

Angry Judges

Terry A. Maroney*

Abstract

Judges get angry. Law, however, is of two minds as to whether they should; more importantly, it is of two minds as to whether judges' anger should influence their behavior and decision making. On the one hand, anger is the quintessentially judicial emotion. It involves appraisal of wrongdoing, attribution of blame, and assignment of punishment—precisely what we ask of judges. On the other, anger is associated with aggression, impulsivity, and irrationality. Aristotle, through his concept of virtue, proposed reconciling this conflict by asking whether a person is angry at the right people, for the right reasons, and in the right way. Modern affective psychology, for its part, offers empirical tools with which to determine whether and when anger conforms to Aristotelian virtue.

This Article weaves these strands together to propose a new model of judicial anger: that of the *righteously angry judge*. The righteously angry judge is angry for good reasons; experiences and expresses that anger in a well-regulated manner; and uses her anger to motivate and carry out the tasks within her delegated authority. Offering not only the first comprehensive descriptive account of judicial anger but also first theoretical model for how such anger ought to be evaluated, the Article demonstrates how judicial behavior and decision making can benefit by harnessing anger—the most common and potent judicial emotion—in service of righteousness.

Introduction.....	2
I. Judicial Emotion and Anger.....	7
A. Judicial Emotion: Its Inevitability and Potential Utility.....	7
B. Anger: A Capsule Summary.....	10
1. Justifying Anger.....	11
2. Anger's Core Characteristics.....	14
C. The Ubiquity and Visibility of Judicial Anger.....	16
II. Angry Judges.....	19
A. Anger at Lawyers.....	20

* Associate Professor of Law, Associate Professor of Medicine, Health, and Society, Vanderbilt University. Thanks to Kathryn Abrams, Sharyn Roach Anleu, Susan Bandes, Douglas Berman, Hon. Elena Duarte, Jeff Fagan, Tracey George, Hon. Alex Kozinski, Kathy Mack, Alistair Newbern, Michael O'Hear, Hon. David Stras, Hon. Anul Thapar, Dan Sharfstein, Kevin Stack, Christine Sun, David Zlotnick, and participants in workshops at Benjamin N. Cardozo School of Law and Columbia Law School. For excellent research assistance I thank Meredith Hiester, Adam Pié, Christopher Weber, and Evie Whiting, as well as the research librarians at Vanderbilt Law School, particularly Stephen Jordan.

B.	Anger at Parties and Witnesses	26
C.	Anger at Other Judges	31
III.	The Righteously Angry Judge.....	35
A.	Being Angry “with the Right Motive”	36
1.	Righteous Judicial Anger Reflects Factually Accurate Premises.....	36
2.	Righteous Judicial Anger is Relevant.....	37
3.	Righteous Judicial Anger Reflects Good Beliefs and Values.....	38
B.	Being Angry “In the Right Way”	433
1.	The Behavioral Benefits of Judicial Anger.....	44
2.	The Behavioral Dangers of Judicial Anger.....	47
3.	Regulating Judicial Anger To Maximize Benefits and Minimize Dangers.....	53
C.	A New Model of Judicial Anger.....	58
	Conclusion	59

Introduction

Judges get angry. They get angry at lawyers. A federal district judge, for example, gained notoriety by publicly inviting lawyers to a “kindergarten party” where, he proposed, they would learn “how to practice law at the level of a first year law student.”¹ They also get angry at litigants. An “angry” California judge revoked Lindsay Lohan’s probation for failure to take her community service obligations seriously;² a week later, Lohan’s father was denied bail by a “very angry judge” who “read him the riot act” for violating an order of protection.³ They even get angry at each other. Chief Justice Edith Jones of the Fifth Circuit, during an oral argument, slammed her hand on the bench, told a fellow judge to “shut up,” and suggested he leave the courtroom.⁴ Judicial anger is a persistent reality, a regular feature of judges’ emotional diet. The popular website *Above the Law* has even given a catchy name to judges’ public expressions of anger: “benchslaps.”⁵

Legal culture, however, is of two minds about judicial anger. On the one hand, anger could be called the quintessentially judicial emotion. Humans (including judges) feel anger when we

¹ *Morris v. Coker*, No. A-11-MC-712-SS, A-11-MC-713-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

² Bob Tourtellotte, *Angry Judge Revokes Lindsay Lohan Probation*, REUTERS, Oct 19, 2011.

³ Kathleen Perricone, *Michael Lohan Denied Bail By Angry Judge*, N.Y. DAILY NEWS, Oct. 29, 2011.

⁴ Debra Cassens Weiss, *5th Circuit Oral Arguments Turn Contentious When Chief Judge Tells Colleague to Shut Up*, ABA JOURNAL, Sep. 26, 2011. Jones later apologized for her “intemperate language.” *Id.*

⁵ Above The Law, <http://abovethelaw.com> (last visited Feb. 5, 2011).

perceive that a rational agent has committed an unwarranted wrongdoing; that experience of anger generates a desire to affix blame and assign punishment, and facilitates actions necessary to carry out that desire.⁶ This coupling of judgment and action rather precisely describes one core function of the judge. Indeed, we often expect judges to act as society’s anger surrogates, so as to avoid vigilante action. We often rely on them to assign blame, frequently task them with assigning consequences, and always hope they will be motivated to perform these functions.

On the other hand, anger seems to pose a danger to the neutral, careful decision making we also expect of judges. Anger is powerful, and its effects sometimes regrettable; consider the actions of a Florida judge who, “red faced and yelling,” left the bench to “physically intimidate” an assistant state attorney.⁷ Anger is the prototype for the traditional view of emotion—a view strongly reflected in legal theory—as a savage force that unseats rationality, distorts judgment, manifests in impulsive aggression, and imperils social bonds.⁸ Indeed, fear of such irrationality led Judge Richard A. Posner to declare that we ought to “beware...the angry judge!”⁹

Law’s split attitude on judicial anger, then, reflects inability to reconcile our valuation of what anger offers with our fear of what it threatens to take away.

Aristotle counseled that we might reconcile these opposing impulses by recognizing that anger “may be felt both too much and too little, and in both cases not well.”¹⁰ Rather than categorically condemning or lauding anger, he urged that we judge anger through the lens of virtue. Virtue consists of feeling anger “at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way.”¹¹ The Aristotelian tradition thus challenges the traditional legal supposition that anger is a suspect aspect of judicial experience, and a suspect basis for judicial action, merely because it is an emotion.¹² Rather, it suggests, anger sometimes is appropriate and sometimes not, the difference residing in reasons—what the emotion is about—and action—how the emotion is experienced and expressed.

⁶ JAMES R. AVERILL, ANGER AND AGGRESSION: AN ESSAY ON EMOTION 248-49 (1982); INTERNATIONAL HANDBOOK OF ANGER: CONSTITUENT AND CONCOMITANT BIOLOGICAL, PSYCHOLOGICAL, AND SOCIAL PROCESSES (Michael Potegal et al. eds., 2010). See Parts I.B. & III., *infra*.

