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## The Wrath of Reason and The Grace of Sentiment: Vindicating Emotion in Law

*For every complex problem there is an answer that is clear, simple, and wrong.*

Henry Louis Mencken

### ABSTRACT

Why require Justice to be blind to passions? The standard model of jurisprudence offers two lines of answers: (1) Justice is about formal rationality and judging is essentially reason-giving, while emotions are irrational feelings, so justice *is* thus blind to passions; (2) Justice ought to be predictable to live up to the rule of law and judges should strive towards impartiality, while passions obscures judgment and instigates prejudice and partiality, so justice *should* thus be blind to passions, lest it decays into its very opposite. Mainstream jurisprudence also incorporates two major lines of attack against these claims: (3) Detractors argue against (1) that law suffers from indeterminacy and judges from breakfast biases; (4) detractors argue against (2) that equity requires practical reasoning when not empathy, mitigating the rigour of the law. These opinions are all grounded on specific, but often uncritically assumed, accounts of emotion. While (1), (2) and (3) are rooted in an irrationalist approach to emotion; (4) stems from a cognitivist approach to emotion. Both of these approaches are problematic. This paper attempts to shed light on the underlying accounts of emotion and highlights some problematic aspects of them. No matter if you defend (1)-(4), jurisprudents today need a better grasp on emotion in law.

### OUTLINE

1. Introduction
2. The Standard Model of Jurisprudence
3. Four Portraits
4. The Wrath of Reason and The Grace of Sentiment
5. Conclusion

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This paper is dedicated to Livia and Tommaso for many reasons, and many passions.

## 1. Introduction

The paper investigates some common descriptive and normative claims on why justice is and should be blind to our emotions, shedding light on how jurisprudence cast emotion in relation to law. In section two, focus is on what jurisprudence usually has to say about emotion. On the one hand, we find the claims of those who think law *is* emotionless like a machine, and objections of those who believe this to be untruthful. On the other hand, we find the claims by those who believe law might not be like a machine but *should* aspire to be more like one, and the objections of those who believe this to be undesirable. Thus we can say that the standard model of jurisprudence encompasses four possible configurations of our topic that correspond to four portraits depicting the legal decision-maker's relation to emotions. These are illustrated in section three. In section four, I explore the philosophical understanding of emotion behind the theses advanced by advocates and detractors of law's supposed or required detachment from emotive phenomena. The standard model relies on two broad theories of emotion, none of which can be uncritically assumed. On the first view, what really counts is reason. It may be unmerciful, but if justice is to be made, reason, being the very opposite of emotion, must come to the fore. Like anger is blind, so justice needs to be. We may call this perspective on law and emotion *the wrath of reason*. It builds on an irrationalist approach to emotion. On the second view, what really counts is practical reasoning, which cannot and should not be severed from emotions; instead, emotive intelligence should be developed through empathy. We may call this perspective *the grace of sentiment*. It builds on a cognitivist approach to emotion.

My overall aim is to provide an overview or a map of how jurisprudence thinks of emotion. This will hopefully show that law and emotion is an interesting field in its own right. My point here is to show that the contemporary philosophical debate may prove instructive for legal scholars. We need a better-informed and subtler approach to emotion than those prevailing today if we are to overcome the current state-of-the-art.

## 2. The Standard Model of Jurisprudence

How does the standard model – i.e. the textbook version of jurisprudence commonly fed to our students – understand the relation between law and emotion?

### 2.1. The Sound of Silence

Silence best describes the standard model.<sup>1</sup> Generic mention of the “sense of (in)justice” is made, often only to distinguish between law and justice; and to the “internal point of view” but a quick look at its various significances proves that the reference is to the “mental state” or “psychological ingredient” called *belief* – not *emotion*. Confusing emotion with how officials might conceive law's normativity is to catch a red herring. Some emotions might be mentioned but usually as mere relics of the past: Vengeful anger and honour-based retaliation are depicted as the murky origins of law. We recall how courts were instituted at the Areios pagos in Athens to limit vengeance being sought by the family members of the deceased, leading to the significant revolution that conferred upon the State the exclusive right to punish. We tell a similar story about how we abandoned the law of retaliation, although the talion

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<sup>1</sup> Most textbooks do not deal explicitly with the topic. Emotion does not appear in indexes, glossaries and the like. The IVR Encyclopaedia is no exception; nor is the recent Enciclopedia de Filosofía y Teoría del Derecho (Instituto de Investigaciones Jurídicas, UNAM, 2015).

is really a question of commensuration – associated with the scales of justice, the signature emblem of the trader – unintelligible without the rationality of calculation.<sup>2</sup>

Emotion mostly appears as the opposite of Reason.<sup>3</sup> The law we speak of is commonly cast in sociological terms using Weber-styled typologies as formal *rational* law: Law is part of a broader exercise of social power characterized as being of a legal-*rational* type.<sup>4</sup> If emotion is mentioned, it is mostly negatively, generally

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<sup>2</sup> *Lex taglionis* (Exodus 21:24) may be interpreted as an effort to restrain the otherwise spiralling ambitions of revenge-taking as suggested by Nico H. Frijda in “The Lex Taglionis: On Vengeance” in Stéphanie van Goozen, Nanne van de Poll, Joseph Sergeant (eds.) *Emotions: Essays on Emotion Theory*, Hillsdale, NJ: Lawrence Erlbaum 1994, p. 264. See the outstanding study by William Ian Miller, *An Eye for an Eye*, CUP, Cambridge 2006. On vengeance see the excellent analysis by Charles L. Grisworld, *The Nature and Ethics of Vengeful Anger*, in James E. Fleming (ed.) *Passions and Emotions*, ”Nomos” LIII, New York University Press, New York 2013, pp. 77-124; Robert C. Solomon, “Justice v. Vengeance: On Law and the Satisfaction of Emotion”, in Susan Bandes (ed.) *The Passions of Law*, New York University Press, New York 1999, pp. 123-148; J. Elster, “Norms of Revenge” in J. Deigh (ed.) *Ethics and Personality: Essays on Moral Psychology*, Chicago Univ. Press, Chicago 1992, pp. 163-165.

<sup>3</sup> Analytical practical philosophy has not ignored emotions and dispositions but it has often framed them as functional to rationality. The debate on reasons for action (being reason a consideration that counts in favour of some action) represents a paradigmatic example. The foundational texts of this debate (Donald Davidson, “Actions, Reasons and Causes”, in *Essays on Actions and Events*, OUP, Oxford 1980, pp. 3-19; Derek Parfit, *Reasons and Persons*, OUP, Oxford 1984; Bernard Williams, “Internal and External Reasons”, in *Moral Luck*, OUP, Oxford 1981, pp. 101-113; Steven Darwall, *Impartial Reason*, Cornell Univ. Press, Ithaca, NY 1983) take into account dispositions, motivations and desires. However, all these subjective statuses are understood as properties that might instantiate reasons. Exemplary is the discussion of blame in an influential article by Williams: In order to bootstrap internal reasons for action, blame cannot just be felt by the agent, but needs to be responsive to reasons (i.e., containing some objective dimension). Only if blame is appropriate, it can generate reasons for action (see B. Williams, “Internal Reasons and the Obscurity of Blame”, in *Making Sense of Humanity*, CUP, Cambridge 1995, pp. 35-45). The primacy of rationality becomes even more evident on the Kantian side of the discussion (See C. Korsgaard, *The Sources of Normativity*, CUP, Cambridge, 1996) and, obviously, more specifically on the side that prioritizes external reasons. In the field of legal theory, the most prominent scholar within this tradition, Joseph Raz, has tried to combine elements of internal and external reasons through the so-called ‘value-reason nexus’ (in *Value, Respect, and Attachment*, CUP, Cambridge 2001, p. 5). Being his account based on values, it implies that emotions are not irrational as long as they are responsive to reasons, that is, they instantiate some property whose value can be detected or recognized by the agent. Values might have a social origin, but cognitively they have an objective dimension. An autonomous agent is therefore the agent acting not according to desires but in line with a value-based conception of reasons: “We are ourselves so long as, as we see it, we are responsive to reason. What counts, however, is not the justification or rationality of our view, but the view itself: We are ourselves and we lead our own life so long as we see ourselves as rational agents” (J. Raz, *Engaging Reason*, OUP, Oxford 1999, p. 19). Rationality is then conceived as “the ability to realize the normative significance of the normative features of the world, and the ability to act accordingly” (*Ibid.*, p. 68). A similar view of (value-based) reasons is held by Thomas Scanlon, *What We Owe to Each Other*, Harvard University Press, Cambridge (Mass.) 1998.

<sup>4</sup> Weber asserts that bureaucracy “develops the more perfectly (...) the more completely it succeeds in eliminating from official business love, hatred, and all purely personal, irrational, and emotional elements” (M. Weber, *Economy and Society*, Eds. G. Roth, C. Wittich, Univ. of California Press, Berkeley 1978, p. 975). This reading is confirmed by the fact that, according to Weber’s classification of legitimate power, charismatic power refers to the affective dimension: Sheldon Wolin, “Legitimation. Method and the Politics of Theory” in *Political Theory*, 1981, 9:3, pp. 401-424. Affection-driven charismatic power is by antonomasia extra-legal, neither subjected to a higher norm (*sub lege*), nor able to give law but merely case-by-case rulings or decrees (*per leges*): Francisco J. Laporta, *El imperio de la ley. Una visión actual*, Trotta, Madrid 2007, pp. 108 ff.

adopting a view of the emotions, in line with many Western thinkers who have tended to view emotions as obstacles to intelligent action.<sup>5</sup>

Some scholars believe this predominance of reason is due the prominent role played by legal positivism, often identified as a reason-centred theory.<sup>6</sup> The history of Natural law, however, offers abundant material as to why this characterisation is unconvincing: It is not because positivism and naturalism form an opposing couple that these two outlooks embrace different poles of the reason/emotion dichotomy. Naturalism casts justice as *Recta Ratio*.<sup>7</sup> For positivists and naturalists alike, rule of law has a distinctively rational flavour that rule of men lacks.<sup>8</sup> To put it succinctly with Aristotle, “he therefore that recommends that the law shall govern seems to recommend that God and reason alone shall govern, but he that would have man govern adds a wild animal also; for appetite is like a wild animal, and also passion warps the rule even of the best men. Therefore the law is wisdom without desire” (*Pol.* III, 1287a).

An objection, however, could come from those scholars conversant with the Law & Emotion movement (L&Em) who observe that “law and emotion scholarship has reached a critical moment in its trajectory.”<sup>9</sup> Emotion has implications for judge-made law and doctrine, legislation, regulation, legislative programs, public policy in general. In a sense then, “emotion is everywhere in law.”<sup>10</sup> Isn’t silence on emotion just a relic of past scholarship? As this scholarship has been suggesting for a while now, law’s deep commitment to rationalism has rendered us oblivious and ill-informed about the emotions that infuse the life of the law – surprisingly, we may

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<sup>5</sup> The negative view on emotions prevailed from Plato to Darwin who, in *The Expression of the Emotions*, gave the impression that emotional expressions, while useful in the past, were similar to the appendix: a vestigial organ, left over from an earlier phase in our evolutionary history, no longer of any use. Richard A. Posner shares this idea: “our emotional repertoire” was suited to prehistoric conditions but “may not be as well adapted to the conditions in which we live today” (R.A. Posner, *How Judges Think*, Harvard Univ. Press 2008, p. 229), likening emotion to sex drive. This posture is being challenged today as a result of the empirical work done in other disciplines, exemplified by the growth of cognitive science, at the crossroads philosophy, developmental neuroscience, artificial intelligence, linguistics, evolutionary psychology, and anthropology.

<sup>6</sup> For instance, Mortimer Sellars claims “many self-styled legal positivists fall prey to this technocratic fallacy” where “technocrats seeks to remove emotion from the law altogether by redefining legal reasoning as mere logic or deduction.” See *Id.*, *Law, Reason, and Emotion* (June 9, 2014). Available at SSRN:

<http://ssrn.com/abstract=2448000> or <http://dx.doi.org/10.2139/ssrn.2448000> (quoting pp. 13-14).

<sup>7</sup> Cicero, *De Re Publica*, III, chap. 22, sec. 33.

