Judicial Emotion as Vice or Virtue

Perspectives both Ancient and New

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DPSP Annual
Volume 1 (2020)

Abstract

Is emotion a judicial vice or a judicial virtue? While Western post-Enlightenment norms insist on the former, contemporary psychology suggests the latter. This view is illuminated and given nuance and texture by the Aristotelian tradition. This chapter explores historical, philosophical, and scientific perspectives that converge around the view that emotion is a vital source of judicial wisdom. It situates that argument within the broader frame of law and emotion studies, demonstrates how most scholars within that movement either explicitly or implicitly adopt an Aristotelean philosophy, and uses the case of anger to demonstrate the value of an Aristotelean virtue approach to the emotional element of judicial behavior and decision making.

Keywords

judges, emotion, Aristotle, cognitive appraisal, emotion regulation, anger

Cite as

Maroney, Terry. Judicial Emotion as Vice or Virtue: Perspectives both Ancient and New . DPSP Annual, I: Research, Volume 1 (2020), 69-86.

Article Info

Research question · Law and Emotion
Reviewed by: Susan Bandes, André Verburg
Volume 1 (2020)

1. Introduction

Is emotion a judicial vice or a judicial virtue? While Western post-Enlightenment norms insist on the former, contemporary psychology suggests the latter- or, at least, it suggests that either could be true, or that sometimes it is one and sometimes the other. This more realistic and nuanced view of judicial emotion is illuminated and given texture by the Aristotelian tradition. [1]

Exploration of the role of emotion in judicial behavior and decision making forms an important part of the larger law and emotion movement within interdisciplinary scholarship. The movement is based primarily in the United States but is gaining significant traction elsewhere, particularly Europe, the United Kingdom, and Australia. This chapter briefly describes the contour of that movement. Importantly, much law and emotion scholarship relies—either implicitly or explicitly—on Aristotelean concepts of the emotions. The Aristotelean perspective is particularly useful in analyzing judicial emotion. This chapter uses the case of anger to demonstrate that utility. A virtue perspective illuminates the normative variability not just of anger but of judicial emotion more generally.

2. Aristotelean Thought within Law and Emotion Scholarship

Much of the exploration of the role of emotion in law – particularly that subset that explicitly identifies itself with the law and emotion movement – has been Aristotelian (whether explicitly or implicitly) in its approach.

2.1 Some background on law and emotion

Law and emotion interact on multiple levels. Events that call for a legal response—violent crime, property theft and damage, environmental destruction, and infringements on personal liberty, just to name a few—evoke powerful emotional responses among those immediately affected and in the public at large. The people who implement those legal responses—police, legislators, lawyers, judges, and jurors—experience emotions of their own. Law sometimes varies according to the existence, sincerity, and depth of emotion: in determining whether a search or seizure was unreasonable under the U.S. Constitution, for example, the extent to which the person searched was frightened or humiliated is relevant; a similar inquiry is at the heart of the law of workplace sexual harassment. Sometimes law has to put a price on it, as in determinations of emotional damages. People even have emotions about law itself, or about particular laws, feelings that range from revulsion to reverence. [2]

A distinct body of scholarship exploring this constellation of interactions between law and emotion began to emerge in the United States in the mid-1980s, trailing slightly behind the explosion of emotion research in psychology and disciplines as diverse as history, sociology, and neuroscience. As emotion research has grown exponentially in the social sciences, hard sciences, and humanities in the intervening decades, so too has law and emotion scholarship. It gained significant traction by the late 1990s, progress marked by

the 1999 publication of *The Passions of Law*, [3] and has expanded rapidly since that time. Happily, the scholarship is no longer limited to the United States. Recent years have seen the publication of journals devoted to law and emotion in the United Kingdom; [4] the convening of conferences in Germany and the Netherlands; [5] and the rollout of empirical studies in Sweden and Australia, [6] just to name a few high points in the increasing internationalization of this developing field.