⁷ Rene Stutzman, *Judge Shea to be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, ORLANDO SENTINEL, June 1, 2011.

⁸ Michael Potegal & Raymond W. Novaco, *A Brief History of Anger*, in INTERNATIONAL HANDBOOK OF ANGER 9-24, 15 (Michael Potegal et al. eds. 2010) (“Anger is the prototype for the classical view of emotions as ‘passions’ that seize the personality, disturb judgment, alter bodily conditions, and imperil social interaction.”); see also Kathryn Abrams, *The Progress of Passion*, 100 MICH. L. REV. 1602, 1602 (2002) (describing stark dichotomy between reason and emotion in legal thought); Terry A. Maroney, *Law and Emotion: A Proposed Taxonomy of an Emerging Field*, 30 LAW & HUM. BEHAV. 119 (2006) (same).

⁹ RICHARD A. POSNER, HOW JUDGES THINK 110 (2008).

¹⁰ Aristotle, NICOMACHEAN ETHICS, 1106b20, in THE BASIC WORKS OF ARISTOTLE 958 (R. McKeon ed., 1941).

¹¹ *Id.*

¹² See Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CAL. L. REV. 629, 634-42 (2011) (the ideal of emotionless judging has both a long pedigree and contemporary traction).

Modern affective science—that is, the psychological and neuroscientific study of human emotion¹³—proceeds from the same theoretical basis, and adds empirical substance. Affective science confirms that emotions are rooted in thoughts, reflect judgments, and are directed toward objects.¹⁴ Emotions, including anger, therefore can be evaluated by interrogating the accuracy of, and values revealed by, those elements. The science also provides concrete tools with which to discern anger’s impact on thought, behavior, and decision making.¹⁵ Those impacts then can be judged as normatively desirable or not, though not in the abstract; such judgments are highly dependent on context. Judging is one such context.¹⁶ To evaluate anger’s impact on judicial behavior and decision making as good or bad, we must have an idea of what we want that behavior and decision making to look like, and why.

This Article brings together these philosophical, psychological, and jurisprudential strands to build an account of judicial anger, one that can break the present stalemate in which we simultaneously welcome and reject such anger. Interdisciplinary analysis reveals tools by which we may evaluate specific iterations of judicial anger as justified or not, and its behavioral and decisional impacts as desirable (or tolerable) or not. The new model proposes that those who are angry for the right reasons, and in the right way, be thought of as *righteously angry judges*.

By proposing this new model for judicial anger, this Article furthers important debates on judicial behavior. First, it builds on a growing scholarship examining judicial emotion. Such scholarship—spearheaded most recently by this author, but also encompassing work by Hon. Richard A. Posner,¹⁷ Hon. William J. Brennan,¹⁸ and the early-twentieth-century legal realists¹⁹—seeks both to expose the reality that judges experience emotion and to interrogate how such emotion does, and should, influence their judging. In prior work, this author has sought to build a theoretical base for that project, to use cutting-edge empiricism to give it substance, and to articulate a normative frame within which to judge it.²⁰ This Article is the third in that series. Such scholarship fills a gap in the psychological study of judging, which historically has left aside questions of emotion.²¹ It similarly furthers the behavioral law and

¹³ See THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES (David Sander & Klaus R. Scherer eds., 2009); HANDBOOK OF AFFECTIVE SCIENCES (Richard J. Davidson et al. eds., 2003).

¹⁴ Maroney, *Persistent Cultural Script*, at 643-45 (citing, *inter alia*, MARTHA C. NUSSBAUM, UPHEAVALS OF THOUGHT (2001), and ANDREW ORTONY ET AL., THE COGNITIVE STRUCTURE OF EMOTIONS (1988)).

¹⁵ Maroney, *Persistent Cultural Script*, at 644-48.

¹⁶ Terry Maroney, *Emotional Regulation and Judicial Behavior*, 99 CAL. L. REV. 1485, 1514 (2011).

¹⁷ POSNER, HOW JUDGES THINK; RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY (2001).

¹⁸ William J. Brennan, Jr., *Reason, Passion, and “The Progress of Law,”* 10 CARDOZO L. REV. 1988).

¹⁹ JEROME FRANK, LAW AND THE MODERN MIND (1930).

²⁰ Maroney, *Persistent Cultural Script*; Maroney, *Emotional Regulation and Judicial Behavior*. The next article in the series will focus on the notoriously ill-defined concept of “judicial temperament,” which, I propose, should be understood to consist of poor emotion regulation skills in persons with high levels of trait anger. Going forward, the series will include explorations of emotion, gender, and the female judge, as well as the impact of the diverse settings in which judges work (e.g., appellate versus trial dockets, family versus criminal court). The project, currently devoted to constructing a theory of judicial emotion, eventually will include an empirical component.

²¹ David Klein, *Introduction*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING xv (David Klein & Gregory Mitchell eds. 2010) (emotion is an important but understudied “area of inquiry for students of judges”).

economics project, which explores the myriad of ways in which judges’ human attributes influence their decisions.²²

Second, whereas prior scholarship has tended to treat judicial emotion as a general category, this Article focuses exclusively on one emotion: anger. It therefore brings the analysis to a new level of particularity. Such a deliberately narrow focus has productively been applied to other questions of law and emotion; consider, for example, recent work on regret and abortion rights,²³ as well as the relevance of happiness to regulatory law.²⁴ The narrower focus allows for a sharper image.

Third, the Article promises to have real-world impact. Judging the propriety of instances of judicial anger is a regular feature of the case law, and thus is important doctrinally.²⁵ The model proposed herein affords a mechanism by which a previously undertheorized—or, one might less charitably say, sloppy—area of law can be afforded greater rigor. Judges, too, stand to benefit. Just as medical professionals increasingly are taking note of the emotional aspects of their work, attending to which improves job satisfaction and performance, judges are poised to begin doing the same.²⁶ This author’s prior work has sparked that development;²⁷ this Article will further it. Developing judicial awareness of anger and the ways in which it can be managed is particularly critical, given the frequency with which angry judges are accused of bias and misconduct.²⁸

The Article proceeds as follows. Part I briefly encapsulates this author’s prior work showing that judicial emotion is both inevitable and not necessarily—or even usually—a bad thing. Judges are human, and emotion is central to human life: it reflects a rational assessment of the world, motivates action, and enables reason. The emotionless judge, as I have demonstrated elsewhere, is a dangerous myth. Though judicial emotion cannot be eliminated, it can be well-regulated. This Part briefly distinguishes between regulation efforts that are counterproductive and those that help a judge steer the correct emotional course. The Part then moves from emotion in

²² Maroney, *Emotional Regulation and Judicial Behavior*, at 1492 & nn 36-38 (citing, inter alia, Klein, *Introduction*, at xv; W. Kip Viscusi, *How Do Judges Think About Risk?*, AM. L. & ECON. REV. 26, 36 (1999)).