<sup>8</sup> Rule of law derives from the distinction between “empire of laws” (rule by law) and “empire of men” (rule under men). This classical *topos* was developed in Plato’s *Statesman*. See *Platonis Opera*, ed. John Burnet, OUP, Oxford 1903, 294a (here in Benjamin Jowett’s trans.): The Stranger, says «in a sense, however, it is clear that law-making belongs to the science of kingship; but the best thing is not that the laws be in power, but that the man who is wise and of kingly nature be ruler.» The English formula is from *Encyclopedia Britannica* (Edinburgh 1771). More conventionally, «a government of laws and not of men» is from *Marbury vs. Madison*, 5 US 137, 163 (1803). This characterisation of the “rule of law” includes both *gubernaculum per leges* and *sub lege*, the latter tending to get confused with constitutionalism. As known, Edward Coke used the concept in early 17<sup>th</sup> century England to foreclose the participation of the King in deliberations of the common law courts. Cf. the case «Prohibition del Roy», 1608 12 Coke Rep 63. For the early origins of the expression and evolution in common law, see Theodore Frank, Thomas Plucknett, *A Concise History of the Common Law*, Little, Brown & CO, Boston 1956, 48.

<sup>9</sup> Kathryn Abramst, Hila Kerentt, “Who’s afraid of law and emotions?”, 94 *Minn. L. Rev.* (2010), pp. 1999-2063.

<sup>10</sup> Susan A. Bandes, “Empathy, Narrative, And Victim Impact Statements”, *Univ. Chicago Law Review*, 1996, 63, pp. 361-392.

add, since law basically shapes the affective lives of its subjects. Litigation, as we all know, is an intensely emotional, and tiresome, process.

L&Em has undergone rapid development, from a movement allied with feminists and other critical scholars in challenging the notions of rationality and objectivity, to an interdisciplinary debate aimed at exploring many dimensions of human affection. Legal scholars re-discovered a range of passions in law.<sup>11</sup> “As legal analysts sought to learn more about the range of emotions they now perceived, they increasingly turned to fields outside the law, where inquiry into the emotions was better established.”<sup>12</sup> Today, at least two bodies of legal scholarship challenge the primacy of the traditional rational-actor, law-and-economics approach to law and policy:<sup>13</sup> The first, taking a cognitive-psychological or behavioral economics approach, focuses on mental heuristics and biases that lead to departures from rational decision-making. This literature is voluminous and increasing.<sup>14</sup> The second line of legal scholarship focuses on the role of emotion in legal decision-making, whether by judges, juries, bureaucrats, legislators, or citizens. Likewise, L&Em scholarship departs from the traditional conceptions of law as rationality and its representatives have been labeled “new emotional realists.”<sup>15</sup>

Moreover, “law and neurosciences may be viewed as importantly allied with law and emotions analysis in recognizing the incompleteness of the traditional focus on the rational dimension of cognition.”<sup>16</sup> The scholarship that goes under the label *Law & Neurosciences*, has been casting doubt on psychological assumptions made by jurists and legal doctrine, especially in relation to criminal law, procedural issues, criminal responsibility, and use of technologies in the courtroom. Many thinkers claim the deliverances of our emotions can give rise to fast responses to the environment, involving little or no conscious deliberation. These “fast and frugal”

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<sup>11</sup> Among the affects that received attention there were not only the obvious emotions like mercy and the desire for vengeance, but also disgust, romantic love, bitterness, uneasiness, fear, resentment, cowardice, vindictiveness, forgiveness, contempt, remorse, sympathy, empathy, hatred, spite, malice, shame, respect, moral fervor, and last but not least the “passion for justice” itself: E.g. William Ian Miller, *The Anatomy of Disgust*, Harvard University Press, Cambridge (Mass.) 1997; Martha C. Nussbaum, “The Secret Sewers of Vice: Disgust, Bodies, and the Law”, in *The Passions of Law*, cit., pp. 19-61. There are thus certain emotions that are specific to the realm of law, but also some that are specific to certain realms in law. Criminal law is one of the few areas of doctrine in which an examination of emotions (e.g. defendant acting in the “heat of passion”, showing “remorse”, the deterrence by cultivating shame among criminal offenders etc.) has been a standard feature of the doctrinal landscape. But L&Em contributes to showing that law and emotion form binomials relevant to many different contexts, where legal settings are affectively laden, such as family law, criminal procedure, torts, educational law, but also in settings where law nudges behavior through emotion, demotivates through “neutralization” of emotion (e.g. administrative law) and so forth.

<sup>12</sup> K. Abramst, H. Kerentt, “Who’s afraid of law and emotions?”, cit., p. 2010.

<sup>13</sup> A good example is the Project on Law and Mind Science at Harvard: <http://sites.harvard.edu/icb/icb.do?keyword=k13943&pageid=icb.page63708>

<sup>14</sup> Jeremy A. Blumenthal, “Emotional Paternalism”, 35 *Florida State Univ. Law Review*, 2007, Fall, 2-70. See e.g. Christine Jolls *et al.* “A Behavioral Approach to Law & Economics”, *Stanford Law Review* 1998, 50, pp. 1471 ff.; Jeffrey J. Rachlinski, “Cognitive Errors, Individual Differences and Paternalism”, *University of Chicago Law Review*, 2006, 73, pp. 207 ff.; Amir & Orly Lobel, “Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy”, *Columbia Law Review* 2008, 108, pp. 2098; Richard H. Thaler, Cass R. Sunstein, *Nudge: Improving Decisions About Health Wealth and Happiness*, Yale Univ. Press 2008.

<sup>15</sup> Terry A. Maroney, “The Persistent Cultural Script of Judicial Dispassion”, in *California Law Review*, 2011, 99, p. 632. See also Id., “Law and Emotion: A Proposed Taxonomy of an Emerging Field”, *Law and Human Behaviour*, 2006, 30, pp. 119-142.

<sup>16</sup> K. Abramst, H. Kerentt, “Who’s afraid of law and emotions?”, cit., p. 2027.

responses of the “two-track mind” might be adaptive, evolutionary responses.<sup>17</sup>

This new understanding has implied taking a step away from the view on emotions as irrelevant to law. It is however much disputed what norms of rationality this kind of emotive thinking conforms to, and how it relates to the more considered, pondered, kind of reason-giving that we ordinarily associate with legal reasoning. At any rate, these developments point to the importance of emotion in practical reasoning as has been shown by the contemporary debates on the weakness of will (*akrasia*), i.e. acting against one’s own judgment about what is best to do. In parallel, the philosophical debate on emotion has been booming over the last decades as old-school philosophy of mind was being challenged,<sup>18</sup> indirectly fueling the L&Em scholarship. In many fields today, bounded rationality is *en vogue*.

Even if we acknowledge how the intellectual horizon evolved, the objection we are examining is overcome as the very L&Em-scholars recognize that “mainstream legal academics have often greeted [this scholarship] with ambivalence”<sup>19</sup> so “broader agendas and stories have buried ideas about judicial emotion.”<sup>20</sup> Jurisprudence rarely takes emotion seriously. Silence persists.

## 2.2. Emotionlessness in Law

What does the standard model say about passions? Essentially two things: That justice is, and should be, disconnected from its whims. The equivalence between justice and rationality largely passes through a cultural filter that associates passions with lack of autonomous judgement, partiality, preference, bias, and unfairness. The assumption is that emotion floods careful reasoning in a tidal wave of affect. While reason offers the Archimedean lever, emotion draws decision-makers towards the shadowy association with particulars.

Let us try to spell out the well-known descriptive and normative claims in the standard model. They are associated with the iconographical tradition of a blindfolded lady justice, where the blindfold is a symbol of impartiality and stands for the lack of caprice that justice is said to either embody or that its advocates would like her to embody. They are also associated with the complex and uncanny metaphorical tradition of “legal mechanics.”<sup>21</sup>

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<sup>17</sup> It is easy to see how some basic emotions helped our ancestors to survive; the capacity for fear is very useful in a world where hungry predators lurk in every shadow. The American neuroscientist Joseph LeDoux (*The Emotional Brain: The Mysterious Underpinnings of Emotional Life*, Simon & Schuster, New York 1996) famously showed that the same neural mechanisms mediate the fear response in all sorts of animals, from pigeons to humans. He distinguishes between the high road in the sensory cortex and the low road, connecting sensory thalamus to amygdala, and leading up to different emotional responses.

<sup>18</sup> Peter Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., p. 1: “Philosophy of mind in the Anglo-Saxon tradition was for long time preoccupied with the mind-body problem, involving such questions as how mental properties and events can have a place in the material world, and had little truck with the work of phenomenologists, much of which included insightful discussions on the emotions. (...) It was a tendency in Anglo-Saxon philosophy of mind (...) to assimilate emotion to other more familiar (and supposedly better understood) kinds of mental state such as belief and desire, leaving the feeling side of emotion to psychologists.”

<sup>19</sup> K. Abramst, H. Kerentt, “Who’s afraid of law and emotions?”, cit., p. 2010.

<sup>20</sup> T. Maroney, “The Persistent Cultural Script”, cit., p. 665.

<sup>21</sup> I have explored this metaphor in *Social Tools and Legal Gears: Hägerström on the Nature of Law*. In Sven Eliaeson et al. (eds.), *Axel Hägerström and Modern Social Thought*, Bardwell Press, Oxford 2014, pp. 257-282; see also Minsoo Kang, *Sublime Dreams of Living Machines. The Automaton in the European Imagination*, Harvard Univ. Press, Cambridge (Mass.) 2011.

(1) Law is like a machine – It is essentially a matter of formal rationality;

(2) Law should be like a machine – Its clockwork enhances legal certitude;

Of course, the history of jurisprudence also provides numerous attacks on both these sets of claims. We find the objections of those who believe the descriptive claim to be untruthful and the objections of those who believe the normative aspiration to be undesirable:

(3) Law is not like a machine – It is seriously indeterminate;

(4) Law should not be like a machine – It requires practical wisdom.

This classification leaves us with opposing views in two key diatribes: the descriptive debate over the nature of legal reasoning and the normative debate over the preferred decision-making. Let us unpack the views on emotion that these claims build on.

### 3. Four Portraits

The standard model encompasses four ways of depicting the legal decision-maker's relation to emotions. To spell them out, four portraits may be sketched. Let me introduce them to you: Jean-Jacques the dispassionate lawgiver; Mr. Steiguer the breakfast biased judge; the selfless Hercules; and Solomon the empathic equity magistrate.

#### 3.1. The Dispassionate Lawgiver and the Breakfast-biased judge

For our first character in the mainstream script of jurisprudence, law is essentially a question of logic and deduction (*Zweckrationalität*). Let us call him Jean-Jacques, in honour of Rousseau, whose *législateur* in *Contrat social* presents this typical emotive detachment:<sup>22</sup> “A superior intelligence beholding all the passions of men without experiencing any of them (...). This intelligence would have to be wholly unrelated to our nature, while knowing it through and through; its happiness would have to be independent of us, and yet ready to occupy itself with ours.”<sup>23</sup> He shares anthropology with the bloodless Vulcan Spock. The pointy-eared half human alien from *Star Trek* has no emotions and therefore attains a superhuman degree of rationality. His decisions result from reason alone. Yet, in order to display truly superior intelligence, Jean-Jacques is not a psychopath able only to formulate and apply rules, deprived of the cognitive capacities involved in understanding what others are thinking and feeling. To this extent, he is not a computer.<sup>24</sup> He is not affectively mind-blind. He is

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<sup>22</sup> It does not matter if he is involved in legislation or application of law because the cognitive abilities remain the same. In the first case, he deduces from his understanding of the anthropology and situation of his subjects which constitution suits them best; in the second case, he deduces from the law which decision should be applied to the case at hand.

<sup>23</sup> J.J. Rousseau, *Du contrat social*, Book 2, chap. 7.