The field's diversity is rooted in a set of common perspectives and commitments. Abrams and Keren helpfully propose that law and emotion scholarship seeks to illuminate the affective features of legal problems; investigate these features through interdisciplinary analysis; and integrate resulting understandings into practical, normative proposals, helping law to be more responsive to the emotions that inflect its operation. [7] As emotion shapes law and law shapes emotion, legal theory and practice ignore emotion at its peril. [8]

Perhaps most fundamentally, law and emotion scholarship positions itself in opposition to the widespread and caricatured view of emotion that permeates Western legal theory—a view that reason and emotion are separable and exist in an oppositional relationship to one another. This view underlies the common supposition that law ought to admit only of reason and, therefore, that part of the work of law is to heavily police its boundaries so as to exclude and neuter emotion. [9] Virtually all modern scholars of the emotions, whatever their disciplinary home, reject those underlying views. Law has been more stubborn. A major part of the task of law and emotion scholars therefore has been to find a language with which to persuade traditional legal theorists to understand emotions as something other than irrational, epiphenomenal, idiosyncratic, stubborn, and mysterious.

2.2 Aristotle's theory of the emotions and contemporary appraisal theory

Scholars have found this language in two primary sources: first, contemporary affective psychology, and second, Aristotle. These ancient and new accounts of human nature, different as they are on many levels, converge in at least one aspect: the idea that emotions both contain and rely on thoughts and judgments about the world. Those thoughts and judgments are not *all* emotions—they also carry physiological and motivational aspects—but thoughts and judgments are a necessary part of emotion.

A contemporary affective psychologist would refer to this aspect of emotion as a "cognitive appraisal." A cognitive appraisal is a set of perceptions and evaluations, distinctive sets of which underlie any given emotion. [10] For example, as cogently articulated by the great psychologist Richard Lazarus, fear reflects perception of "an immediate, concrete, and overwhelming physical danger"; guilt attends self-evaluation of having "transgressed a moral imperative"; sadness indicates a belief that one has "experienced an irrevocable loss"; and so on for every emotion. [11] Thus, emotion embodies thought, often complex thought, and those thoughts can be evaluated just like any others. That is, using for a moment the example of guilt, we may judge both whether the event really occurred as the guilty person believes it did, and whether her actions actually transgressed a moral

imperative.

As legal scholars have been quick to note, this fundamental notion—that emotions contain and rely on evaluative thoughts—is deeply Aristotelian. The most prominent advocate of this view within law has of course been Martha Nussbaum. Nussbaum, particularly in *Upheavals of Thought*: *The Intelligence of Emotions*, [12] has offered an interpretation of Aristotle that centers on the object-directed, thought-driven nature of emotion. Emotions are not, as legal theory long has held, "unthinking, opposed to reason in some very strong and primitive way," just "mindless surges of affect"; rather, emotions embody beliefs about states of the world. [13] A similar account has been explicitly adopted by other prominent legal theorists, most notably Judge Richard A. Posner, who has defended emotion's role in law on that basis. [14]

Aristotle, to be sure, recognized that emotion is something distinctive; it cannot be collapsed into other forms of thinking and reasoning. But he did not denigrate it simply because it is emotion. Rather, for Aristotle emotion could be either virtuous or non-virtuous, depending on whether it reflects a correct way of viewing the world and one's place in it. As the philosophers Cheshire Calhoun and Robert C. Solomon therefore have asserted,

> Aristotle, in his Rhetoric, developed a strikingly modern theory of emotion that stands up to the most contemporary criticism. [15]

Legal scholars have come to rely on this cognitive view of emotion for a number of purposes. Rhetorically, it forces emotion's denigrators to find new justifications for its outlaw status, and highlights emotion's kinship with traditionally valued forms of legal reason. Normatively, it offers a tool with which to judge the propriety of any given emotion within legal judgment. For example, Nussbaum argues that the distinctive cognitive underpinnings of disgust render it an illegitimate basis for law, for disgust felt toward another human being both reflects and expresses a morally inappropriate dehumanization, as if that person were feces or a slug. Disgust at those objects, she argues, is appropriate; disgust with a human is not, at least as a basis for law, because it disturbs law's baseline assumption of equality among humans. [16] Dan Kahan, on the other hand, argues that the cognitive structure of disgust can reflect a morally proper judgment not of persons but rather of the evils we often impose on one another, and therefore could find a place in law. [17] Thus, as this debate reflects, recognizing an emotion's cognitive element does not answer difficult questions of its legal normativity. However, recognizing that element allows us to argue coherently and with specificity in terms that are highly accessible to law.

3. Emotion as a Judicial Virtue

The growing acceptance of an emotional element in law has been hard-won and has benefitted greatly from the contribution of Aristotelean thought. But perhaps nowhere has such progress been more difficult, or as challenging to traditional notions of law, than in the context of judging. And perhaps nowhere is Aristotelean thought as crucial.