²³ Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008).

²⁴ Jonathan Masur et al., *Welfare as Happiness*, 98 GEO. L. REV. 1583 (2010); Jonathan Masur et al., *Happiness and Punishment*, 76 CHI. L. REV. 1037 (2009).

²⁵ Part II, *infra* (discussing doctrinal treatment of judicial anger episodes).

²⁶ Maroney, *Emotional Regulation and Judicial Behavior*, at 1517-19 (drawing parallel to the medical profession’s move toward emotional engagement).

²⁷ Since the publication of *Emotional Regulation*, this author has been approached with requests to work with judges to develop judicial training around issues of emotion, both in the United States and elsewhere. One such training is now being planned, for example, with the Ecole Nationale de la Magistrature in Paris.

²⁸ See, e.g., Robert H. Tembeckjian, *How Judges Hide from Justice*, N.Y. TIMES, May 22, 2005 (NY Commission on Judicial Conduct “censured a Brooklyn Criminal Court judge for coming off the bench in unprovoked anger and grabbing and screaming at a defense lawyer”); Lynda Cohen, *Atlantic County Superior Court Judge Accused of Screaming at A Woman During a Custody Hearing—Apologizes but Denies Ethics Violation*, PRESS OF ATLANTIC CITY, Sept. 4, 2010; Kerri Rempp, *Nebraska Judge Reprimanded for Behavior in Custody Case*, RAPID CITY JOURNAL, June 14, 2010 (judge censured for “angry and condescending tone and demeanor”); Lise Olsen, *Secrecy may help misbehaving judges*, HOUSTON CHRON., Dec. 14, 2009 (federal judge drew complaints about “bursts of temper” for years before “alcohol, emotional and judgment problems landed him behind bars”).

general to anger specifically. It presents a capsule summary of that emotion and its core attributes, engaging first with the ancient philosophical debate over whether anger ever is justifiable, and (after answering in the affirmative) outlining the physical and psychological effects with which it is associated. Finally, it explains that, among the emotions judges are likely to feel in the course of their work, anger is the most visible and readily identified.

Part II demonstrates the reality of judicial anger. It scours caselaw, news reports, new-media sources such as YouTube, and judges' self-reports to discern both the common objects of, and reasons for, judicial anger. Angry judges' most frequent targets are lawyers, who occupy first place by a considerable distance. Following lawyers are litigants, witnesses, and—perhaps surprisingly—other judges. The most common prompts for such anger are incompetence, disrespect, inflicting unwarranted harm on others, and lying. This Article does not attempt to analyze the psychological makeup of individual judges; however, its findings suggest that certain judges seem prone to anger states that are relatively frequent and extreme.²⁹

Having shown judicial anger as it is, Part III takes on the issue of how it ought to be. It presents a new model for judicial anger, that of the *righteously angry judge*. The Part begins by noting that the audience to judicial anger (whether the public, members of the media, or reviewing courts) tends to evaluate the propriety of those states along two axes: justification, or the reasons for the anger, and manifestation, or the manner in which it is experienced and expressed. This Part deepens the analysis of those two axes, which it positions as the core components of righteousness.

The Part first argues that anger can be a legitimate judicial experience and basis for judicial action, the threshold condition being that it rest on good reasons. A reason is “good” if its premises are factually accurate, if it is relevant to an issue properly before the judge, and if it reflects good values. The Part then uses concrete examples to show how good and bad reasons can be distinguished. For example, it demonstrates that, when commingled with contempt, judicial anger conveys a belief in the judge's superiority.³⁰ Because judges in a democratic society have no claim to superiority, but only to authority, such anger reflects a fundamentally bad judicial value.

²⁹ This sort of judge—some of whom are mentioned in this Article—will be analyzed in greater depth in the next article in this series, focusing on emotion and judicial temperament. *Supra* n.20. While complaints about temperament usually focus on behavior in the professional setting, expressions of anger in a judge's personal life sometimes spark debate over fitness to serve. For example, Judge William Adams of Texas is under fire because his daughter posted to YouTube a video of him angrily beating her 8 years earlier. The beating was a punishment for illegally downloading files to her computer. The incident received widespread press coverage, and many people have called for Adams to be removed from the bench. See Melissa Bell, *Hillary Adams hopes father, Judge William Adams, will repent after she posted violent YouTube video*, WASHINGTON POST, Nov. 3, 2011 (describing popular outcry and official investigation after video went “viral” and daughter appeared on the Today show).

³⁰ Paul Ekman, *Antecedent Events and Emotion Metaphors*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 146, 147 (Paul Ekman & Richard J. Davidson eds., 1994) (defining contempt as “feeling morally superior to someone”).

Good reasons are the threshold condition; judges’ anger also must manifest in an acceptable way. The Part therefore transitions from philosophy to affective science, using that science to explain anger’s impact on behavior, including on the processes and outcomes of decision making. Anger tends, for example, to spur quick decisions that rely on heuristics. Again using concrete examples, this Part demonstrates how judicial anger is experienced and expressed. Importantly, it shows how emotion regulation skills—that is, the tools we use to shape what emotions we have, when we have them, and how we express them³¹—can help judges manifest anger so as to maximize its benefits and minimize its dangers.

The Part concludes by encapsulating the new model. The righteously angry judge is angry for good reasons, experiences and expresses that anger in a well-regulated manner, and uses her anger to motivate and carry out the tasks within her authority. Righteously angry judges deserve not our condemnation but our approval.

I. Judicial Emotion and Anger

Before analyzing how and why judges get angry, it is important first to establish why judicial emotion warrants our attention; what is special about anger; and how anger can be identified.

A. Judicial Emotion: Its Inevitability and Potential Utility

The standard legal story is that judges ought to be—and are capable of being—emotionless. As I have explained elsewhere, since the time of the Enlightenment ideas of the “good judge” have included the command that such a judge be “divested of all fear, anger, hatred, love, and compassion.”³² Over the course of the last century, this ideal—once considered a fundamental tenet of Western jurisprudence³³—has been somewhat moderated. Perhaps the greatest success of the early-twentieth-century legal realists was to normalize the observation that judges are humans first.³⁴ Few today would dispute that judges are human, that humans experience emotion, and that judges therefore experience emotion.³⁵

However, our legal culture continues to insist that such judicial emotion be tightly controlled. Justice Sotomayor reflected the now-prevailing view when she testified, at her 2009 confirmation hearings, “We’re not robots [who] listen to evidence and don’t have feelings. We

³¹ James J. Gross, *Antecedent- and Response-Focused Emotion Regulation: Divergent Consequences for Experience, Expression, and Physiology*, 74 J. PERSONALITY & SOC. PSYCHOL. 224 (1998).