<sup>24</sup> This holds true in so far computers can be said to have no emotions, an increasingly tricky issue. Defining emotions in neurobiological terms, as part say of the limbic brain process, excludes computers by definition. A less parochial approach has it that emotion *is* as emotion *does*. Computers could thus by definition have emotions were they to behave in given way. If emotions are social and intersubjective phenomena, they are rule-based; if there are rules, these may be coded. This is the prevailing approach to having human raters teach machine-learning algorithms to discover rules that reflect associations between particular combinations of signs and particular states. Yet, “the ways that people commonly talk and think about emotion are sufficient for most of the practical purposes that most people have had until recently. The development of emotion-oriented computing shows that there are practical purposes for which they are not sufficient” (Roddy Cowie, *Describing the Forms of Emotional Colouring that Pervade Everyday Life*, in *The Oxford Handbook of Philosophy of Emotion*, cit., p. 67). Today this issue goes far beyond Herbert Simon's 1967-robot dilemma.

just dispassionate, and what makes him such is essentially not having a dog in the race. This reflects the twin meanings of dispassion: He is both emotionless and impartial, qualities seen as necessarily linked.

This is why lawgivers of his kind need not even be part of the community, as in the case of Lycurgus,<sup>25</sup> nor living in our time.<sup>26</sup> Exclusion from the community is the ultimate sign of the irrelevance of compassion (here broadly construed according to its etymology, *cum-passion or sym-patheia*): There is no need for the dispassionate lawgiver to *feel* with his subjects, merely *knowing* his Guinea pigs is sufficient. The legal reasoning of such a lawgiver is necessarily deprived of any affective elements that might give rise to partiality. It also builds on the idea that various parties' interests can be established objectively and that the optimal rational choice can be discovered.

Jean-Jacques is the legal version of the philosophical notion that moral reasoning is the process of discovering and applying a system of universal laws. This "uncreative" view of application is usually associated in Continental Europe with Montesquieu's *bouche de la loi*<sup>27</sup> and in American legal culture with Christopher Columbus Langdell, the putative father of modern legal education, who treated law as a science and legal reasoning as a deductive process.<sup>28</sup> Lurking behind this image is the omniscient judge and law conceived as a closed system that provides predetermined answers to the questions, without reference to external or non-legal elements.

Do notice that psychological realism is not the point here. This image of the lawmaker is grounded on the assumption that disencumbered deliberation not only is possible but a viable solution (at least for certain creatures). An explanation for this otherwise puzzling fact is that this decision-maker is not involved so much with reasoning as with reason-giving. Although the reasoning process might involve unreflected elements or intuitive hunches, post-hoc reason-giving does not. Those who refer to this model distinguish the question of how judges reach their decisions from the issue of how these decisions are supported, the point being that decisions need not be supported by reference to emotion.

On this view, emotion is superfluous. Feelings are irrational or perhaps just a-rational; and have no place in the justificatory practices that Jean-Jacques engages in. The context of discovery, in which the emotions might play a role, is simply irrelevant. The model focuses exclusively on the context of justification. Therefore, "this notion of judging is premised on a conception of law as unsituated in time and place."<sup>29</sup>

Many find this un-situatedness unconvincing.<sup>30</sup> For detractors of Jean-

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<sup>25</sup> Lycurgus was not Spartan. He is saddled with inventing the *Ewigkeitsklausel* for the Spartan constitution as he makes the city swear not to change any laws while he is in Delphi. He never returns.

<sup>26</sup> He is said to be "working in one century, to be able to enjoy in the next" (J.J. Rousseau, *Du contrat social*, Book 2, chap. 7).

<sup>27</sup> The reference is to *Esprit des Lois*, book 11 § 6 where the "English" model of the judge is described as different from the French model where discretionary margins of interpretation have an anti-despotic containment function in monarchical rule, due to the fact that the judiciary power is aristocratic and thus independent from the King yet moved by honour, "le ressort du gouvernement monarchique." See Marco Goldoni, *Montesquieu and the French Model of Separation of Powers*, in "Jurisprudence", Volume 4, Number 1, June 2013, pp. 20-47; Lando Landi, *L'Inghilterra e il pensiero politico di Montesquieu*, Cedam, Padova 1981.

<sup>28</sup> Christopher C. Langdell, *A Selection Of Cases On The Law Of Contracts* (1871).

<sup>29</sup> Susan A. Bandes, "Moral Imagination and Judging", in *Washburn Law Journal*, 2011, 51, p. 104.

<sup>30</sup> Scholars such as Lynne Henderson, Judith Resnik, Martha Minow, and Elizabeth Spelman contested the categorical valorisation of qualities such as detachment or impartiality associated with "reason"



Jacques' position, law is not mere logic; it is no machine, predisposed for a determinate outcome, predictable in its computing legal operations. The judge as the *bouche de la loi* offers a fundamentally flawed description of legal reasoning. The image of law as purified deduction is untruthful. There is no "view from nowhere." Rather, a whole range of extra-legal values, considerations and perspectives enter into legal reasoning.

There are all sorts of gradualist positions between, on the one hand, the extreme case of the judge who merely discovers a written law and applies it with the same level of involvement as the computer applying an algorithm, where – at least ideally – all outcomes are predetermined and; on the other hand, the random ordeal and/or arbitrary case-to-case decision-making of "substantively irrational law", i.e. what Max Weber called "the justice of the Khadi." However, theorists arguing against Jean-Jacques' position do not theorize legal reasoning in relation to formally irrational law, such as cases with trial by ordeal or oracle, where decisions are taken on the basis of tests that everybody recognizes as being beyond the control of the human intellect. Rather, detractors of formalism are interested in legal systems where decisions are taken on the basis of tests that are (supposedly) intelligible and within the control of the human intellect, yet that appear to escape it. Therefore, our second character in the mainstream script of jurisprudence is not the Khadi, but rather Mr. Steiguer, an embodiment of the position according to which that law suffers from indeterminacy and judges from biases.

In his work *L'homme machine* (1747), the materialist French enlightenment *philosophe*, Julien Offray de La Mettrie, tells the story of Mr. Steiguer from Wittighofen in Switzerland: He was "a bailiff" who was "the most upright and even indulgent of judges when fasting but was capable of hanging the innocent as well as the guilty when he had feasted."<sup>31</sup> Mr. Steiguer is an exemplary instantiation of the breakfast biased judge – symbol and embodiment of the theory also known as "digestive realism" that says that judicial decisions depend on what judges had for breakfast.<sup>32</sup>

Do note that both Jean-Jacques and Mr. Steiguer represent descriptive

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specifically because the judge's unsituatedness. E.g. L. Henderson, "Legality and Empathy", *Michigan Law Review*, 1987, 85, 1574 ff.); J. Resnik, "On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges", *South California Law Review*, 1988, 61, pp. 1877-1944; M. Minow, E.V. Spelman, "Passion for Justice", *Cardozo Law Review*, 1988, 10, November, pp. 37-76; M. Minow, "Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors", *William and Mary Law Review*, 1992, 33, pp. 1201 ff. More generally, much contemporary research on the psychology of judging similarly takes as its starting point the fact that judges are situated human beings: David Klein, *Introduction*, in D. Klein, G. Mitchell (eds.) *The Psychology Of Judicial Decision Making*, OUP, Oxford 2010, pp. xi-xv.

<sup>31</sup> Julien Offray de La Mettrie, *L'homme machine* [1747], Eng. Trans. *Machine Man and Other Writings*, CUP, Cambridge 1986, p. 7.

<sup>32</sup> Jerome Frank is said to have coined the phrase "justice is what the judge ate for breakfast." Some say Frank once made the breakfast remark as an offhand oral quip: Morton J. Horowitz, *The Transformation of American Law 1870-1960. The Crisis of Legal Orthodoxy*, OUP, Oxford 1992, p. 176. Others think it is more likely that Frank, because of his views, is saddled with having said something actually said in jest by Roscoe Pound or by Supreme Court Justice Owen J. Roberts: Frederick Schauer, *Thinking Like A Lawyer*, Harvard Univ. Press, Cambridge (Mass.) 2009, p. 129. It is unclear if this phrase really has anything to do with American legal realism, as pointed out by Brian Leiter, "Rethinking Legal Realism: Toward a Naturalized Jurisprudence", in *Texas Law Review*, 1997, 76, pp. 267-315, now in *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy*, OUP, Oxford 2007, Ch. 1. At any rate, Felix S. Cohen ("The Problems of a Functional Jurisprudence", *The Modern Law Review* 1937, 1, pp. 5-26) speaks of "digestive disturbances" (p. 9).

positions. Digestive realism does not affirm that it is good (or bad) to decide upon a good (or bad) breakfast; it simply holds that judges are led to some decisions because of what they had for breakfast. Digestive realism tells us that non-legal factors typically determine judicial decisions, but it does not tell us anything about the outcome of the decision (would it favour the defendant or the prosecutor?). That non-legal factors can influence decision-making is neither a radical claim, nor a claim susceptible of being easily falsified. More interestingly the position claims that for non-legal factors to determine judicial decisions the judge's *mood* would be important.<sup>33</sup>

Moods are “background states that raise or lower our susceptibility to emotional stimuli.”<sup>34</sup> Moods last longer than emotions – from several minutes to several hours. Germans have a special word for it: *Stimmung*. Mood-specialist Matthew Ratcliffe argues that unlike emotion, moods are pre-intentional, “non-conceptual bodily feelings” which provide “spaces of significant possibility.”<sup>35</sup> On one hand, this explains why the causal connection between the mood and the judicial outcome, in favor of defendant or prosecutor, is underdetermined. On the other hand, we are not sure that mood really means mood. Some scholars insist that feeling states need to lack objects to be classified as moods (a person may be in an irritable or anxious mood for no identifiable reason, but to be angry there must be an object for the anger).<sup>36</sup> In the case at hand, the breakfast causes the state, which then is not a mood after all. It is more likely that the term is used as a synonym, or placeholder, for what Imre Lakatos called “influential metaphysics” (*grosso modo* the worldview a person has).

The judge's worldview, or that of any other person, surely includes a whole range of unarticulated, often uncritically assumed, opinions. Pretending that human beings can be disembodied, their opinions neutral, their character traits changed, their moods erased, their habits neglected, when they engage in deliberation and decision-making is so far-fetched that it needs no comment. But that was never Jean-Jacques' claim. “It would take Gods to give laws to men” says Rousseau. Jean-Jacques is undeniably like Mr Data in *Star Trek* who has an “ethical subroutine” implanted in order to understand others but who has no emotions of his own. In the debate between the dispassionate lawgiver and the breakfast biased judge, the latter makes the kill when it comes to psychological realism, but it is a hit beyond the target: All criticism that centers on the unconvincing psychology of Jean-Jacques fails.

Advocates of digestive realism have yet another objection against Jean-Jacques: The indeterminacy of law. Indeterminate are not merely rules, but also the sources of law and the very finding of legal material as relevant in a given case. The claim is that the multiplicity of legal sources renders the formalist pretence of

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<sup>33</sup> Giovanni Tuzet, “A Short Note on Digestive Realism”, *Revus*, 2015, 25, p. 2, available at: <http://revus.revues.org/3226>; Moreover, “the descriptive claim is causal: It causally connects breakfast and decision. But the causal process is a bit more complex: It is likely to go from the quality of the breakfast to the judge's mood, and from this to the outcome of the case. (...) Suppose that the judge had a large, nice and completely satisfying breakfast: He would be in a good mood, but this is insufficient to predict his decision. You need to know in addition his attitudes towards defendants and prosecutors. (...) Digestive processes are bias-arousers: They trigger a process of bias-arousing in which decision-makers let their biases determine the outcome of the case in hand.”

<sup>34</sup> D. Evans, *Emotion. Emotion. A Very Short Introduction*, OUP, Oxford 2001, p. 47.

<sup>35</sup> M. Ratcliffe, *The Phenomenology of Mood and the Meaning of Life*, in P. Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., pp. 348-371.

<sup>36</sup> Nico H. Frijda, “Mood” in David Sander, Klaus R. Scherer (eds.) *The Oxford Companion To Emotion and The Affective Sciences*, OUP, Oxford 2009, pp. 258-59.

doctrinal determinacy an insidious falsity.<sup>37</sup> For Jean-Jacques' detractors, there are no easy cases; choosing the facts to be investigated is *per se* a potentially normative activity, or, at the very least, a question the nature of which need to be established. If "the authoritative tradition speaks with a forked tongue"<sup>38</sup> the choice among rules competing to control the case is the major source of doctrinal under-determinacy. Some seem to imply that the very judgment concerning the relevance of a source, or legal material, is indeterminate. This is a much more serious threat to formalism than Hart's admission of rule-indeterminacy or any admission that there are vague standards, such as reasonableness or good faith.<sup>39</sup> This indeterminacy hits the very facts. It is the *framing of the relevance* of certain facts that amounts to a discretionary exercise. Here lies Mr. Steiguer's breakfast bias.