3.1 The persistent cultural script of judicial dispassion

Accepting a legitimate role for emotion in judicial behavior and decision making is challenging because it runs so squarely into what I have called the "persistent cultural script of judicial dispassion." [18] Insistence on emotionless judging is a cultural script of unusual longevity and potency. Thomas Hobbes declared in the mid-1600s that the ideal judge is "divested of all fear, anger, hatred, love, and compassion." [19] Nearly three hundred years later, the German jurist Karl Wurzel classified "dispassionateness of the judge" as a fundamental tenet of Western jurisprudence. Indeed, he wrote, lawyers were "the first and the most emphatic in insisting on the absence of emotional bias," because "absence of emotion is a prerequisite of all scientific thinking," and judges, more so than other scientific thinkers, regularly are "exposed . . . to emotional influences." [20] Just a few years ago, the nomination of U.S. Supreme Court Justice Sonia Sotomayor turned into a firestorm over the mere suggestion that she might bring to the bench a capacity for empathy. [21]

This fact that hostility to judicial emotion enjoys a long pedigree does not make it correct, either as an account of what judges actually do or as an aspiration for what they ought to do. It is, for one thing, entirely unrealistic; judges are human and inevitably feel emotions in response to their work. While we tell them to "put those feelings aside," that is a very difficult thing for humans to do, and the effort to suppress emotion often does more harm than good. [22]

More radically, even were it realistic for judges always to put their emotions aside we would not actually want them to. Indeed, the great U.S. Supreme Court Justice William J. Brennan, Jr. launched the law and emotion movement with a strong declaration to that effect. Brennan wrote that in the modern era "the greatest threat to due process principles is formal reason severed from the insights of passion." Passion—which he defined as "the range of emotional and intuitive responses to a given set of facts or arguments, responses which often speed into our consciousness far ahead of the lumbering syllogisms of reason"—does not "taint the judicial process, but is in fact central to its vitality," preventing law from devolving into the agent of an "alien" and sterile bureaucracy. [23]

Brennan was correct in perceiving emotion's value even though he was vague on articulating the features of emotion that give it that value. Briefly stated, those features are the following: emotions reflect reason, enable reason, and are educable. That emotions

reflect reason is a core finding of appraisal theory. Further, as contemporary psychology and neuroscience have convincingly demonstrated, without a normal capacity for emotion human beings become incapable of practical reason. Finally, emotions are educable because they can respond to reason: if we change the way we think about things, the emotions that attend those things change. Such change is often not easy, but neither is training in formal logic. The fact that humans find something hard does not mean it is beyond our capacity. It may instead signal need for a skill that can be trained and practiced. [24]

Contemporary understandings of emotion, then, compel the same conclusion as was promoted by many of the early-twentieth century American Legal Realists [25] and their contemporary, the Dutch scholar Paul Scholten: [26] judicial emotions are not only inevitable but valuable. That emotions are valuable does not, of course, mean they are invariably reliable guides; no one attempts to make that case. Nor could one make such a case while taking seriously the cognitive theory of emotions, as emotions can reflect inaccurate beliefs or bad values. Their value is variable. That variation is nicely captured through the lens of Aristotelean virtue.

3.2 Judicial emotion through the lens of Aristotelean virtue: the case of anger

To illustrate the utility of an Aristotelean virtue frame when evaluating judicial emotion I turn to the specific emotion of anger. As Aristotle wrote in the *Nicomachean Ethics*, emotion is virtuous if felt

> at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way. (EN 1106b20, transl. McKeon) [27]

The same is true of judicial anger. Anger is an important example not just because it so nicely illustrates the value of a virtue approach but also because it is so pervasive. Anger is a common, perhaps the most common, emotion that judges feel in the course of their work. [28] Judges regularly are confronted with highly angering stimuli: lawyers who lie, pander, or are incompetent; litigants and witnesses who defy or insult; evidence of the harm people do to one another; frustrating situations they are powerless to fix; intransigent colleagues; and so on. Indeed, courts frequently acknowledge that anger is a regular staple of the judicial diet, such that even highly trained and professional jurists will sometimes give voice to it, including in ways they might later regret. In the words of one court, trials "are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower," and the pressures of the job "can cause even conscientious members of the bench . . . to give vent to their frustrations by displaying anger and partisanship." [29]

The relevant question therefore is not whether judges ought to get angry, but under what circumstances such anger is appropriate to experience and express.