³² Maroney, *Persistent Cultural Script*, at 630-31 (quoting THOMAS HOBBS, *LEVIATHAN* 203 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651)).

³³ Karl Georg Wurzl, *Methods of Juridical Thinking* (1904), in *SCIENCE OF LEGAL METHOD: SELECT ESSAYS* 298 (Ernest Bruncken & Layton B. Register trans., 1971).

³⁴ Maroney, *Persistent Cultural Script*, at 656 (citing Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV 697, 706 (1931)).

³⁵ Maroney, *Emotional Regulation and Judicial Behavior*, at 1487.

have to recognize those feelings and put them aside.”³⁶ Under this post-realist account, judicial emotion is to be temporally isolated—that is, experienced only at a pre-decisional moment—and operationally neutered—that is, disabled from exerting any effects on behavior and decision making.³⁷ At critical moments of deliberation and action, the judge is still expected to be emotionless.

Even this moderated adherence to the ideal of emotionless judging is profoundly out of step with reality, for two reasons. First, even were it achievable, emotionlessness is not always a worthy goal, even for judges.³⁸ Second, emotion generally cannot be eliminated; it can only be regulated.³⁹

A foundational tenet of modern psychology is that emotions are critical to human flourishing.⁴⁰ Emotions rest on thoughts: they reflect our evaluations of events in the world and the relationship of those events to our goals and values.⁴¹ Emotions thus reflect reasons. They also motivate action in service of reasons. An emotion signals that an event is of particular importance, facilitates responsive behavior, and can signal our needs to others.⁴² Emotion also is critical to substantive rationality, particularly the ability to make social judgments, choices regarding one’s own welfare, and moral decisions.⁴³ These concepts find further intellectual backing in philosophical accounts.⁴⁴ Emotion and cognition both contribute to rationality, just as both emotional and cognitive dysfunction can detract from it.⁴⁵

Were judges truly to submerge all emotion, then, they would lose something of importance. They would lose an important source of engagement with, and commitment to, the reality of their work. An Australian magistrate, for example, has expressed that a judge who loses contact with

³⁶ Id. at 1487 (quoting Andrew Malcolm, *Sotomayor Hearings: The Complete Transcript, Part I*, Top of the Ticket, (July 14, 2009)).

³⁷ Maroney, *Emotional Regulation and Judicial Behavior*, at 1488-89 (tracing the evolution of thought on judicial emotion).

³⁸ Maroney, *Persistent Cultural Script*, at 668-71 (citing, inter alia, POSNER, *FRONTIERS OF LEGAL THEORY* at 228, 242).

³⁹ See generally Maroney, *Emotional Regulation and Judicial Behavior*.

⁴⁰ Maroney, *Persistent Cultural Script*, at 645 (noting consensus that “emotions are evolved mechanisms for maximizing survival chances”) (citing, inter alia, JOSEPH LEDOUX, *THE EMOTIONAL BRAIN: THE MYSTERIOUS UNDERPINNINGS OF EMOTIONAL LIFE* 37-72 (1996)).

⁴¹ See, e.g., Richard S. Lazarus, *The Cognition-Emotion Debate: A Bit of History*, in *HANDBOOK OF COGNITION AND EMOTION* 3-19, 3 (Tim Dalgleish & Mick Power eds., 1999); Klaus R. Scherer, *Appraisal Theory*, in *HANDBOOK OF COGNITION AND EMOTION* at 637-63. For more in-depth explanation of this fundamental aspect of emotion theory, Maroney, *Persistent Cultural Script*, at 642-44; Maroney, *Emotional Regulation and Judicial Behavior*, at 1501-03.

⁴² Maroney, *Persistent Cultural Script*, at 644-45; Maroney, *Emotional Regulation and Judicial Behavior*, at 1502.

⁴³ Maroney, *Persistent Cultural Script*, at 645-48.

⁴⁴ Id. at 647-48.

⁴⁵ Id. at 646-48; Terry A. Maroney, *Emotional Competence, “Rational Understanding,” and the Criminal Defendant*, 43 AM. CRIM. L. REV. 1375 (2006).

“that feeling for humanity,” reflected in emotion, cannot do her job.⁴⁶ Judge Mark Bennett, in a rare instance of public self-disclosure, offers a similar assessment:

Early in my second year as a judge I had a discussion about sentencing with a mentor judge I told him of the extraordinary difficulty and emotional toll I was encountering in sentencing. He said, “Don’t worry, Mark, it will get much easier.” Out of respect, I did not respond, but I said to myself, if it gets easy to deprive someone of their liberty please shoot me. I have not been shot, and it hasn’t gotten any easier.⁴⁷

As one commentator noted during the public debate over judicial “empathy” prompted by the nomination of Justice Sotomayor, without emotions judges would “not know what anything was worth.”⁴⁸

Though complete suppression of judges’ emotions is not a worthy goal, regulation of those emotions is.⁴⁹ Like all humans, judges can and do exert energy to shape what emotions they have, when they have them, and how those emotions are experienced and expressed.⁵⁰ The innate human capacity for regulation allows us continually to try and steer the emotional course best suited to the situation at hand.⁵¹ This Article delves more deeply into judicial anger regulation at a later juncture.⁵² For present purposes, it is sufficient to note that suppression and denial—that is, efforts simply not to feel what one wants not to feel, or to pretend one is not feeling it—tend to be highly counterproductive, especially for judges.⁵³ In contrast, recognizing and engaging with emotion allows judges to rethink, change, or accept it.⁵⁴ Engagement strategies provide the greatest hope for helping judges maintain access to emotion in a way that furthers, not hinders, job performance.⁵⁵

These propositions together suggest that judicial emotion, including anger, is inevitable; that at best it can be managed, not eliminated; and that such management need not have the invariant goal of utmost minimization, because judicial emotion—including anger—might sometimes be appropriate, even valuable.

⁴⁶ Maroney, *Emotional Regulation and Judicial Behavior*, at 1500 (citing Sharyn Roach Anleu & Kathy Mack, *Magistrates’ Everyday Work and Emotional Labour*, 32 J.L. & SOC’Y 590, 612 (2005)).

⁴⁷ Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge’s Musings On Defendants’ Right and Rite of Allocation*, THE CHAMPION, March 2011, p.2, n.1.

⁴⁸ David Brooks, *The Empathy Issue*, N.Y. TIMES, May 28, 2009.

⁴⁹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1502 (“[I]teral absence of emotion cannot ... be the desired end of th[e] regulatory effort”).

⁵⁰ *Id.* at 1490 (citing James J. Gross & Ross A. Thompson, *Emotion Regulation: Conceptual Foundations*, in HANDBOOK OF EMOTION REGULATION, at 3, 7-8 (James J. Gross ed., 2007)).