I would like to suggest that the fact that a choice is made in considering a determinate factual aspect of a situation, or a person, as *being relevant* for activating a given legal category, like conferring a right or imposing a duty, does not necessarily entail that the choice is arbitrary, even though it may lie within the discretion of the law-maker to perform this choice. In other words, not any selection is discriminatory and not any choice amounts to discrimination. So it is still possible that the judgement of relevance is not after all a normative judgement, as advocates of Steiguer's model would have it, but it might be a perfectly sound judgement of *reason*.<sup>40</sup>

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<sup>37</sup> Some claim that the fact that law is affected by a strong form of indeterminacy would constitute the core difference between realism and positivism: Patricia Mindus, "Realism Today: On Dagan's Quest Beyond Cynicism and Romanticism in Law", in *International Journal for the Semiotics of Law*, October 2014. The problem of indeterminacy does not affect merely the open texture of legal language as expressed in rules (cf. Hart's reading of the indeterminacy challenge in hard and easy cases). See Hanoch Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory*, OUP Oxford 2013, pp. 18-19: "The inescapable reason for indeterminacy is the availability of multiple, potentially applicable doctrinal sources" thus making "legal doctrine hopelessly indeterminate not (or, at least, not primarily) because of the indeterminacy of discrete doctrinal sources but mainly because of their multiplicity;" so "fully appreciating the magnitude and depth of doctrinal indeterminacy (...) requires that we not look merely at one given rule. Rather, the main source of doctrinal indeterminacy is the multiplicity of doctrinal materials potentially applicable at each juncture in any given case."

<sup>38</sup> Karl N. Llewellyn, "Some Realism about Realism", in *Jurisprudence: Realism in Theory and in Practice*, Univ. Chicago Press, Chicago 1962, p. 70.

<sup>39</sup> As Llewellyn explains, in distinguishing between *ratio decidendi* and *obiter dictum*, judges can rely either on the rule stated by the previous court or on the legally relevant facts (or on both): Karl N. Llewellyn, *The Bramble Bush* [1930] in Id., *The Case Law System in America*, Paul Gewirtz (ed) Univ. of Chicago Press, Chicago 1933; Id., *The Common Law Tradition: Deciding Appeals*, Little Brown & Co., Toronto 1960, pp. 77-91; esp. p. 25: "The relevant facts are not treated as such, but are rather classified in categories that are deemed significant. But neither the selection of the pertinent facts nor their classification into categories is a self-evident or logically necessary undertaking. In all these ways, judges have significant discretion as to the question of how wide, or how narrow, the *ratio decidendi* of the case should be - that is, what should its scope be vis-à-vis other rules."

<sup>40</sup> Consider e.g. what personal characteristics a person needs to have in order to enjoy an entitlement such as, say, voting rights. There are good reasons for claiming that age is a relevant criterion, but eye colour is not. Because it is possible to make an argument about age as a proxy for full legal capacity, intellectual maturity or moral autonomy required to make sense of the exercise of franchise, while no such argument is available for eye colour. There is no connection between political capacity and being, say, fair-eyed. So being fair-eyed is not a reasonable access criterion for franchise. But this is so, independently of any esthetical, moral or broadly normative assumption. In order to make this point, no specific normative or moral reasoning is required and ordinary, epistemologically sound reasoning is sufficient. The reasoning involved perhaps even boils down to calculating the consequences following from a premise. This can be done, without investigating one's normative preferences or what one ate for breakfast. This line of thought is at the centre of the project I am currently developing: <http://civissum.eu/index.html>

At any rate, the real dispute between Jean-Jacques and Mr Steiguer is not between those who think judges look at “facts” and those who think judges look at rules; and it is not between those who think that facts are construed and those who believe facts are given. Rather, the dispute is between, on the one hand, those who think judges look to formal legal rules to determine both the facts that are legally relevant and what the outcome is indicated by those facts; and on the other, those who think the judges look to non-legal information to determine which facts are relevant, and what should be done on the basis of these facts.<sup>41</sup> It is thus clear what positions are defended by Jean-Jacques and Mr. Steiguer respectively.

For admirers of Jean-Jacques, reference to emotion is superfluous. Similar to a distraction, emotion appears in the formalist account to be an irrational feeling, a mindless surge of affect; nothing that needs to be accounted for in the context that really counts, the justification of legal decisions. The law, like the heart, has reasons of its own. This “script has retained power despite its tension with (psychological) reality because it is anchored to an entrenched view of emotion. This traditional view holds that emotion is by its nature irrational, undisciplined, and idiosyncratic.”<sup>42</sup>

For the opponents, emotions are not unimportant, but they belong to the non-legal factors that impact on legal decision-making; emotion is assigned “membership in an undifferentiated ‘arational’ family, one including concepts as diverse as intuition, politics, and the Freudian unconscious (...). When realists did mean to refer to emotion, they did so in an undifferentiated fashion, simultaneously invoking the concepts of bias, prejudice, personality, temperament, will, and even creative activity” and “they therefore grouped emotion with whatever other influences felt similarly unknowable and uncontrollable.”<sup>43</sup> In the tradition of digestive realism, the judge might be an emotional creature, but these emotions only materialize as unfounded beliefs and prejudices – less structured than the average post-hoc sentence required when justifying legal decisions – aroused by such a frivolous element as the breakfast menu. So when it comes to emotion, the breakfast-biased judge runs into problems: Law might be seriously indeterminate, thus introducing non-legal elements into the relevance criteria; but not all non-legal elements are alike. It still needs to be proven that reference to emotion would qualify as “non-legal.”<sup>44</sup>

This point becomes more intriguing when we consider empathy: Empathy is not regarded as just another variable that may or may not be an appropriate ground for the decision.<sup>45</sup> Jurisprudence has for a long time accommodated debates about the

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<sup>41</sup> F. Schauer, *Thinking Like A Lawyer*, cit., p. 132.

<sup>42</sup> T. Maroney, “The Persistent Cultural Script”, cit., p. 632.

<sup>43</sup> *Ibid.*, pp. 666-7.

<sup>44</sup> Could for instance epistemic emotions, such as curiosity, consistency, perseverance, play a positive role in legal decision-making? Their opposites are usually taken to hint to a sloppy and badly executed job. This constitutes, at least partially, a problem for Jean-Jacques as well. See Adam Morton, *Epistemic Emotions*, in P. Goldie (ed.) *Oxford Handbook on Philosophy of Emotion*, cit., pp. 385-399. Others broaden the scope so as to include in epistemic emotions feelings of anxiety that are said to play a critical role in rationality by signalling when gathering more information and deliberating about what to do is warranted. An unarticulated assumption in much work on emotions and law is that the emotive judge invariably tends toward sloppiness, bias, and irrationality. This is a problem in its own right. Because the emotions that a judge may need to deprive himself of must be such that they do not include epistemic passions, or so-called non-standard emotions – from the more common curiosity and intellectual honesty, to the less frequently felt contemplative enjoyment.

<sup>45</sup> There has been quite some debate recently over the role of empathy in legal decision-making, especially in American legal theory, pursuant to the debate following the *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, To Be an Assoc. Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111<sup>th</sup> Cong. 121 (2009).

appropriate decisional role of morality, or of scientific knowledge. Empathy is treated differently. “It is regarded as (...) a wild, untamed, destabilizing force that cannot coexist with the rule of law.”<sup>46</sup>

Paradoxically, could Jean-Jacques be the one to adjust to less a-rational reference to emotion? He is aware that as lawgiver he needs to have a full understanding of the psychological workings of the recipients of his decisions; and such an understanding would include appreciation of our emotions. However, the potential role emotion could play for Jean-Jacques tends to be elusive. In fact, in this type of approach, emotion could be useful to our lawgiver only for cognitive purposes. “Cognitive empathy functions as a tool for understanding others; it seems to have no particular emotional valence. Empathy of this sort can be used for any purpose at all, including purposes detrimental to the person to whom it is directed.”<sup>47</sup> Cognitive empathy might be essential in adjudication and legislation; but this is not the reason why judges are being praised for not yielding to emotion. This conception of empathy in particular, and emotion in general, is an overly restrictive conception. It frames emotion as either strictly irrelevant or as sort of *belief* (an unfounded belief, a bias, a prejudice). Yet, we have something else in mind when we speak of emotion in general and empathy in particular: Empathy is also about feeling *with* others. It implies a response that is not merely cognitive.<sup>48</sup> Whatever emotion is, it does not seem to be a mental mode immediately reducible to belief. Perhaps it is messier, as some suggest: “Emotions are probably the most complex mental phenomena as it involves all types of mental entities that belong to various ontological levels.”<sup>49</sup> Neither Jean-Jacques, nor Mr Steiguer are able to see this.

### 3.2. The Selfless Umpire and the Empathic Equity Magistrate

The standard model offers another set of ideas from which distinct views on the role of emotion emerge. In this diatribe, two positions are cast as diametrically opposed, even though their objects do not entirely overlap; their disagreement thus being in part illusionary.

On the one hand, we find those who believe that a good judge should feel no emotion; if she does, she puts it aside. The rule of law in general, and legal certitude in particular, are best promoted by decision-making stripped of emotion. Law should be like a machine in that justice ought to be predictable. Judges should strive towards impartiality, not fall prey to passions that obscure judgment and instigate lopsidedness. To call a judge emotional is a stinging insult, signifying a failure of discipline, independence, and disinterestedness. Emblematically, we may refer the opinion of Joseph C. Hutcheson Jr., then a young lawyer and later a federal district court judge, who was so convinced of this view to declare that “if anyone had suggested that the judge had a right to feel, or hunch out a new category into which to

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<sup>46</sup> S. Bandes, “Moral Imagination and Judging”, cit., p.105.

<sup>47</sup> *Ibid.*, p. 110.

<sup>48</sup> See e.g. Robin West, “The Anti-Empathic Turn”, in J.E. Fleming (ed.) *Passions and Emotions*, cit., p. 248; L. Henderson, “Legality and Empathy”, cit., pp. 1574-1654; S. Bandes, “Empathetic Judging and the Rule of Law”, in *Cardozo Law Review De Novo*, 2009, pp. 133-148; S. Bandes, “Empathy, Narrative, and Victim Impact Statements”, cit. Some distinguish empathy from sympathy: While the first would be a source of information, the second would be a moral sentiment that motivates action. Even admitting such a distinction, which might just be overstating an etymological difference, we have still not been able to account for sympathy.

<sup>49</sup> Aaron Ben-Ze’ev, *The Thing Called Emotion*, in P. Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., p. 41.

place relations under his investigation, I should have repudiated the suggestion as unscientific and unsound, while as to the judge who dared to do it, I should have cried, “Away with him!”<sup>50</sup> For these defenders of an imperturbable Lady Justice, justice *should* thus be blind to passions, lest it decays into its very opposite.

On the other hand, detractors argue against this position that being emotionally blind makes the judge a bad decision-maker. Good judging nurtures what has been called “judicial emotion”, i.e. a judge’s experience of a discrete, identifiable emotional state (such as fear, anger, happiness, sadness, surprise, or disgust) while performing her professional role. Typically, this position is circumscribed to hard cases, politically salient cases or – more traditionally – to equity, a kind of judging specifically requires *phronesis*, practical wisdom.<sup>51</sup>

The disagreement is normative.<sup>52</sup> Frank insisted on this aspect: “I have no naïve notion that” a judge without any “emotional attitudes” exists, and “I have no desire to live in a society in which such sub-human or super-human judges exercised the power of judging.”<sup>53</sup> Referring to a famous 1987 lecture by Supreme Court Justice William J. Brennan, where the latter engaged in a hymn to “passion,”<sup>54</sup> Owen Fiss rightly pointed out: “I do not believe Justice Brennan was (...) merely restating the obvious: Judges are people, and as much as they strive to be rational, emotion and passion inevitably creep into the judicial process (...). [He instead] celebrated passion as a factor that *should* enter the decisional process.”<sup>55</sup> The way to prove (or refute) this normative thesis needs to build on different arguments than the arguments used in the first diatribe. That a normative ideal is hard to reach is no argument against it. Both positions share the understanding that emotions do have import on a normative level. They disagree, however, on its value. Here we find our third and fourth characters in our portrait gallery: Hercules and Solomon.