3.2.1 Seneca and Aristotle on anger

To get at this question it is instructive to examine an important contrast between Seneca and Aristotle. [30]

Though Seneca and Aristotle may be positioned as extreme opposites on the issue of anger, they in fact agreed on what anger is. They agreed that anger is an emotion that is directed at persons who culpably have inflicted harm on someone or something within one's zone of care, and that it predisposes one to pursue punishment or correction of the wrong. They agreed, further, that making such a complex evaluative judgment requires the exercise of reason. [31]

However, in his *De Ira*—the first known work devoted entirely to anger—Seneca argued that anger's dependence on reason did not redeem the emotion, for he believed it to be grounded in the wrong use of reason. First, Seneca advocated that the cognitive judgments underlying anger represent false valuations of the world and one's place in it. Affronts to one's pride, for example, should not arouse anger, because one should not be prideful. [32] Second, Seneca argued that the thinking underlying anger necessarily reflects illogic and weakness. [33] Third, he posited that anger depends on a free-will choice to yield to the feeling. Though the ability to make such a choice stems from humans' status as rational agents, the consequences of so choosing are irrational. Once yielded to, anger—which Seneca called "the most hideous and frenzied of all the emotions" [34]—vanquishes the reason on which its existence depends. Anger in this quintessentially Stoic view therefore is a mistake in all instances.

In contrast, in the Aristotelian view anger can be entirely good and proper. Aristotle held that one *should* value one's own safety, dignity, and autonomy, just as one should care about the safety, dignity, and autonomy of others. One should feel a strong impulse to respond to affronts to those goods, for only thus are those goods appropriately valued and the world set right. [35] Anger is in this view "commingled with, if not equivalent to, justice itself." [36]

As Aristotle therefore wrote in the *Nicomachean Ethics*, anger may be felt both too much and too little, and in both cases not well."(*NE* 1106B20) As Averill has asserted, by this Aristotle did not intend to define virtuous anger as "an algebraic mean between two set quantities," but rather as a response that is well-calibrated to the nature of the offense, the qualities of the offender, and the prospects for corrective action. [37] For example, to be enraged with a person who has violated one's mother is virtuous, as not to feel rage would signify an inadequate valuation of one's mother. [38] Thus, Aristotle wrote,

> they are thought to be fools who fail to become angry at those matters they ought. (NE 1126a4, transl. McKeon)

While the Stoic position against anger has rhetorical appeal, it is fatally flawed insofar as it in no way reflects lived human experience. Not even Seneca appears actually to have believed his hard line; his real target was violence and cruelty, not anger per se. [39] The Aristotelian account similarly condemns needless violence and cruelty but does not in the same stroke condemn all anger. That account instead invites us to dissect, educate, and shape this fundamental human experience through the power of our reason. The superiority of the Aristotelian account is further evidenced by the number of allies it claims, both ancient and contemporary. [40] For example, the early Christian theologian Sir Thomas Aquinas defined anger much as Aristotle had—a judgment "by which punishment is inflicted on sin"—and maintained that, while it can be turned to bad ends, it is an indispensable aspect of justice. [41] That account is strongly embraced by virtually all contemporary philosophers of emotion and underpins virtually all of modern affective science. [42] The Aristotelian view is the superior one with which to evaluate judicial anger.

3.2.2 Judicial anger through an Aristotelian lens

When judicial anger meets the Aristotelian measure of virtue it may be characterized as *righteous*. [43] The opposite also holds true: when judicial anger is not righteous, it is a form of vice. To discern righteousness we first ask whether the anger is *justified*—in Aristotle's terms, whether it is felt

> with reference to the right objects, towards the right people, with the right motive. (NE 1106b20, transl. McKeon)

The justification inquiry is logically precedential, as if when anger is unjustified no experience or expression of it is proper. If the anger is justified, we ask whether its *manifestation* comports with the expectation that judges be fair and dignified—in Aristotle's terms, whether it is shown

> at the right times, and in the right way. (NE 1106b20, transl. McKeon)

Some examples, grounded in research into actual cases, [44] are helpful to flesh out this account.