⁵¹ *Id.* at 1504 (citing, inter alia, DANIEL M. WEGNER, WHITE BEARS AND OTHER UNWANTED THOUGHTS: SUPPRESSION, OBSESSION, AND THE PSYCHOLOGY OF MENTAL CONTROL 122-24 (1989)).

⁵² See Part III.B., *infra*.

⁵³ Maroney, *Emotional Regulation and Judicial Behavior*, at 1536-54.

⁵⁴ *Id.* at 1513-31.

⁵⁵ *Id.* at 1554-55.

B. Anger: A Capsule Summary

We now turn to the specific case of anger.⁵⁶ Anger is a complicated emotion, but one about whose basic properties philosophers and psychologists agree.⁵⁷ Anger consistently is associated with a sense that the self, or someone or something the self cares about, has been offended or injured, coupled with a belief that another person was responsible.⁵⁸ The responsible person must appear to have acted culpably, either because she intended to harm or was neglectful where care was warranted.⁵⁹ To experience anger—as opposed to, say, despair—in response to such a trigger, one generally also holds some sense of being able to influence the situation or cope with it.⁶⁰ Change any one of these components and you change the emotion. For example, if one perceives herself to be the responsible agent, she will feel guilt or shame; if a situation (say, a devastating earthquake), not a person, is responsible, she generally will feel sadness; and if she has no power to influence or cope with the situation, she likely will feel fear and anxiety.⁶¹

⁵⁶ See, e.g., Leonard Berkowitz, *Anger*, in HANDBOOK OF COGNITION AND EMOTION at 411-28, 418 (discussing theoretical debate over how cleanly emotions can be distinguished); cf. Lisa Feldman Barrett, *Are Emotions Natural Kinds?*, 1 PERSPECTIVES ON PSYCHOL. SCI. 28 (2006).

⁵⁷ Jennifer S. Lerner & Larissa Z. Tiedens, *Portrait of the Angry Decision Maker: How Appraisal Tendencies Shape Anger's Influence on Cognition*, 19 J. BEHAV. DEC. MAKING 115, 117 (2006) (a “remarkably consistent picture of anger emerges” from the psychological literature: anger is “associated with a sense that the self (or someone the self cares about) has been offended or injured,” a “sense of certainty about what happened” and “what the cause of the event” was, that another person was responsible, and that “the self can still influence the situation” or has the “power or ability to cope” with it).

⁵⁸ Paul M. Litvak, *Fuel in the Fire: How Anger Impacts Judgment and Decision-Making*, in INTERNATIONAL HANDBOOK OF ANGER 287, 291 (Michael Potegal et al. eds., 2010); ROBERT S. LAZARUS, EMOTION AND ADAPTATION 222-25 (1991) (anger supposes an external human agent who ought to be held accountable); Berkowitz at 415-16 (“appraisal conceptions” of anger locate the emotion in an appraisal of “offense or mistreatment,” and “disapproval of someone’s blameworthy action”). See also Paul Ekman, *Facial Expressions*, in HANDBOOK OF COGNITION AND EMOTION at 301-20, 318 (“The specific event which gets an American angry may be different from what gets a Samoan angry,” because what one “finds provocative, insulting or frustrating may not be the same across or within cultures,” but the core “theme will be the same”).

⁵⁹ This component of anger, central to many philosophical and psychological accounts, likely applies only to the anger of older children and adults. See Nancy L. Stein & Linda J. Levine, *The Early Emergence of Emotional Understanding and Appraisal: Implications for Theories of Development*, in HANDBOOK OF COGNITION AND EMOTION, at 383-408, 395 (“with increasing age, children become ... more likely to respond with anger when harm is intentionally caused by another person”). Further, children and adults sometimes respond with anger to situations caused by no culpable agent, such as when they experience pain. See id. (acknowledging such “irrational” anger, which may be more properly understood as distress that primes one to interpret other stimuli as angering); Averill at 127-46.

⁶⁰ LAZARUS, EMOTION AND ADAPTATION, at 222-25.

⁶¹ Id.; see also Berkowitz at 415 (in differentiating emotions, “interpretation of the cause” is vital”), 417 (if a person believes the situation cannot be remedied, she is more likely to be sad) (citing N.L. Stein & L.J. Levine, *Making Sense Out of Emotion*, in PSYCHOLOGICAL APPROACHES TO EMOTION 45-73 (N.L. Stein et al. eds., 1990)). In psychology, these underlying reasons are referred to as the emotion’s “appraisal” structure. Klaus R. Scherer, *Evidence for Both Universality and Cultural Specificity of Emotion Elicitation*, in THE NATURE OF EMOTION: FUNDAMENTAL QUESTIONS 172, 179-234 (Paul Ekman & Richard J. Davidson eds., 1994); NIEDENTHAL ET AL at 13-17 (examining cognitive appraisal theories); NUSSBAUM, UPHEAVALS OF THOUGHT, at 19-79, 139-69.

This Section begins by engaging with the ancient debate, relevant to our contemporary one, over anger’s justification; it then presents a brief overview of how anger is experienced and expressed.

1. Justifying Anger

An important threshold question is whether anger *ever* can be justified. Contemporary ambivalence on this question reflects long-standing philosophical and theological debates. The anti-anger position is associated with Seneca, considered the greatest of the Roman Stoics, and the opposing one with Aristotle.⁶² Seneca and Aristotle agreed on a number of fundamental principles, such as the fact that anger is directed at persons who culpably have inflicted harm on someone or something within one’s zone of care,⁶³ and that it predisposes one to pursue punishment or correction of the wrong.⁶⁴ They agreed, further, that making such a complex evaluative judgment requires the exercise of reason.⁶⁵ Where they parted ways was on the fundamental question of whether anger always is destructive or sometimes is productive.

Seneca laid out his position in *DE IRA*, the first known work devoted entirely to anger.⁶⁶ Anger’s dependence on reason did not, for Seneca, redeem the emotion, for he believed it to be grounded in the wrong use of reason. First, Seneca advocated that the cognitive judgments underlying anger represent false valuations of the world and one’s place in it. Affronts to one’s pride, for example, should not arouse anger, because one should not be prideful.⁶⁷ Seneca

⁶² Averill at 74. Seneca’s actual opposite might have been Lacantius, who argued “that anger was given by God for the protection of humankind.” *Id.* at 75-76. Aristotle’s more nuanced position has unquestionably been more influential, however, and is more often offered as the relevant contrast.

⁶³ I coin the term “zone of care” to encompass all persons on whose behalf one might properly be angry. See ROBERT C. SOLOMON, *A PASSION FOR JUSTICE* 253 (1990) (though Aristotle defined anger as an injury to oneself or one’s friends, it is possible to broaden the concept to all those about whom one is motivated to care, and with whom one can find a way to empathize).