Conventional wisdom has it that judges should leave their personal predilections and emotional commitments behind as they ascend the bench. This view of emotion in legal decision-making is well-captured by Chief Justice Roberts well-known umpire-metaphor,<sup>56</sup> in which judges do leave their emotions behind in designing the best solution to a case. A historical precedent of this view is Thomas

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<sup>50</sup> Joseph C. Hutcheson Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision”, *Cornell Law Review*, 1929, 14, p. 278.

<sup>51</sup> Aristotle, *Nic. Ethics*, Book V, 1141b.

<sup>52</sup> At a different level of analysis, however, the dispute is descriptive since it hinges on determining how reasoning occurs in relation to different types of cases, in accordance with Cardozo’s observation that “legal scholars have been unable to agree over how much of the judicial decision-making process is reasoning, and how much is mere emotion.” (Benjamin N. Cardozo, *The Nature Of The Judicial Process*, Yale Univ. Press, New Haven 1921, pp. 44-45). No one, as far as I have been able to see, actually claims that any adjudicative practice, at any level, would require emotion in terms of phronetic wisdom. Whereas there is debate about the higher threshold (hard cases), there is no serious debate about the lower threshold (easy cases), such as the fact that, say, faceless administrations (or even legal bots) apply law without this posing issues for which practical wisdom is generally invoked. Of course, where to set the threshold (i.e. what constitutes a hard and easy case) is another (related) question that I shall leave aside.

<sup>53</sup> Jerome Frank, “What Courts Do in Fact”, *Illinois Law Review*, 1932, 26, n. 55, pp. 761-764.

<sup>54</sup> William J. Brennan, Jr., “Reason, Passion, and The Progress of the Law”, *Cardozo Law Review*, 1988, 10:3, p. 17: “The greatest threat to due process principles is formal reason severed from the insights of passion.”

<sup>55</sup> Owen M. Fiss, “Reason in All Its Splendor”, *Brooklyn Law Review* 1990-91, 56, p. 797.

<sup>56</sup> Chief Justice Roberts stated in his confirmation hearing that “judges are like umpires. Umpires don’t make the rules, they apply them (...). They make sure everybody plays by the rules.” See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 5 (2005).

Hobbes who declared in the mid-1600s that the ideal judge is divested “of all fear, anger, hatred, love, and compassion.”<sup>57</sup> What is wrong with taking one’s emotions to the bench is well formulated by Arthur Corbin: Judge-made law “grows up in the semi-darkness of ignorance and emotion,” rather than “in the strong light of pure reason.”<sup>58</sup> The risk of admitting emotive judges is that they are affected by the “prejudices and passions of common humanity.”<sup>59</sup> Sympathies and animosities are part of human psychology but should play no role in legal reasoning: The “turn to passion” is a misguided attempt to curb uncertainty.<sup>60</sup>

Our third character in the mainstream script of jurisprudence embodies this position: The selfless Hercules.<sup>61</sup> Unlike jurors or children, judges discipline themselves to respond to the problems before them with careful, linear rationality.<sup>62</sup> Hercules may be gifted with human psychology, but is able to lift himself over and above certain parts of it: He does not get tired or fall prey to whimsies. Even though he might sympathize with one party, he does not let this influence his reasoning. Judges – being (all too) human – do feel emotion, but should, in so far as their professional activities are concerned, deprive themselves of their personal inclinations, just like the citizen in Rousseau deprives himself of his interest as a private individual when voting. In this sense, Hercules is selfless. Emotions do have normative significance: They should be disregarded in finding the right answer to a legal problem. Emotion is conceived as an add-on that should not be introduced into the rational process of justification. Hercules divests emotion without losing himself.

To him, emotions are cast as subjective and fanciful; emotion works like taste – *de gustibus*. We might feel it but it *should* not matter, because like taste and flavours, emotions are impervious to argument or reason. It is a question of preferences. In a way, emotion here may be likened to a sort of *desire* that gives rise to an individual inclination. This way of casting emotion as an idiosyncratic element is the normative take on the topic in mainstream legal culture.

Yet, a different but still quite common take is the one offered by Solomon. He serves “to know wisdom and instruction; to perceive the words of understanding; to receive the instruction of wisdom, justice, and judgment, and equity; to give subtlety to the simple, to the young man knowledge and discretion.”<sup>63</sup> He is no bloodless Vulcan, no faceless administrator. He asks for (and gets) “an understanding heart to judge thy people, that I may discern between good and bad: for who is able to judge this thy so great a people?”<sup>64</sup> The “great judge”, like Solomon, has the personality

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<sup>57</sup> Thomas Hobbes, *Leviathan* [1651] A.R. Waller (ed.) Cambridge Univ. Press, Cambridge 1904, p. 208.

<sup>58</sup> Arthur L. Corbin, “The Law and the Judges”, *Yale Review*, 1914, 234, 3, p. 250.

<sup>59</sup> George P. Costigan, Jr., “The Supreme Court of the U.S.”, *Yale Law Journal*, 1907, 16, n. 69, p. 266.

<sup>60</sup> O. Fiss, “Reason in All Its Splendor”, *cit.*, pp. 797-98.

<sup>61</sup> The reference to Dworkin is an obligation and to his judge “of superhuman skill, learning, patience and acumen” who is “more reflective and self-conscious than any real judge need to be or, given the press of work, could be”: Ronald Dworkin, *Taking Rights Seriously*, Harvard Univ. Press, Cambridge (Mass.) 1978, pp. 116-117. Hercules conceives of law as a seamless web, or a gapless system, in which he seeks consistency and integrity; he “constructs a scheme of abstract and concrete principles that provides a coherent justification for all common law precedents and, as far as these are to be justified on principle, constitutional and statutory principles as well”: *Id.*, *Law’s Empire*, Harvard Univ. Press, Cambridge (Mass.) 1986, p. 265. Like in the case of Jean-Jacques, criticism against Hercules that claims that he is unrealistic does not bite. He stands for a normative ideal and does not inhabit any actual bench.

<sup>62</sup> Richard A. Posner, “Emotion Versus Emotionalism in Law”, in *The Passions of Law*, *cit.*, p. 311.

<sup>63</sup> Proverbs 1, 2-6.

<sup>64</sup> Kings 3:4-9.

traits of Plato's "man of kingly nature."<sup>65</sup> He rules against "unreasonable" laws set by the lawmaker and opposes the tyrant who is such in virtue of his stubborn inflexibility, his inability to see the "reasons" of others.<sup>66</sup> What the great judge does is to use *equitas* and *pietas* against *ius strictum*.<sup>67</sup> When applying the law strictly would deviate from justice, the intention behind the law or other substantial principles,<sup>68</sup> Solomon derogates. The "error" inherent in the law belongs originally to the legislator who, with or without intention, either failed to notice a particular set of circumstances, or deliberately overlooked them in the interest of framing a universal statement applicable to most cases. Consequently when the law is either silent or inappropriate before a particular case, Solomon interprets the law by applying what he would have legislated in the view of the present situation. Two circumstances define the scope of the claim that justice *should not* be blind to passions: Solomon works on (i) *equity* and is guided by his (ii) *empathy*.

Rooted in the Latin principle of *aequitas* – that "equals" the disparities between *ius scriptum* and *ius aequum*<sup>69</sup> – equity developed to make law more indeterminate.<sup>70</sup> Insisting on the individuality of the case and thus deploying imaginative exercises, *epieikeia* is a mean to correct the errors caused by rigid application of inflexible rules to a specific case (Aristotle, *Nic. Ethics*, Book V, 1137b). Set on the permeable line between carving out exceptions and creating rules,

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<sup>65</sup> In this sense he is similar to the great politician: The *kybernetes* or *gubernator* "as the pilot, by watching continually over the interests of the ship and of the crew – not by laying down rules, but by making his art a law – preserves the lives of his fellow sailors, even so, and in the same way, may there not to be a true form of polity created by those who are able to govern in a similar spirit, and who show the strength of art which is superior to the law?" (Plato, *Statesman* 296e, trans. Benjamin Jowett). Yet, the great judge differs from the great lawmaker: The great law-makers, i.e. wise men like Minos, Lycurgus, Solon – symbols of *gravitas* – or heroes like Moses, Cyrus, Theseus, Romulus – symbols of *celeritas* – are not supporters of "the rule of men" but of *gubernaculum per leges* (George Dumézil, *Mitra-Varuna. Essai sur deux représentations indo-européennes de la souveraineté*, Gallimard, Paris 1948, pp. 37ff.). The judge that best reflects the political view of such founding fathers is not Hercules or Solomon, but Jean-Jacques who is the perfect applier of *their* laws. See Massimo Cuono, *Decidere caso per caso. Figure del potere arbitrario*, Marcial Pons, Madrid 2013.

<sup>66</sup> In Sophocles' *Antigone*, Creon is accused of such inflexibility by his son Haemon: "For the dread of thy frown forbids the citizen to speak such words as would offend thine ear; but can hear these murmurs in the dark, these moanings of the city for this maiden; 'no woman,' they say, 'ever merited her doom less, none ever was to die so shamefully for deeds so glorious as hers; who, when her own brother had fallen in bloody strife, would not leave him unburied, to be devoured by carrion dogs, or by any bird:—deserves not she the meed of golden honour?'" (Sophocles, *Antigone*, 680; Trans. Richard C Jebb, CUP, Cambridge 1917).

<sup>67</sup> *Ius strictum*, *equitas* and *pietas* have a highly complex relationship: Ulpianus triade of Natural law has been at the centre of many debates. E.g. Leibniz criticizes Hobbes for reducing law to merely *ius strictum* at the expense of *equitas* (G.W. Leibniz, *Meditation on the Common Concept of Justice*, 1702-03).

<sup>68</sup> The idea that the judge realizes the intention of the law instead of simply changing the rules because injustice would result from its implementation is an interpretation of equity that emerged in the Anglo-American tradition with Christopher St. German dialogue *Doctor and Student* [1532] and Edward Hake's *Epieikeia* (Edward Hake, *Epieikeia: A Dialogue On the Equity in Three Parts* [1600 ca], ed. D.E.C. Yale, Yale University Press, New Haven, Conn. 1953). See Dennis R. Klinck, *Conscience, Equity, and the Court of Chancery in Early Modern England*, Ashgate, Burlington 2010.

<sup>69</sup> Cicero, *De Officiis*, I 10, 33; II 12, 24; *De Oratore*, 1.57; *Digesto*, D.1.1.7.1.

<sup>70</sup> Within 16<sup>th</sup> and 17<sup>th</sup> century England, the jurisprudence of equity claimed to remedy the rigors of the Common Law, which was perceived as the kind of rigid and rule-bound system that civil lawyers sometimes accuse Continental legal systems of being. See Bernadette Meyler, "Equity over Empathy", in J.E. Flemings (ed.) *Passions and Emotions*, cit., p. 316; Stephen H. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective", *University of Pennsylvania Law Review*, 1987, 135, pp. 909 ff.).



it concerns the production of norms inferred from particular cases, by negotiating between the universality of the law and the randomness of particular circumstances (1137b). This is why equity, in order to mitigate the rigour of the law, requires practical reasoning: *Phronesis* is not “practical wisdom concerned with universals only – it must also recognize the particulars; for it is practical, and practice is concerned with particulars. This is why some who do not know, and especially those who have experience, are more practical than others who know.”<sup>71</sup> Solomon needs to be gifted with certain abilities: Empathic skills.