Judicial anger is justified if it rests on accurate premises; is relevant to the judicial task; and reflects worthy beliefs and values. The first criterion is the simplest. If a judge is angry at a lawyer for having lied to him, for example, it matters whether the statement actually was untrue, whether the lawyer believed it to be untrue, and whether the lawyer intended to mislead. The judge's assessment of the truth status of any of these questions might be literally wrong. This is precisely what happened in one case, in which a judge harshly penalized a lawyer for falsely representing that certain information had been ordered sealed by another judge; she turned out to be correct. An appeals court righted the

wrong, but the lawyer already had been made to suffer the brunt of the mistaken judge's wrath. [45] Other examples include a judge who became enraged at a group of jurors for (he thought) defying orders to appear, and ordered them jailed and strip-searched; they in fact had obeyed mistaken instructions to wait in the wrong courtroom. [46] Judges, of course, make mistakes. The fact of a mistake does not necessarily impugn her qualifications or character, particularly if it is an honest one, but it does rob her anger of justification.

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

The triggers for a judge's anger might, for example, be irrelevant—that is, not tethered to legally or morally salient features of the case before her. A judge might find cause for anger with a litigant when she is really mad at his lawyer. Even if the lawyer is the recognized target, the judge might find fault with some current, relatively blameless act because she is seething over some earlier misstep by that lawyer. Indeed, occasional statements by judges in unguarded moments suggest that such irrelevant anger, anger that lives on and finds outlet in ways disconnected from its original trigger, does have an impact on judicial behavior. [47]

Perhaps the most important inquiry, though, is whether the anger reflects the sort of beliefs and values that are proper for a judge in a democracy. A judge ought not, for example, be angry at persons for doing things they have a legal right or obligation to do. Consider cases in which trial judges express anger at lawyers and litigants for having successfully appealed their rulings. Appeal is a legal entitlement, and appellate success indicates adequate grounds, but a judge might nonetheless take umbrage at the suggestion that he was wrong and resent having been called out as wrong. [48] Similarly, judges sometimes became enraged at defense attorneys for making proceedings more difficult and protracted, even though in many of those instances that is the advocate's job. Indeed, in many cases not complicating the proceedings would be a dereliction of a defense lawyer's duties. [49] Anger in that instance shows that the judge has chosen to disrespect an obligation the law commands him to respect.

Judges sometimes also take great offense at people who talk back in a manner they perceive as challenges to their authority. [50] These anger triggers can also come bundled together. In a recent case that drew enormous publicity, a state-court trial judge angrily confronted a defense attorney who was asserting his client's right to a speedy trial. The attorney, though acting well within his legal rights, spoke to the judge in a rather obnoxious manner. The judge—in open court, with many people watching—expressed a wish to hit the lawyer with a rock; cursed him; and challenged him to a fight in the hallway, leading to a hallway confrontation during which blows may have been exchanged. [51] Such anger is unjustified, and therefore not righteous, because it signifies that the judge places too great a value on his personal pride, wrongly measures that pride by shows of

servility, and places undue emphasis on always being correct. Similarly, the judge who ordered jurors jailed (as a result of which they were strip-searched) for allegedly defying orders to appear was not just operating on mistaken premises, but reacting in a shockingly extreme fashion to a perceived affront.

In contrast, a judge is perfectly justified in being angered at affronts to justice. Indeed, one might argue that Aristotle would see an obligation for the judge to be angry. Consider cases in which judges have caught government officials, including police officers, in lies on the witness stand. [52] Such lies can lead to wrongful prosecution and conviction in ways that are difficult to detect and correct. It would be unvirtuous not to be angered at such behavior, because it corrupts the judicial process itself and therefore is an affront to a public good that lies within the judge's obligation to protect.

Further, at criminal sentencing it often is appropriate for the judge to feel and express anger at the harm the defendant has done to the community. Expressing anger vividly demonstrates to victims and their survivors that they are within the judge's zone of care. It communicates, in a way that other demonstrations could not, that they are members of the valued community. It also demonstrates judicial respect for the defendant. As one feels anger only where a human agent has chosen to inflict an unwarranted harm, showing anger reveals the judge's assessment that the defendant is a fellow human possessed of moral agency. By using his authoritative position to send moral messages to the wrongdoer, the judge frees others in society from feeling a need to do so themselves, including through vigilante action. The judge who imposed a 150-year-long sentence on the disgraced financier Bernard Madoff, for example, has openly embraced a role for emotion in sentencing. [53] That judge functioned as the mouthpiece of our collective anger at Madoff for the extraordinary harms he caused. Such judicial anger is virtuous because justice relies upon it. As Solomon has written, one cannot