⁶⁴ Averill at 74; see also NUSSBAUM, *UPHEAVALS OF THOUGHT*, at 29 (anger requires this set of beliefs: “that some damage has occurred to me or to something or someone close to me; that the damage is not trivial but significant; that it was done by someone; probably, that it was done willingly”). Aristotle and the other Greek philosophers developed a sophisticated taxonomy of anger terms, including *menis* (wrath), *chalepaino* (annoyance), *kotos* (resentment), *cholos* (bitterness or bile), *thumos* (zeal), and *orgē* (intense anger). Potegal & Novaco at 13-14; Averill at 80. Philosophers and psychologists sometimes contest whether one can be angry only at another human, see NUSSBAUM, *UPHEAVALS OF THOUGHT*, at 130 n.95, but most agree that anger at a non-human requires anthropomorphizing, AVERILL at 95 (“[W]e all sometimes become angry at inanimate objects, and at events that are justified and/or beyond anyone’s control. But in such circumstances we also typically feel somewhat foolish and embarrassed about our own anger. Hence, the exceptions tend to prove (test) the rule.”).

⁶⁵ Averill at 83 (quoting SENECA, *DE IRA*, Loeb Classical Library edition, AD 40-50/1963, at 115: “Wild beasts and all animals, except man, are not subject to anger; for while it is the foe of reason, it is nevertheless born only where reason dwells.”).

⁶⁶ Averill at 82-83 (citing SENECA, *DE IRA*).

⁶⁷ GERTRUDE GILLETTE, *FOUR FACES OF ANGER: SENECA, EVAGRIUS PONTICUS, CASSIAN, AND AUGUSTINE* 7 (2010) (to Seneca, anger always is caused either by arrogance (overvaluation of the self) or ignorance (wrongly thinking things of the world to have value)).

argued, second, that the thinking underlying anger necessarily reflects illogic and weakness.⁶⁸ Third, he posited that anger depends on a free-will choice to yield to the feeling.⁶⁹ Though the ability to make such a choice stems from humans' status as rational agents, the consequences of so choosing are irrational. Once yielded to, anger—"the most hideous and frenzied of all the emotions"—vanquishes the reason on which its existence depends.⁷⁰

Anger in this quintessentially Stoic view therefore is a mistake in all instances.⁷¹ And because Seneca framed anger as a choice, he could call it a blameworthy mistake, in a way that a primal urge is not. Nor did he accept arguments that anger might be necessary to action—for example, to motivate courage in battle—or that it might represent a proper response to evil—as when one's mother has been raped.⁷² There is nothing done in or because of anger that in the Stoic view could not be done better under other influences and motives.⁷³

Seneca wrote largely in response to the account advanced centuries earlier by Aristotle. In contrast to the Stoics, Aristotle believed that anger could be entirely good and proper.⁷⁴ One *should* value one's own safety, dignity, and autonomy, just as one should care about the safety, dignity, and autonomy of others. One should feel a strong impulse to respond to affronts to those goods, for only thus are those goods appropriately valued and the world set right.⁷⁵ Anger is in this view "commingled with, if not equivalent to, justice itself."⁷⁶

Not all anger, though, is the equivalent of justice in the Aristotelian account. Only virtuous anger is just.⁷⁷ To be enraged with a person who has violated one's mother is virtuous, as not to

⁶⁸ Averill at 85 (quoting SENECA, DE IRA, at 267f: "No mind is truly great that bends before injury. The man who has offended you is either stronger or weaker than you: if he is weaker, spare him; if he is stronger, spare yourself.")

⁶⁹ Averill at 83; WILLIAM S. ANDERSON, ANGER IN JUVENAL AND SENECA 152 (1964) (the mind causes ira by assenting to it).

⁷⁰ Averill at 83 (quoting SENECA, DE IRA, at 107).

⁷¹ Averill at 75, 83.

⁷² ANDERSON, ANGER IN JUVENAL AND SENECA, at 150 (worst sort of "iniuria," or a "gratuitous, unmerited, unexpected act of evil," is "the murder of one's father or rape of one's mother").

⁷³ Averill at 84; Potegal & Novaco at 15 (Seneca maintained that "both in sport and war, the disciplined combatants defeat the angry ones," just as Sun Tzu, a 4th century BC military strategist, saw anger as a "fault upon which military commanders could capitalize"); ANDERSON, ANGER IN JUVENAL AND SENECA, at 160 (Seneca wrote that the angry man should "rationally set about the punishment or the ending of the crime. Anger contributes nothing to this goal.").

⁷⁴ Averill at 82.

⁷⁵ ARISTOTLE, NICOMACHEAN ETHICS, quoted in WHAT IS AN EMOTION? CLASSICAL READINGS IN PHILOSOPHICAL PSYCHOLOGY 44-52 (Cheshire Calhoun & Robert C. Solomon eds., 1984) ("they are thought to be fools who fail to become angry at those matters they ought").

⁷⁶ Potegal & Novaco at 18. Plato, too, took the position that anger was "a natural, open response to a painful situation." Id. See also Averill at 77 (to Plato, anger became "allied with reason to protect the individual from wrongs perpetrated by others").

⁷⁷ Antony Duff, *Virtue, Vice, and Criminal Liability*, in VIRTUE JURISPRUDENCE 193-213, 194-98 (Colin Farrelly & Lawrence B. Solum eds., 2008) (explaining Aristotelian virtue, in which reason and passion "speak with the same voice" and jointly manifest in right actions).

feel rage would signify an inadequate valuation of one's mother.⁷⁸ In contrast, to become furious at a slave for committing some small error in front of guests is not virtuous, for it bespeaks too heavy an investment in displaying one's status as a superior.⁷⁹

Reason thus is as central to Aristotle's account as to Seneca's, but it serves as anger's most redeeming quality. Reason supplies not just the underlying appraisal that triggers the emotion, but also the mechanism by which one evaluates it. Through reason one determines whether the beliefs and values reflected in angry feelings have a good factual and moral basis.⁸⁰ More, reason helps us determine whether feelings and the actions they spur are commensurate to the insult. Aristotle wrote that as to anger "we stand badly if we feel it violently or too weakly, and well if we feel it moderately"⁸¹—the goal being not "an algebraic mean between two set quantities," but rather a response that is perfectly calibrated to the nature of the offense, the qualities of the offender, and the prospects for corrective action.⁸²

With the competing visions thus understood, it is apparent that the Aristotelian view is the superior one with which to evaluate judicial anger. This is so, in large part, because it is the view that most accurately captures lived human experience. Whatever the rhetorical value of eschewing anger, our lives would be unrecognizable without it.⁸³ Not even Seneca appears actually to have believed his hard line; his real target was violence and cruelty.⁸⁴ The Aristotelian account similarly condemns needless violence and cruelty, but does not in the same stroke condemn all anger. That account instead invites us to dissect, educate, and shape this fundamental human experience through the power of our reason. The superiority of the Aristotelian account also is evidenced by the number of allies it claims, both ancient and

⁷⁸ ARISTOTLE, RHETORIC, quoted in WHAT IS AN EMOTION?, at 44-52 (anger is directed at persons who harm "those whom it would be a disgrace not to defend—parents, children, wives, subordinates"); Averill at 97 (all but Seneca agreed that one sometimes has "not only the right but the *obligation* to become angry").

