to this trope in question rests on an examination of ancient texts, but is taken from an author by the name of D. S. Allen.

³⁵ *Nicomachean Ethics*, edition used Aristotle, *The complete works of Aristotle* (trans. W.D. Ross, revised by J.O. Urmsen).

³⁶ *On the soul (De Anima)*, edition used Aristotle, *The complete works of Aristotle* (trans. J.A. Smith)

³⁷ *Rhetorics*, edition used Aristoteles, *Rhetorik* (trans. C. Rapp).

³⁸ Solomon, *A Passion for Justice*, 253.

³⁹ See Maroney, "Angry Judges." at 1219, footnote 64.

⁴⁰ This is why I would also resist the temptation to turn Aristotelian indignation into a general "sense of injustice", as Nussbaum, *Upheavals of Thought* does at 312.

⁴¹ The following account of Aristotelian virtues is based on Rapp, "What Use Is Aristotle's Doctrine of the Mean."

⁴² Incidentally, all these parameters together define the appropriateness of an emotional response. Maroney uses this formula in order to distinguish between factors that make an episode of anger legitimate and other factors that only concern the right manifestations of that emotion.

⁴³ In fact, what Maroney describes as the regulation of judicial emotions is far more reminiscent of the techniques suggested by post-Aristotelian thinkers, like the Stoics and the Epicureans.

⁴⁴ See the references to Martha C. Nussbaum's work above.

⁴⁵ Martha C. Nussbaum made the same important distinction, but preferred to speak of 'rational in a normative' (what we called 'rational') and 'rational in a descriptive sense' (what we called 'cognitive'). See Nussbaum, "Aristotle on Emotions and Rational Persuasion." at 320, footnote 4.

⁴⁶ *Politics*, edition used Aristotle, *The complete works of Aristotle* (trans B. Jowett)

⁴⁷ Edition used Aristotle, *On rhetoric: a theory of civic discourse* (G.A. Kennedy). For my translation in German: Aristoteles, *Rhetorik* (trans. C. Rapp). For a general overview Rapp, "Aristotle's Rhetoric."

⁴⁸ See for example Barnes, *The Cambridge Companion to Aristotle*, 263.

⁴⁹ Solomon, *A Passion for Justice*.

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Reviews

Cristina Viano

-the quality of the contribution . Excellent. Rapp takes position in the current debate regarding the following question: do personal emotions, like anger, help a judge to judge correctly? Rapp clearly shows that Aristotle answers this question in the negative and that his position in the debate is quite different from the model of the righteously angry judge (RAJ), as theoretically elaborated by some neo-Aristotelians, like T. Maroney. Indeed, to understand Aristotle correctly, we must distinguish between the individual morality of the prudent man (phronimos), who maintains a correct relationship with passions and the professionalism (ergon) of the good judge, who, on the contrary, to judge well, should not be under the influence of passions. ^{[[1]]}_{SEP}-the relation between the article and the research question. The analysis of Rapp is of fundamental relevance for the research question Law and Emotion: it shows the true position of Aristotle by distinguishing it from certain neo-Aristotelian interpretations, which are too modern and simplified. In particular, at the end of his article, Rapp warns against the use of Aristotle as authoritative source on the basis of a selection of texts that are decontextualized. -recommendations for improvement of the article . It is excellent and I have no suggestions for amelioration.

Ton Hol

The paper of Christof Rapp is publishable. It is written in a clear style, well reasoned, and about an interesting topic. It has a clear focus and its critical analysis adds to the ongoing debate. I especially liked the second part (say, from section 5). I got rather 'irritated' reading sections 3 and 5. Although well analysed, I would be happy if these sections could be shortened. Having experience as a Judge for about 25 years, I do not recognize the 'angry judge'. Judges hardly become angry. If they do, we think they are not professional. So, reading these sections made me ask whether the author (Maroney) knows what she is writing about. Professionals will have serious difficulty in recognising themselves in the emotion of anger. (Rapp makes clear why by the end of the paper. See his remarks on the crooked straightedge). The question of emotions in judicial decision making is however still important in the current debate. Mostly it is about showing or not something like feeling pity for the victim by the Judge, or whether it is only to the prosecutor and lawyer to refer to or show emotions. Bringing in the more complex setting of a trial in this way, would make it (even) more interesting to read the article. Because of the simplicity of Maroney's approach, I had an adverse emotion continuing reading the paper. The example of anger is not representative for judicial emotions, much too simple. Still, I liked the second part. It is well reasoned, and the standpoint is certainly defensible. Some more references to Aristotle's texts would have been welcomed.

author's response

I would like to thank the reviewers of my text very much for their helpful and friendly comments and suggestions. I have added references to Aristotle's text.