> have a sense of justice without the capacity and willingness to be personally outraged. [54]

Finally, we come to manifestation. As Aristotle cautioned, anger ought not be manifested either too violently nor too weakly. (*EN* 1105b24) Even justified anger can be unvirtuous if expressed in a way that detracts from the dignity of the court, misdirects public attention from the parties and issues, or otherwise is demonstrably excessive. Returning to the example above of the judge, who threatened and physically fought with the defense attorney, entertain the notion that at least a portion of that anger was justified. In fact, the judicial conduct board that reviewed this incident concluded on the basis of good evidence that the defense attorney was acting consistently with his reputation of being incompetent, obnoxious, and unreliable; in contrast, the judge was well-respected and liked. [55] To the extent that the judge's anger was responding to a bona fide attempt by the defender to provoke him, it may have been at least partially justified. But no amount of justification

could overcome the extremity of the response, which has resulted in very professional serious consequences for the judge. Similarly, in a civil case an appeals court was required to overturn a highly competent judge's imposition of extreme sanctions after losing patience with lawyers who were in fact acting badly. [56]

Even justified anger, then, must be well-regulated to be virtuous. Emotion regulation is the mechanism by which humans "fine-tune" our emotional responses to serve situational demands. [57] Regulating one's emotions is labor, and often very difficult labor at that. [58] But judges can and do learn to be strategic about how and when they show their anger, a skill they can improve with mindful effort. [59] Doing so encourages them to take the time necessary to examine the reasons behind their anger; determine whether it is justified; decide whether a public good is served by communicating it; and then choose to communicate it in a way that, to use an American expression, throws off more light than heat. This is something that great judges actually do, and something all good judges can learn to do. Indeed, in recent years this author has collaborated frequently with judicial groups in the United States to foster greater emotional-regulation skill throughout the judiciary.

4. Conclusion

Aristotle provided us with a theoretical framework within which to welcome judges' inevitable emotions. By testing those emotions for virtue, both in the reasons they reflect, the purposes for which they are expressed, and the manner in which they are expressed, we can separate the righteous from the non-righteous. This is as true of other emotions, such as sorrow and joy, as it is for anger.

To be sure, a judge may both experience and express unjustified anger without being a bad judge; indeed, even excellent judges, being fallible humans, will do so. But one mark of true excellence is the ability to introspect about justification, recognize one's failings, and take corrective action—whether that be apologizing, otherwise making amends, or resolving to process similar situations differently in the future. One marker of a consistently bad judge, in contrast, is a pattern of unjustified anger, robustly expressed, with little or no introspection or change. Most judges will fall somewhere in the middle, meaning they have capacity to develop this particular virtue.

Cultivating this sort of virtue is not easy. Indeed, we should expect it to be hard. [60] As Aristotle wrote:

> [I]t is not an easy task to delineate how, at whom, at what, and for how long one should anger, nor at what point justifiable anger turns to unjustifiable. He who swerves a bit toward excess of anger is not to be blamed [, but] [h]ow far and how much one has to swerve before he becomes . . . blameworthy is not easy to specify. (NE 1126b1, transl. McKeon)

Difficulty signifies challenge rather than certain defeat. The Aristotelean model provides

theoretical tools with which to imagine righteous judicial anger and practical tools with which to achieve it.

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[1] It is largely adapted from my prior writings on the topic, to which the reader is directed for a more in-depth analysis. See Maroney, “The Persistent Cultural Script of Judicial Dispassion,” 629; Maroney, “Emotional Regulation and Judicial Behavior,” 1485; Maroney, “Angry Judges,” 1207.

[2] Maroney, “A Field Evolves.”

[3] Bandes, *The Passions of Law*.

[4] Schweppe and Stannard, "What Is so 'special' about Law and Emotions?".

[5] "Criminal Law and Emotions in European Legal Cultures: From the 16th Century to the Present," *Max Planck Institute for Human Development*, May 2015, https://perma.cc/X5E4-WBNK; "Aristotle: Law, Reason, and Emotion," *University of Amsterdam*, November 2014, https://perma.cc/K638-GL45.

[6] Anleu, Blix, and Mack, "Researching Emotion in Courts and the Judiciary: A Tale of Two Projects."

[7] Abrams and Keren, "Who's Afraid of Law and the Emotions?."