Solomon does not merely *understand* other people’s motivations. He also *feels* for them, senses sympathy or compassion.<sup>72</sup> Advocates of Solomon hold that “our intuition, emotion and conscience are appropriate factors in the jurisprudential calculus.”<sup>73</sup> The myth of dispassion “rests on two fictions: (1) that emotion necessarily leads to injustice, and (2) that a just decision-maker is necessarily a dispassionate one.”<sup>74</sup> For many of them, empathy contributes to the justifiability of a decision: This is why “empathy and moral imagination, properly understood, are part of the solution to the problem of unaccountable judges interpreting indeterminate law, rather than part of the problem.”<sup>75</sup> Empathy is a prerequisite for the phronetic abilities that characterize the nuanced judging equity deals with.

Emotionally impaired decision-makers are bad before such particular cases because this kind of judging requires emotive intelligence.<sup>76</sup> Those who, like Jean-Jacques or Hercules “knows” how humans behave, but are emotionally detached, are “less practical” in this activity. Hercules would not have resolved case of the twin mothers with such a resolutely illegal method, suggesting the division of the child. Solomon’s ability to sense the mother’s desperation at the mere prospect of the dead child is what guides his decision-making. His empathic skills enable him to choose sides in the dispute, whereas Hercules or Jean-Jacques would have been left, intellectually speaking, in the place of Buridan’s ass.

This is the meaning of the claim that “the ability to understand the goals of others is the essence of the art of judging.”<sup>77</sup> Solomon enables us to grasp that “legal decision-making is enriched and refined by the operation of emotions because they direct attention to particular dimensions of a case, or shape decision-makers’ ability to understand the perspective of, or the stakes of a decision for, a particular party. Efforts to exile affective response – a damaging outgrowth of historic dichotomizing – can produce legal judgments that are shallow, routinized, devaluative, and even irresponsible.”<sup>78</sup>

Do note that Solomon is unable to deprive himself of this empathic ability. Were he stripped of his phronetic skills he would not be Solomon. Emotion cannot be left behind as one ascends the bench. It is identity-defining, yet not a mere personal predilection. Solomon’s empathy is not a subjective idiosyncrasy like a taste or a

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<sup>71</sup> Aristotle, *Nic. Ethics*, Book VI, 1141b (in Ross’ trans.).

<sup>72</sup> Benjamin C. Zipursky, “Anti-empathy and Dispassionateness in Adjudication”, in J.E. Fleming (ed.) *Passions and Emotions*, cit., esp. p. 309.

<sup>73</sup> Irving R. Kaufman, “The Anatomy of Decision-making”, *Fordham Law Review*, 1984, 53:1, p. 16.

<sup>74</sup> Samuel H. Pillsbury, “Emotional Justice: Moralizing the Passions of Criminal Punishment”, *Cornell Law Review*, 1989, 74, p. 655.

<sup>75</sup> S. Bandes, “Moral Imagination and Judging”, cit., p. 101.

<sup>76</sup> Peter Salovey, John Mayer, “Emotive intelligence” in *Imagination, Cognition and Personality*, 1990, 9, pp. 185-211. See also Daniel Goleman, *Emotive Intelligence*, Bantam Books, New York 1995.

<sup>77</sup> R. West, “The Anti-Empathic Turn”, cit., p. 243.

<sup>78</sup> K. Abramst, H. Kerentt, “Who’s afraid of law and emotions?”, cit., p. 2004.

preference. It is not a distraction either. It is not sneaked into the otherwise linear process of reason-giving. It is what makes his judgement wise.

Just like advocates of Jean-Jacques and Steiguer use a *fourre-tout* notion of emotion, Solomon's advocates are also imprecise about what they mean: They say "emotion" but intend "intuition", "hunch" – a semi- or para-conscious cognitive skill that flows from experience; more exactly, from the phronetic wisdom of experienced people.<sup>79</sup> Emotion is synonymous with a full and true appreciation of social reality. A good example of such a position is Bandes who means that judges "make assumptions about" a whole range of things in which experience plays an important role: "How domestic violence victims or rape victims or victims of police brutality ought to act. They make assumptions about how pregnant women feel towards their unborn babies, how cops react to sanctions, how it feels for a 13-year old girl to be strip searched in the school principal's office, how it feels to be sent to the 'coloured only car' on the train."<sup>80</sup> Experience is necessary in order to even have intuitions about how other people feel in these situations.<sup>81</sup> When Joseph Hutcheson declared that judges "arrive at their verdicts by *feeling*" he was describing the mental process of "intuition."<sup>82</sup> When Holmes said "the meaning of a sentence is to be felt rather than to be proved," it is unlikely that he meant that his emotions tell him what words mean. He more likely was referring to intuition.<sup>83</sup>

These "assumptions" or "intuitions" deriving from experience of one's own and other people's emotive lives may be unarticulated, but they have little in common with the strict irrationalist or subconscious view of emotion that others hold. It becomes clear why advocates of Solomon hold that "the traditional legal story casting emotion as stubbornly irrational is simply not true. Emotion's critical role in reflecting and enabling reason coexists with an ability to shape our experience and expression of it in accordance with a hierarchy of reasons."<sup>84</sup>

### 3.3. Four Views of Emotion

The way jurisprudence addresses our topic seems prone to adopt an over-simplistic view of emotion. The study of emotion's role has been hampered by the tendency to view emotions reductively, mainly as a set of quick, intense, uneducable, and unreflexive bursts of feeling. "It has been hampered by the failure to distinguish among several different sorts of emotive phenomena including (...) immediate reflex emotions, long-term affective commitments, moods and emotions based on complex moral and cognitive understandings."<sup>85</sup>

We are now ready to conclude that there are, in the standard model, basically four ways of thinking about emotion:

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<sup>79</sup> Owen Fiss perspicaciously sees that "a good deal of Brennan's 'passion' is subsumable under Holmes's broad use of the term experience" (O. Fiss, "Reason in All Its Splendor", cit., pp. 801-02).

<sup>80</sup> S. Bandes, "Moral Imagination and Judging", cit., p. 113.

<sup>81</sup> There is an increasing debate today in moral philosophy about the value we should ascribe to intuition (see Folke Tersman, "Intuitional Disagreement", *The Southern Journal of Philosophy*, 2012, 50, 4, pp. 639-659). The intuition we are discussing here is experience-based; it is connected to the normative issue of the social composition of the judiciary.

<sup>82</sup> Joseph C. Hutcheson Jr., "The Judgment Intuitive", cit., p. 277, referring to a "sixth sense" consisting of a flash of insight following brooding.

<sup>83</sup> T. Maroney, "The Persistent Cultural Script", cit., p. 669.

<sup>84</sup> *Ibid.*, p. 649.

<sup>85</sup> Susan A. Bandes, "Emotion and Deliberation: The Autonomous Citizen in the Social World", in J.E. Fleming (ed) *Passions and Emotions*, cit., p. 190.

First, emotion may be conceived as superfluous for understanding the nature of legal decision-making; this is so because justice is about formal rationality and judging is essentially reason-giving. Emotion, conversely, is conceived as an irrational feeling: It is like a *distraction*. This is the idea of emotion behind the common claim that justice *is* blind to passions.

Second, emotion may be conceived as an extraneous factor impacting on legal decision-making; this is so because law suffers from serious indeterminacy, not merely semantically but in the very selection of the relevant material. This opens the floodgates to all kinds of opinions, drives, urges, and desires that affect decision-makers. Emotion is here conceived as a false or uncritically assumed presupposition: It is like a *bias*. This is the idea of emotion behind the claim that justice *is not* blind to passions since judges, set to determine intrinsically indeterminate law, are biased.

Third, emotion may be conceived as belonging to the personal predilections that judges should leave behind as they ascend the bench. This is so because justice ought to be predictable and judges should strive towards impartiality, while passions obscure judgment and instigate lop-sidedness. In order to live up to the rule of law, the principle of legality and certitude, decision-makers ought to, as far as possible, disregard their emotions. Judges should not let their subjective idiosyncrasies influence their decision-making. Emotional detachment is a requirement of impartiality. Emotion is here conceived as a preference: It is like a *taste*. This is the idea of emotion behind the common claim that justice *should* be blind to passions.

Fourth, emotion may be conceived as essential to the practical wisdom required for good judging. This is so because (a certain kind of) judging requires practical reasoning, not merely formal deduction. This is paradigmatically the case of equity. Here empathy has an important role to play, in mitigating the rigour of the law. Emotion is conceived as a cognitive ability: It is similar to a *skill*. This is the idea of emotion behind the common claim that justice *should not* be blind to passions, lest it decays into its very opposite.

At the core of all these four positions there are thus different views of emotion:

- (1') Emotion is a feeling
- (2') Emotion is a bias
- (3') Emotion is a preference
- (4') Emotion is a skill

These four views of emotions can be traced back to two major philosophical understandings of emotion that we shall examine next.

#### **4. The Wrath of Reason and The Grace of Sentiment**

Let us turn to the understanding of emotion that grounds the theses of the advocates and detractors of law's supposed, or required, detachment from emotive phenomena. The descriptive and normative accounts of emotionlessness in law in the standard model rely on two broad theories of emotion: The irrationalist approach and the cognitivist approach, none of which can be uncritically assumed.<sup>86</sup> The philosophical

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<sup>86</sup> Today we find theories of emotion that blur the divide between the irrationalist and the cognitivist approaches. For instance, Peter Goldie and others have argued that emotions are *sui generis* mental states: P. Goldie, *The Emotions: A Philosophical Exploration*, OUP, Oxford 2000; Ronald De Sousa, *The Rationality of Emotion*, MIT press, Cambridge Mass. 1987; Aaron Ben-Ze'ev, "Emotion as a subtle mental mode", in Robert Solomon (ed.) *Thinking about Feeling: Contemporary Philosophers on Emotion*, OUP, Oxford 2004, pp. 250-68. John Deigh recently put forth a variant of the intentionalist view, the theory that emotions are specifically perceptual world-directed states: *Concept of Emotions in*

debate on emotion may prove instructive for legal scholars as well. Let us briefly describe these broad theories of emotion so we can connect them to our four portraits of judges.

#### 4.1. The Wrath of Reason

The first understanding of emotion revolves around a set of assumptions casting reason as the opposite of emotion in a rigid dichotomy of the modalities of the human psyche. This understanding hinges on an *irrationalist approach*.

Reason is the charioteer that must guide the soul to truth, thus conducting and ruling over both moral instincts and irrational appetites.<sup>87</sup> The irrationalist approach considers reason to be the natural ruler of our chaotic, unruly emotive life that makes us wantons at whims of concupiscence and unconscious impulses. Here “the passions are cast like foes to be subjected or defeated, neutralized or de-potentiated through extenuating civil wars of the Will (...). Never as something to comprehend.”<sup>88</sup> On the one hand, we find the untameable, inaccessible feelings and instincts; and, on the other, we find mature, deliberative knowledge. The advocate of the irrationalist theory of emotion might say of emotion what Kant claimed about inclinations (*Neigung*): “It must (...) be the universal wish of every rational being to be wholly free from them.”<sup>89</sup> Both Kantian and utilitarian ethics adopt versions of this dichotomised account; it can be traced to a well-developed strategy in traditional ethics: Stoicism. This position is still held today by those who see emotions as responses part of our evolutionary heritage, which we would be better off without when deciding what to do.<sup>90</sup>

Reason and emotion belong to opposite constellations of meaning.<sup>91</sup> Reason and emotion are thus conceived as “constraining pairs of descriptors such as biased-unbiased, nonrepresentational-representational, noncognitive-cognitive, caused by external stimuli-responsive to reasons, physiologically based-cognitively-based, motivating-motivationally inert, and so on.”<sup>92</sup> Rationalism and Romanticism alike require this dichotomy.

This first approach to emotion allows different explanations of what normative judgments are and how they are made. It is a theory compatible with many models of moral judgement. No specific meta-ethical position needs to be assumed. The irrationalist view of emotion is compatible with a rationalist model of decision-making,<sup>93</sup> according to which we reason first, then we feel emotions. One may believe the psychological account that claims that emotions arise as a consequence of reason, yet keep on embracing an irrationalist view on emotion. The same goes for the so-called intuitionist model that says that emotions constitute intuitions about what is right and wrong and that we use these intuitions to make our judgments; reason then

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*Modern Philosophy and Psychology*, in P. Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., pp. 17-40. See also Id., *Emotions, Values, and the Law*, OUP, Oxford 2008. For our present purposes it is sufficient to flesh out the two main theories here described.