⁷⁹ The example is drawn from Seneca, who criticized anger triggered by "a slave's breaking of a cup" or "a subordinate's less-than-fawning subservience." NUSSBAUM, UPHEAVALS OF THOUGHT, at 393. An Aristotelian virtue perspective would offer a different reason to criticize the emotion – not because it is angry, but because the appraisal giving rise to the anger is condemnable.

⁸⁰ NUSSBAUM, UPHEAVALS OF THOUGHT, at 29-31.

⁸¹ Averill at 82 (quoting Aristotle, NICOMACHEAN ETHICS 1105B25).

⁸² Id. at 82.

⁸³ Id. at 31 ("More than most emotions, anger is often condemned as antisocial. ... Yet anger is among the commonest of emotions."). See also NUSSBAUM, UPHEAVALS OF THOUGHT, at 159-60 (no human group has ever achieved the Stoic ideal, though it may aspire or purport to). Perhaps having a goal of total anger elimination could facilitate its minimization, which might be adaptive (particularly for persons with high trait anger); the more realistic goal of strategic minimization, however, could achieve that benefit without the dangers associated with striving for the unattainable. Maroney, *Emotional Regulation and Judicial Behavior*, at 1552-54 (detailing such dangers).

⁸⁴ Seneca made his case against anger easier by focusing only on its most extreme manifestations. Where Aristotle contemplated a wide range of angering provocations, from minor insults to violent attacks, Seneca's examples are of unbridled rage and cruelty. Averill at 85 (quoting DE IRA: if "anger suffers any limitation to be imposed upon it, it must be called by some other name—it has ceased to be anger; for I understand this to be unbridled and ungovernable."); Nussbaum at 393; ANDERSON, ANGER IN JUVENAL AND SENECA, at 56-57. Seneca's view on anger appears diametrically opposed to Aristotle's largely because of definitional sleight of hand.

contemporary.⁸⁵ For example, the early Christian theologian Sir Thomas Aquinas defined anger much as Aristotle had—a judgment “by which punishment is inflicted on sin”—and maintained that, while it can be turned to bad ends, it is an indispensable aspect of justice.⁸⁶ Finally, the Aristotelian account is strongly embraced by virtually all contemporary philosophers of emotion,⁸⁷ and underpins virtually all of modern affective science.⁸⁸ This Article therefore analyzes the propriety of judicial anger through a fundamentally Aristotelian lens.

2. Anger’s Core Characteristics

Seneca and Aristotle devoted close attention to anger not just because of its close relation with reason but also because of its distinctive effects. If their debate highlighted the importance of examining those effects, contemporary psychology has taken up that challenge. A robust literature demonstrates how, “[o]nce activated, anger can color people’s perceptions, form their decisions, and guide their behavior.”⁸⁹ Such effects, more closely scrutinized at a later juncture,⁹⁰ may be briefly synopsized as follows.

Anger is strongly associated with a sense of certainty, individual agency, and control.⁹¹ These characteristics tend to predispose one to make quick decisions, privileging fast judgment over close analysis.⁹² Anger also energizes the body and mind for action;⁹³ an angry person feels motivated to approach the offending situation and change it.⁹⁴ Though the goal of anger is thus in

⁸⁵ Though Plato and Aristotle held differing views of emotions generally, their views on anger’s redeeming qualities are surprisingly harmonious. Plato asserted that anger can be allied either with the rational portion of the *psychē*, as when it helps protect the individual from wrongdoing, or with the irrational portion, as when loss of control leads to rash deeds. AVERILL at 77-78. See also ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1880) (“The violation of justice is injury,” and “is the proper object of resentment, and of punishment, which is the natural consequence of resentment”).

⁸⁶ Averill at 87-90 (Aquinas synthesized Aristotelian thought with Christian teachings). Lacantius distinguished between uncontrollable rage and just anger, writing that the latter “ought not be taken from man, nor can it be taken from God, because it is both useful and necessary for human affairs.” Id. at 87 (quoting Lacantius, *De Ira Dei*).

⁸⁷ Martha Nussbaum and Robert Solomon have been perhaps the strongest contemporary philosophical voices advocating that emotion—including anger—be regarded as both reflective of reasons and constitutive of reason. Maroney, *Persistent Cultural Script*, at 644.

⁸⁸ Id. (citing to *THE NATURE OF EMOTION* 179-234 (Paul Ekman & Richard J. Davidson eds., 1994); JOHN DEIGH, *EMOTIONS, VALUES, AND THE LAW* 12, 142 (2008) (reflecting modern philosophical consensus that thought is “an essential element of an emotion”).

⁸⁹ Lerner & Tiedens at 116; see also id. at 121-22, Tbl.1 (synopsizing extant experimental literature on effects of anger on judgment and decision-making).

⁹⁰ Part III.B.2., *infra*.

⁹¹ C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 *J. PERSONALITY & SOCIAL PSYCHOL.* 813-38 (1985).

⁹² Lerner & Tiedens at 126.

⁹³ Emotions carry distinct “action tendencies,” or physiological changes that prepare the body for particular sorts of action. Leonard Berkowitz, *Anger*, in *HANDBOOK OF COGNITION AND EMOTION* at 411-28, 412-13 (explaining anger’s physiological concomitants, including increased heart rate, muscle tension, and a “hot” feeling), 424 (emotions’ “action readiness” tendencies); C.E. IZARD, *THE PSYCHOLOGY OF EMOTIONS* 241 (1991) (in anger “the blood ‘boils’, the face becomes hot, the muscles tense[,] [t]here is a feeling of power and an impulse to strike out”).

⁹⁴ Litvak et al. at 291; Berkowitz at 416-17 (angry persons focus on goal of changing undesirable situations), 424-25 (summarizing research showing that anger often is experienced as an urge toward verbal expression, such as

an important sense positive, the means by which change is pursued can be destructive.⁹⁵ Whether acts that are immediately destructive—such as violent attack or sharp words—ultimately are positive or negative depends, of course, on context. Raising my voice at one who has insulted me can quickly signal how seriously I take the insult and jolt the offender into an apology; raising my voice at an infant who is crying from hunger serves no such purpose.

Moreover, anger can be—and often is—co-experienced with other emotions.⁹⁶ One can feel simultaneously angry and sad, or disgusted, or contemptuous. An angry person can even feel hope and joy, as when she is contemplating vengeance.⁹⁷ Combinations are as varied as the triggering events.