[8]Bandes and Blumenthal, "Emotion and the Law," 161–81.

[9] Maroney, "Law and Emotion," 119.

[10] Ortony, Clore, and Collins, *The Cognitive Structure of Emotions*.; Oatley and Johnson-laird, "Towards a Cognitive Theory of Emotions."

[11] Lazarus, "Universal Antecedents of the Emotions," 164–65&tbl.1.

[12] Nussbaum, *Upheavals of Thought*; see also Kahan and Nussbaum, "Two Conceptions of Emotion in Criminal Law"; Deigh, *Emotions, Values, and the Law*, 12, 142 (reflecting modern philosophical consensus that thought is "an essential element of an emotion").

[13] Nussbaum, "Emotion in the Language of Judging," 23,24-25. *See also* Nussbaum, *Upheavals of Thought*.

[14] Posner, *How Judges Think*, 106; Posner, *Frontiers of Legal Theory*, 226–28.

[15] Calhoun and Solomon, "Introduction," 3. See also Solomon, *A Passion for Justice*, 253.

[16] Nussbaum, "Secret Sewers of Vice: Disgust, Bodies, and the Law," 20–21; Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*.

[17] Kahan, "The Progressive Appropriation of Disgust," 63.

[18] Maroney, "The Persistent Cultural Script of Judicial Dispassion."

[19] Hobbes, *Leviathan, or the Matter, Forme & Power of a Commonwealth, Ecclesiasticall and Civill*, 203.

[20] Wurzel, "Methods of Juridical Thinking," 286–428.

[21] Maroney, "The Persistent Cultural Script of Judicial Dispassion," 636.

[22] Maroney, "Emotional Regulation and Judicial Behavior," 1490.

[23] Brennan Jr, "Reason, Passion, and the Progress of the Law."

[24] Maroney, “Emotional Regulation and Judicial Behavior.”

[25] Maroney, “The Persistent Cultural Script of Judicial Dispassion,” 652.

[26] For an exploration of Scholten’s work and legacy, see https://paulscholten.eu/.

[27] Aristotle, *The Basic Works of Aristotle*, 958.

[28] Maroney, “Angry Judges,” 1226.

[29] United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973) (n.d.).

[30] Maroney, “Angry Judges,” 1219–24.

[31] Averill, *Anger and Aggression: An Essay on Emotion*, 83 (quoting (AD 40-50/1963) Seneca, *Moral Essays*, De Ira 115: “Wild beasts and all animals, except man, are not subject to anger; for while it is the foe of reason, it is nevertheless born only where reason dwells.”). See also Anderson, *Anger in Juvenal and Seneca*, 153; Potegal and Novaco, “A Brief History of Anger.”

[32] Gillette, *Four Faces of Anger*, 7.

[33] Averill, *Anger and Aggression: An Essay on Emotion*, 85 (quoting Seneca, *De Ira*, 267: “No mind is truly great that bends before injury. The man who has offended you is either stronger or weaker than you: if he is weaker, spare him; if he is stronger, spare yourself.”).

[34] Ibid., 83 (quoting Seneca, *De Ira*, 107).

[35] Calhoun and Solomon, “What Is an Emotion?.”

[36] Potegal and Novaco, “A Brief History of Anger,” 18. Plato, too, took the position that anger was “a natural, open response to a painful situation.” *Ibid. See also* Averill, *Anger and Aggression: An Essay on Emotion*, 77 (explaining that, to Plato, anger became “allied with reason to protect the individual from wrongs perpetrated by others”).

[37] Averill, *Anger and Aggression: An Essay on Emotion*, 97.

[38] Ibid. (all philosophers but Seneca agreed that one sometimes has “not only the right but the *obligation* to become angry”); Calhoun and Solomon, “What is an Emotion?” (quoting Aristotle, *Rhetoric* using the translation by Solomon) (anger is directed at persons who harm “those whom it would be a disgrace not to defend—parents, children, wives, subordinates”).

[39] Seneca made his case against anger easier by focusing only on its most extreme manifestations, while Aristotle examined a much broader spectrum. Averill, *Anger and Aggression: An Essay on Emotion*, 85 (quoting *Seneca, De Ira*) (“[If] anger suffers any limitation to be imposed upon it, it must be called by some other name—it has ceased to be anger; for I understand this to be unbridled and ungovernable.”).