<sup>87</sup> The reference is to Plato's *Phaedrus* (246a-254e) and his famous Chariot allegory.

<sup>88</sup> Remo Bodei, *Geometria delle passioni*, Feltrinelli, Milano 2003, p. 25.

<sup>89</sup> I. Kant, *Groundwork of the Metaphysic of Morals*, trans. H.J. Patton, New York, Harper Torchbook 1964, pp. 95-96.

<sup>90</sup> E.g. Peter Singer, “Ethics and Intuitions”, *Journal of Ethics*, 2005, 9, pp. 331-52.

<sup>91</sup> R. Bodei, *Geometria delle passioni*, cit., for the history of this dichotomy.

<sup>92</sup> Cheshire Calhoun, *Reliable Democratic Habits and Emotions*, in J.E. Fleming (ed.) *Passions and Emotions*, cit., p. 214.

<sup>93</sup> Marc Hauser, *Moral Minds: How Nature Designed our Universal Sense of Right and Wrong*, Harpercollins, New York 2006.

follows to provide post hoc rationalizations.<sup>94</sup> Advocates of the irrationalist understanding of the emotion may also embrace a dual-process model,<sup>95</sup> according to which normative judgments are occasionally driven by emotion and occasionally by reason. In fact, most thinkers who believe in the ‘imperial power of reason’ have no problem admitting ‘empirical sentimentalism’ as a descriptive theory about how (most people) make up their minds: To the contrary most philosophers classified as ethical rationalists would hardly be surprised to see that experimental subjects are governed by passion rather than reason.

This approach to emotion is mainstream in Jurisprudence. Here, what really counts is rational thought: It may be tough, but if justice is to be made, reason must come to the fore. Like anger is blind, so justice is: We may call this perspective *the wrath of reason*. The name is suggested by another blindfolded woman who often appears in same iconographical tradition that attributes the blindfold to Lady Justice: Wrath, or blind fury.

Canonical passion of the Ancients<sup>96</sup> and deadly sin, Wrath actually gave “the attribute of blindness to all passions since it was considered paradigmatic of passion in itself.”<sup>97</sup> The irrational account of emotion often sees blind fury as typical of emotions in general. This idea of vision and passion is at the root of the conception of passion as biasness. The passions are “excessively clear, but not distinct, capable of increasing the size of their objects but not to focalize them in their peculiarity.”<sup>98</sup> Reason circumscribes, distinguishes, and searches for specific causes, while passion seems to work like a synecdoche with a logic typical of *pars pro toto* or symmetrically *totum pro parte*. Not being able to see and desire the correct proportions, hence to distinguish various parts, is the very mark of injustice.<sup>99</sup> No wonder then that justice needs to be kept away from the passions that have the ability to distort.

There are, however, different ways in which emotion can distort:

(i) It may distort because it drives attention away, like an itch that keeps me from attending a task. This is the way in which emotion may be understood as a distraction from formal deduction; according to a view that equates emotion to feeling, a bodily modification, distracting one’s higher cognitive abilities.

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<sup>94</sup> Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgement*, in “Psychological Review” 108 (2001) 814-834. This psychological theory suggests that emotions *precede* normative judgments, implying that they cannot be components or parts of the latter. This might leave us with an unsatisfying account of how normative judgments may be constituted because of intuitionism’s scepticism about the role of reason: *Prima facie* reason seem to play at least some role in deliberation. But it is still not incompatible with an irrationalist account of emotion.

<sup>95</sup> Joshua Greene et al. “An fMRI Investigation of Emotional Engagement in Moral Judgement”, *Science* 293 (2001), pp. 2105-2108.

<sup>96</sup> Homer’s *Illiad* starts with a particular word for anger or wrath (*mênis*); Aristotle in *Nic. Eth.* finds it “slavish” not to react with anger when one is treated contemptuously; Seneca’s *De Ira* need no mention. See D. Konstan, *The Emotions of the Ancient Greeks*, Toronto University Press 2006, esp. pp. 48-56; S. Braund & G. Most, *Ancient Anger: Perspectives from Homer to Galen*, CUP, Cambridge 2003; R. A. Kaster, *Emotion, Restraint and Community in Ancient Rome*, OUP, Oxford 2005; W.V. Harris, *Restraining Rage: The Ideology of Anger Control in Classical Antiquity*, Harvard Univ. Press, Cambridge (Mass.) 2001; S. Knuutila, *Emotions in Ancient and Medieval Philosophy*, OUP, Oxford 2004.

<sup>97</sup> R. Bodei, *Geometria delle passioni*, cit., p. 38. See also A.J. Greimas, *De la colère. Étude de sémantique lexicale*, in *Du Sens*, II, *Essais sémiotiques*, Paris 1983, pp. 225-246; trad. it. *Della Collera. Studio di semantica lessicale*, in *Del Senso*, II, *Narrativa, modalità, passioni*, Milano 1985, p. 217-238.

<sup>98</sup> R. Bodei, *Geometria delle passioni*, cit., p. 37.

<sup>99</sup> Lack of proportions as a form of bias is the key notion of injustice in Aristotle’s *Nic. Ethics*, Book V: cfr. *pleonexia*.

(ii) It may distort because it prevents the open-mindedness associated with considering all sides of an issue, like a preconception that keeps me anchored to tradition or false beliefs of which I am ignorant and that I am unable to tweak. This is the way in which emotion may be understood as a bias surreptitiously introduced into deliberation, according to a view that equates emotion to an unconscious impulse, an irresistible compulsion, an unconsidered association, or an unwarranted assumption of which I am substantially unaware and towards which my attitude remains uncritical and incapable of changing.

(iii) It may distort because it tends to promote lop-sidedness, favours partiality, taking sides, getting impassioned about something. This is the way in which emotion may be understood as a personal preference, according to a view that equates emotion to a taste, a desire, an urge.

These three different ways of having passions distorting reason can be traced back to the first three of our portraits of legal decision-makers:

Jean-Jacques the dispassionate lawgiver adopts this first idea of emotion (i). For him, emotion is a distraction from formal deduction. To spell out the idea in philosophical terms, he adopts the concept of emotion defined as a consequence of a bodily modification. This theory owes its ancestry to the work of William James who argued that the emotions are bodily feelings or perceptions of bodily feelings.<sup>100</sup> Emotions are here affective states pursuant to bodily changes. James accepted the empiricist view of emotion as a feeling, but reversed the order of events in explaining an episode of feeling: “According to common sense, a person perceives a charging bear, for example, feels fear, blanches, and runs, whereas, on James’s account, the perception of the charging bear causes the person to blanch and run, and the feeling of these bodily movements is the fear.”<sup>101</sup> On this account of emotion, different body movements give rise to different emotions. A creature having another body would be emotionally endeavoured in a different fashion. For James, emotions are epiphenomenal. They are the products of bodily changes, but they do not themselves cause any action.

This is the case also for Jean-Jacques. Like emotions for James, passions for Jean-Jacques are irrelevant in explaining the “springs of action.” Emotions have no motivational force. They do not cause any action in him. This is explained by the fact that he needs not have the same body as his legal subjects. He must understand them, but he may obtain this information by knowing about their bodily changes and emotive reactions (empathic in an epistemic sense); he does not need to share these emotions (empathic in a moral sense, or sympathetic).

A problem with this view is that it sacrifices the motivational force of emotions that is generally held to be important when explaining human action, but since Jean-Jacques need not have a human body we may bracket this issue. Another problem is that there can be no emotions of which we are unconscious. If emotions are feelings, we are necessarily conscious of them; they must be transparent to us. In fact, while perhaps we might unconsciously *emote* certain passions – unconscious love, fear, envy etc. – it makes no sense to speak of unconscious *feelings*. Feeling expresses its own state but is not directed towards any other object. Since it is a mode

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<sup>100</sup> William James, *What is an Emotion?* [1884] in *The Principles of Psychology*, Dover, New York 1950, vol. 2, p. 449: “My theory (...) is that the bodily changes follow directly the perception of the existing fact, and that our feeling of the same changes as they occur in the emotion.”

<sup>101</sup> J. Deigh, “Concept of Emotions in Modern Philosophy and Psychology”, cit., p. 20.

of consciousness one cannot be unconscious of it: There are no unfelt feelings.<sup>102</sup> This brings us to Mr Steiguer.

Our breakfast-biased judge adopts the second idea of emotion (*ii*). For him, emotion may be understood as a bias that creeps into deliberative practices. He is unmindful of how his own breakfast impacts on his victims in court. To spell out the notion in philosophical terms, he adopts the concept of emotion developed by Sigmund Freud: Emotion can be an unconscious impulse, an irresistible compulsion or urge.<sup>103</sup> This Freudian view is most clear in Jerome Frank.<sup>104</sup> Freud took emotions to be states of mind we are conscious of through the feelings that manifest them. Emotions are not feelings, they are merely expressed by feelings. He was looking to explain feelings that have no obvious organic cause and found the explanation in the theory of repressed emotion, where we are unconscious of the emotion that only shows itself through a feeling that seems inappropriate to its object. Emotions are understood as intentional states of mind, not epiphenomena. They cause actions and maintain motivational force even if we are unaware of them. These “imperceptible emotions”<sup>105</sup> are those having greatest impact on our will because they are those of which we are unaware – just like the bias afflicting Mr Steiguer.

The selfless Hercules adopts the third idea of emotion (*iii*). Emotion for him is an ineffable, unintelligible, eminently subjective experience, like a personal preference, predilection or taste. Like in the Romantics, the taste-theory of emotion builds on an irrationalist account where emotions are fundamentally at odds with reason. Like for the Romantics, the taste-theory believes the secrets of sentiment are best unlocked by poetry, not science. The strength of this position is that it makes sense of cultural and individual variation in emotional climate that cognitivist and generally objectivist theories sometimes struggle with. Also, this view may also explain why appealing to feelings offers a way to make people change their mind without having to provide good arguments. But, at a closer look, it is a rather shallow notion.

One serious problem is that emotions are intrinsically *social* phenomena: Although preferences differ from person to person, the fundamental causes behind the adoption of a preference such as causing joy or distress may be common to us all. This is the very point of learning from other people’s experiences. Evolutionary psychology and anthropology have long been engaged in proving that basic emotions constitute a universal language, pan-cultural amongst humans, shared with non-

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<sup>102</sup> The feeling dimension is a primitive mode of consciousness; unlike higher levels of awareness such as those found in perception, memory, and thinking, feeling has no meaningful cognitive content: we may have reasons for experiencing emotions, but not feelings. There is no point in asking people about their reasons for having a toothache.

<sup>103</sup> Sigmund Freud, *The Ego and The Id* [1923] and *The Economic Problem of Masochism* [1924] in *Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. & trans. J. Strachey, Hogarth Press, London 1981, both in vol. 19.

<sup>104</sup> Frank made the connection between subconscious impulses, emotions and legal decision-making. He posited a sort of emotional immaturity that could distort the personality of the judge and warned that judges who most insisted on their own “mechanical logic” were the ones most “swayed by the perverting influences of their emotional natures.” Instead, Frank urged, judges should throw off “childish emotional drags” in order to embody the “modern mind” to which law should adapt. Jerome Frank, *Law and the Modern Mind*, Bretano, New York 1930, p. 268.

<sup>105</sup> The term is Hume’s. Freud’s idea of unconscious emotions derives from Hume’s doctrine of “calm passions” according to which not the intensity of the emotion dictates its hold on our will but its becoming a “settled principle of action” or “predominant inclination of the soul” (David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge, Clarendon, Oxford 1978, p. 418).

human animals.<sup>106</sup> A basic emotion is of rapid onset, and lasts a few seconds or a few minutes. Common examples include joy, distress, anger, fear, surprise, and disgust. Emotional expressions, associated with these basic emotions, would not differ from culture to culture but would be more similar to breathing. Of course, that human beings share the same basic emotional repertoire does not deny the fact of different cultures can produce human beings with different emotional settings. Every culture has its own rules that defined the socially acceptable forms of emotional expression.<sup>107</sup> But this just stresses the point being made here: Assuming emotion to be a mere individual predilection is badly off the mark. Moreover, Hercules' idea that emotion constitutes an add-on that a person may remove at will is problematic. Many hold emotion to constitute a general mode of the mental system, one of which we are not able to undo ourselves at will.