[40] Though Plato and Aristotle held differing views of emotions generally, their views on anger's redeeming qualities are surprisingly harmonious. Plato asserted that anger can be allied either with the rational portion of the *psych?*, as when it helps protect the individual from wrongdoing, or with the irrational portion, as when loss of control leads to rash deeds. See Averill Ibid., 77–78; *see also* Smith, *The Theory of Moral Sentiments*, 93 ("[T]he violation of justice is injury," and "is the proper object of resentment, and of punishment, which is the natural consequence of resentment.").

[41] Averill, *Anger and Aggression: An Essay on Emotion*, 87–90. Lacantius distinguished between uncontrollable rage and just anger, writing that the latter "ought not be taken from man, nor can it be taken from God, because it is both useful and necessary for human affairs." Ibid. at 87 (quoting Lacantius, *De Ira Dei*).

[42] Deigh, *Emotions, Values, and the Law*, 12, 142(reflecting modern philosophical consensus that thought is "an essential element of an emotion"); Maroney, "The Persistent Cultural Script of Judicial Dispassion," 644.

[43] For a fuller exploration of the concept of righteous judicial anger, see generally Maroney, "Angry Judges."

[44] The research from which these examples and assertions are drawn, all of which are from the United States, is described in Maroney, "Angry Judges." That research does not pretend to be comprehensive—such an undertaking would be impossible, given the sheer number of cases heard in the U.S. legal system, most of which are unreported and unnoticed by anyone other than the parties. The examples are nonetheless instructive and reveal important patterns.

[45] *In re* McBryde, 117 F.3d 208, 213 (5th Cir. 1997) (n.d.).

[46] *In re* Sloop, 946 So. 2d 1046 (Fla. 2007) (n.d.).

[47] See e.g., "Former Judge Newton Reprimanded by Court," *Florida Bar News*, June 15, 2000, https://perma.cc/WBQ9-QGUR (reporting a judge made "threatening and abusive" comments to a lawyer who had filed a recusal motion, saying "judges can make or break attorneys" and "clients come and go, but you have to work with the same judges year in and year out. You better learn who your friends are.")

[48] Anderson v. Sheppard, 856 F.2d 741 (6th Cir. 1988) (n.d.).; Tollett v. City of Kemah, 285 F.3d 357 (5th Cir. 2002) (n.d.).

[49] United States v. Nazzaro, 472 F.2d 302 (2d Cir. 1973) (n.d.).; Harrison v. Anderson, 300 F. Supp. 2d 690 (S.D. Ind. 2004) (n.d.).

[50] Shaw v. State, 846 S.W.2d 482, 485–86 (Tx. Ct. App. 1993) (n.d.).

[51] Inquiry Concerning Judge John C. Murphy, Before The Hearing Panel Of The Judicial Qualifications Commission of the State Of Florida, S. Ct. Case No.: SC14-1582, File NO.:

14-255, May 19, 2015 (n.d.). The case is (as of November 2015) still before the Florida Supreme Court, which is considering permanent removal of the judge from the bench.

[52] Benjamin Weiser, "Police in Gun Searches Face Disbelief in Court," *New York Times*, May 12, 2008, B1.

[53] Benjamin Weiser, "Judge Explains 150-Year Sentence for Madoff," *New York Times*, June 28, 2011, accessed November 14, 2015, A1; Chin, "Sentencing: A Role for Empathy," 1561.

[54] Solomon, *A Passion for Justice*, 42.

[55] Those findings by the Judicial Qualifications Commission in Florida are currently (as of January, 2016) under appeal.

[56] Sentis Group v. Shell Oil, 559 F.3d 888 (8th Cir. 2009) (n.d.).

[57] Maroney, "Emotional Regulation and Judicial Behavior," 1504 & n.117 (citing Vandekerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, 3).

[58] Maroney, "Emotional Regulation and Judicial Behavior," 1494; Anleu and Mack, "Magistrates' Everyday Work and Emotional Labour," 612.

[59] A humorous account of one judge's efforts in this regard may be found at O'Brien Jr, "Confessions of an Angry Judge," 251.

[60] Lerner and Tiedens, "Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Angers Influence on Cognition," 115, 132 ("[A]ngry decision makers may then, as Aristotle suggested long ago, have a difficult time being angry at the right time, for the right purpose, and in the right way.").

Acknowledgements

Keynote speech delivered at the Second Paul Scholten Symposium on Law and Emotion. 21 November 2014