Moreover, considering that a lot of today's decision-making processes are made by groups of people and not single law-makers, the social dimension is likely to be held increasingly relevant. It is unwarranted to reduce emotions to individual idiosyncracies since we need to understand the social, public and collective dimension of emotive features: This is key to understanding the impact of emotions of social settings and the feedback effect of institutional arrangements on emotive displays.<sup>108</sup>

Regardless whether one prefers to think of emotion as a bodily feeling, an unconscious drive or a subjective inclination, the fact remains: Jean-Jacques, Mr Steiguer and Hercules all adopt a broadly irrationalist approach. This leaves us with Solomon: What is the idea of emotion that our fourth judge adopts? Our empathic equity magistrate has a quite different understanding of emotion.

#### 4.2. The Grace of Sentiment

The second understanding of emotion revolves around a set of assumptions that avoids casting reason as the opposite of emotion in a rigid dichotomy; instead, the modalities of the human mind are presented in such a way as to render emotion as form of knowledge, an instrument of information, a vehicle of inference. This understanding hinges on a *cognitivist approach*. It is more subtle, but no less problematic.

From the cognitivist outlook, the poles of reason and feeling form a gradualist structure, a *continuum*, in which emotions must be analysed and contextualized, and cannot be ushered away as mere irrational outbursts. Much is to be gained from the psychological etiology of our moral sentiments. This outlook challenges the dominant assumption that the passions play no beneficial role in deliberation. It puts emphasis on the role of rhetoric and persuasion that (contrarily to the first outlook) are not

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<sup>106</sup> The American anthropologist Paul Ekman first showed in the 60s that the cultural theory of emotion was erroneous. So today while researchers disagree about how many basic emotions there are, most consider basic emotions as universal innate. See P. Ekman, R. Davidson, *The Nature of Emotion: Fundamental Questions*, Oxford University Press, Oxford 1994.

<sup>107</sup> Consider e.g. the emotion of "being a wild pig" that afflicts members from the Gururumba people in New Guinea. See Dylan Evans, *Emotion*, cit., p. 13. Patricia Greenspan has shown that even basic emotions have a degree of plasticity that allows for cultural influences to shape our responses from an early age: P. Greenspan, *Emotions and Reasons: An Inquiry into Emotional Justification*, Routledge, New York 1988; Id., "Moral Responses and Moral Theory: socially based externalist Ethics" in *Journal of Ethics*, 1998, 2, pp. 103-22; Id., "Learning Emotions and Ethics" in Peter Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, OUP, Oxford 2010, pp. 539-559.

<sup>108</sup> See e.g. Christian von Scheve, Mikko Salmela (eds.) *Collective Emotions*, OUP, Oxford 2014.



merely tools of “sinister interest” but potentially informative practices.<sup>109</sup> It often draws attention to particularism or contextualism in decision-making, and emphasizes less universalizable principles and hardcore rules than the first approach.

Another important aspect of cognitivist theories of emotion is that they are specifically linked to practical reason. Emotions, like other cognitive states, belong to intelligent thought and action. Emotions carry information about the objects they are directed towards. Consider the conscious person who acted wrongly: The feelings of guilt carry informative content about the person’s actions. Emotions are on a par with beliefs, judgments, decisions and resolutions. They need to have propositional content and can be warranted or unwarranted, justified or unjustified, by the fact that the evaluative judgment in which the emotion consists, either in whole or in part is “fitting.”<sup>110</sup>

Also, the cognitivist approach considers emblematic the emotions that have import for practical reasoning, elevating to paradigmatic emotions a specific class of emotions known as higher cognitive emotions<sup>111</sup> – typified by love, guilt, shame, embarrassment, jealousy, pride – that are fundamentally *social* in a way that basic emotions are not. They are longer lasting and culturally more diverse than the emotions one typically finds on the opposite side of the spectrum of emotional complexity, where we find emotions closer connected to sensations such as horror and disgust.

Law often deals with higher cognitive emotions: Emotions that have import for law are, we are told, of a ‘higher standing’ – both in the sense that there are specifically justice-related passions (the very sense of justice of course, but also epistemic virtue-related emotions such as curiosity, etc.) and in the sense that most emotions discussed by lawyers are *reason-sensitive attitudes* (unlike, say, startles and phobias).

The cognitivist approach models its understanding of emotion on these higher cognitive emotions because it adopts an intentionalist stance: Emotions, like conscience, are necessarily *about* something. This is specifically what distinguishes sentiments from sensations, emotions from bodily feelings.<sup>112</sup> “Feelings that express emotions are, then, important to differentiate from sensations that merely register

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<sup>109</sup> Language is one of our foremost emotive technologies. Few scholars have taken this perspective seriously, investigating “emotive” argumentative strategies such as *ad hominem*, *ad baculum*, *ad misericordiam*, *ad populum*, that may be weak arguments, but not necessarily fallacies. See e.g. Douglas Walton, *The Place of Emotion in Argument*, Penn State Univ. Press, University Park Pa. 1992; Id., Fabrizio Macagno, *Emotive Language in Argumentation*, CUP, Cambridge 2014.

<sup>110</sup> The fittingness or adequacy of the evaluative judgment is often used to distinguish one type of emotion from another: Intentionality is here key to understanding different forms of emotion. When you feel contempt you judge the object of your contempt to be unworthy of your esteem in view of that person’s behaviour; when you feel angry you judge the object of your anger to have injured you or your interests by behaving in a specific manner. The intentional world-directedness of the emotion enables the distinction between contempt and anger.

<sup>111</sup> See Paul Griffiths, *What Emotions Really Are: The Problem of Psychological Categories*, University of Chicago Press, Chicago 1997. Higher cognitive emotions, such as love and hate, differ from basic emotions such as fear and disgust, in many ways. They are not automatic and fast as basic emotions; nor are they universally associated with a single facial expression. Higher cognitive emotions involves much more cortical processing than basic emotions. While basic emotions are largely processed in subcortical structures buried beneath the surface of the brain, mediated by a set of neural structures known as the limbic system, higher cognitive emotions are associated with the areas of the neocortex and some believe that they thus are more capable of being influenced by conscious thoughts.

<sup>112</sup> Jesse J. Prinz, “Constructive Sentimentalism: Legal and Political Implications” in J.E. Fleming (ed.) *Passions and Emotions*, cit., p. 7.

some physiological disturbance. The latter, being symptoms of bodily changes, do not concern anything.”<sup>113</sup> Mere sensations (say, shortness of breath) are deprived of intentionality, if unconnected to emotion (say, fear). Emotions necessarily concern something and this something constitutes the evaluative judgment that the emotion contains.

This second approach is rooted in Ancient philosophy, perhaps more specifically to the Stoics.<sup>114</sup> But it has witnessed a recent upswing with (neo)sentimentalism.<sup>115</sup> Emotion, here, is generally understood as “action-directed, cognitive states of the body.”<sup>116</sup> What is attractive in the theory is the idea that emotions are cognitive world-directed intentional states.<sup>117</sup> Today this understanding prevails among philosophers who studies emotions.<sup>118</sup> Many cognitivists think that emotions can fulfil an epistemic function and help us question our existing reasons.<sup>119</sup> Wise agency does not exhaust itself in the rational guidance of isolated actions at singular moments, but shows itself in the ongoing cultivation and improvement of reasons for action over time. Conceiving emotion as cognitively valuable for improving our casuistic database fits well with Solomon’s idea that fine-tuning emotive intelligence is useful for the judge to become more experienced.

Even if it seems more sophisticated than the first approach, the cognitivist approach is vulnerable to some important objections. If the cognitivist theory of emotion is correct, and emotions have propositional content besides intentionality, the states of mind that emotion consists in need to have an essential cognitive element. This requires of the emoting subject to be capable of grasping and affirming propositions and/or concepts. Therefore one must have acquired language. It is often noted that law presupposes that we are linguistically competent, acculturated, and norm-guided adults. But it implies that it excludes from the range of deliberating subjects babies and beasts who do not, according to the tenets of the cognitivist approach, feel emotions. Yet we do observe emotional reactions even in creatures that have hardly any imaginative or intellectual capacities.

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<sup>113</sup> J. Deigh, “Concept of Emotions in Modern Philosophy and Psychology”, cit., p. 26.

<sup>114</sup> The Stoic theory holds that emotions are taken to be identical to the evaluative judgment. It would be unfair to ascribe to Plato or Aristotle any reduction of emotions to mere feelings accompanying bodily states, or to pure mental cognition; they see emotions as involving both body and soul; see A.W. Price, *Emotions in Plato and Aristotle* in P. Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., pp. 121-142. The cognitivist view is more firmly rooted in stoicism (to some extent Epicureanism) where emotion is cognitive: Christopher Gill, *Stoicism and Epicureanism*, in P. Goldie (ed.) *The Oxford Handbook of Philosophy of Emotion*, cit., pp. 143-165.

<sup>115</sup> A. Gibbard, *Wise Choices, Apt Feelings*, Harvard University Press, Cambridge (Mass.) 1990, coined the term neo-sentimentalist. See also Justin D’Arms, Daniel Jacobson, “Sentiment and Value”, *Ethics*, 2000, 110, pp. 722-748. Neo-sentimentalism is commonly assumed to be a theory about the role of emotion in normative decision-making. Moral judgments are here judgments about whether emotional responses are merited, whether feelings are apt.

<sup>116</sup> Jesse J. Prinz, *Gut Reactions: A Perceptual Theory of Emotion*, OUP, Oxford 2004, p. 11.

<sup>117</sup> A problem with theories that hold emotions to be intentional states of mind is that they are not well-equipped to explain cases in which one experiences an emotion towards something that one knows lacks the properties it must have for the emotion to be warranted (say, fear people typically experience when looking down from a precipice, even though they may be perfectly safe and in no danger of falling).

<sup>118</sup> E.g. Robert Solomon, *The Passions*, Doubleday, New York 1976; Martha Nussbaum, *Upheavals of Thought: The Intelligence of the Emotions*, CUP, Cambridge 2001; Id., *Hiding from Humanity: Disgust, Shame and the Law*, Princeton University Press, Princeton NJ 2004.

<sup>119</sup> Sabine Döring, *Gründe und Gefühle. Zur Lösung “des” Problems der Moral*, de Gruyter, Berlin 2008; Rainer Reisenzein, Sabine Döring, “Ten Perspectives on Emotional Experience: Introduction to the Special Issue”, *Emotion Review*, 2009, I, pp. 195-205.

In this second broad understanding of emotion, what really counts is practical reasoning, which cannot and should not be severed from emotions; it is instead the result of an emotive intelligence that Solomon manifests in making judgments that embody what we may call the grace of sentiment.

## 5. Conclusion

This paper has offered a map of the main ways jurisprudence understands emotion. An effort was made to shed light on some unarticulated assumptions about emotion in the standard model. Four modes of relating to emotions were found; two descriptive positions and two normative positions. Each position held, albeit implicitly, a different view of emotion. These four views could be traced back to two major theories of emotion: The irrationalist and the cognitivist approaches. In these broad approaches to emotion, more specific concepts of emotions – in terms of feelings, intentional states, cognitive content – were highlighted. We could thus appreciate the conception of emotion held by those who sustain that:

- (1) Justice *is* blind to passions: Justice is about formal rationality, whereas emotions amount to feelings and sensations.
- (2) Justice *is not* blind to passions: Detractors argue against (1) that law suffers from indeterminacy and judges from breakfast biases that manifest themselves in unconscious emotions.
- (3) Justice *should* be blind to passions: Justice ought to live up to the rule of law, whilst passions instigate partiality because emotion is a subjective preference.
- (4) Justice *should not* be blind to passions: Detractors argue against (3) that equity requires practical reasoning, where emotions are similar to skills.

No matter if you defend (1)-(4), you are likely to rely on a notion of emotion that requires major qualifications and would profit from engaging with the ongoing philosophical discussion. There is much work to be done on the reciprocal interaction between emotion and institutional design: How emotions sustain and impact on social structures and how these arrangements shape the display of emotions should interest legal scholars. Legal effectiveness depends on interiorisation of norms to a large extent. To take on some of these daunting challenges, jurists today need a better grasp on emotion in law.