Finally, anger comes in many flavors. *State* anger refers to an anger episode consisting of the above-described components. Such episodes can be brief or they can linger; short spurts of anger often are experienced as being “hot,” while lingering anger can harden into a “cold” state.⁹⁸ Anger states can be experienced as uncontrollable, almost as if imposed by a force outside the self, or they can feel more manageable, the difference generally hinging on the emotion’s intensity.⁹⁹ *Trait* anger, in contrast, refers to a baseline tendency to feel angry.¹⁰⁰ Persons with high levels of trait anger are the ones we describe as having a short fuse or a “choleric disposition”; anger defines much of who they are and how they are perceived.¹⁰¹

As this brief overview reveals, anger is in an important sense rational. Contrary to stereotype, it is triggered by reasons—and a fairly constrained set of reasons at that, having to do with culpable infliction of unwarranted harm. True to stereotype, it disposes the angry person to action. Like all emotions, anger is multifaceted, carrying a complex set of attributes that can be deployed poorly or well—including, as the remainder of the Article will show, by judges.

screaming, and physical aggression, perhaps with the aim of doing injury); Eddie Harmon-Jones et al., *The effect of manipulated sympathy and anger on left and right frontal cortical activity*, 4 *EMOTION* 95-101 (2004) (anger has strong approach tendency).

⁹⁵ Fridja, Kuipers, and ter Schure, *Relations among emotion, appraisal, and emotional action readiness*, 57 *J. PERSONALITY & SOCIAL PSYCHOL.* 212-28 (1989) (destructive means include aggression and fighting); see also LAZARUS at 225 (the angry person may be “potentiated” toward open aggression).

⁹⁶ Lerner & Tiedens at 131; Mick J. Power, *Sadness and Its Disorders*, in *HANDBOOK OF COGNITION AND EMOTION* 497-519, 503-07 (“two or more basic emotions might lock an individual into a complex emotional state,” such as with a combination of sadness and anger, “a common experience” typifying phenomena such as grief).

⁹⁷ Lerner & Tiedens at 130; ARISTOTLE, *RHETORIC*, in *WHAT IS AN EMOTION?*, at 44.

⁹⁸ Berkowitz at 414. The speed with which anger arises also can vary. See Litvak et al. at 290 (“practiced” anger, as is common within a family, ignites quickly when “scripts” are activated).

⁹⁹ Averill at 164, 199, 207-08.

¹⁰⁰ *Id.* at 260.

¹⁰¹ Tanja Wranić & Klaus R. Scherer, *Why Do I Get Angry? A Componential Appraisal Approach*, in *INTERNATIONAL HANDBOOK OF ANGER*, at 243-66, 256. See n. 20, *supra* (proposing that trait anger, rather than state anger, is component of poor judicial temperament).

C. The Ubiquity and Visibility of Judicial Anger

Anger is particularly important to examine on its own, because it is one of the most common emotions that judges will experience. This is true because the sorts of situations and stimuli that tend to trigger anger commonly are present in judges' work environments. Not only will judges get angry, but they inevitably will express that anger to others. Among the judicial emotions, anger is also likely the easiest to see. Not only is anger one of the most easily recognized emotions, but among the judicial emotions its expression appears to be the least stigmatized.

Anger likely is one of the most common judicial emotions, first, because it is one of the most common emotions that humans experience in our everyday lives.¹⁰² Anger is a particularly common emotion to experience while at work.¹⁰³ Judges' work being what it is, anger triggers are especially likely to be a regular feature of judges' days. Many of the people with whom judges must interact, whether directly or indirectly, are angry. Litigation reflects disputes; disputes entail accusations of wrongdoing and attributions of blame; the parties therefore tend to start legal proceedings already angered.¹⁰⁴ Moreover, the processes of litigation themselves tend to make people—particularly lawyers—angry. (Non-lawyers may not understand why being served with an improper interrogatory, or having opposing counsel repeatedly reschedule a deposition, can be so infuriating, but it is.) Judges therefore are exposed to a good deal of others' anger. Judges must actively manage that anger, including by encouraging negotiation, policing disputes, and curtailing outbursts.¹⁰⁵ Through constant exposure to such unpleasant interactions, a judge may find herself getting angry, too; this is particularly so if her work conditions are stressful and physically uncomfortable.¹⁰⁶ At a minimum, she may get irritated, which shortens her fuse.¹⁰⁷ That fuse often will find a spark: as the following Part demonstrates, the people who surround the judge often act in a way reasonably calculated not just to make them angry at one another, but also to make her angry at them.

¹⁰² Averill at 162-63.

¹⁰³ ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983).

¹⁰⁴ See, e.g., *Don Van Natta, Jr., Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995 (“with so many people and so many emotions jammed into such small spaces,” New York City courts can be hard to manage); Josh Getlin, *Tart, tough-talking Judge Judy Sheindlin presides over the grim pageant of dysfunction known as Manhattan’s Family Court*, L.A. TIMES, Feb. 13, 1993 (in family court, “[e]verything that can go wrong with an American family plays out on its stage daily”).

¹⁰⁵ Maroney, *Emotional Regulation and Judicial Behavior*, at 1498 (citing Anleu & Mack at 614).

¹⁰⁶ Lazarus at 419-21 (noting studies that “exposure to irritating cigarette smoke, foul odors, high room temperatures” and similar conditions “can generate anger and aggression”). One theory why this is so is that the unpleasant feelings generated by aversive stimuli prime the person to interpret ambiguous stimuli in a manner consistent with anger. Lazarus at 423-24; Part III.B.2. (anger at one object can predispose a person to become angry at another). Cf. Elizabeth Emens, *The Sympathetic Discriminator: Mental Illness, Hedonic Costs, and the ADA*, 93 GEO L. J. 399 (2006) (offering theory of emotional contagion, by which one assumes the emotional state of another).

¹⁰⁷ See MaryAnn Spoto, *N.J. court punishes judge for yelling at woman*, nj.com, June 17, 2011 (judge attributed angry “tirade” against mother in visitation case to “being ‘burned out’ from his years in family court with its increased caseload and decreased staff”). See also Lazarus at 418 (noting close relationship between anger and irritation).

Anger also is relatively easy to identify. In addition to its strong tendency to motivate approach, it tends to manifest in a characteristic facial expression, typically including a frown and deeply furrowed brow.¹⁰⁸ It also changes the quality of one’s voice, making it sharper, louder, and more staccato.¹⁰⁹ Importantly, this cluster of anger characteristics is remarkably consistent. Across cultures, people are more likely correctly to identify a typified “anger face” than any other facial expression of emotion.¹¹⁰

All of anger’s typical manifestations, though—on face, voice, and body—can be deliberately regulated, and sometimes overridden.¹¹¹ For example, a person can put on a “poker face,” calm the voice, and restrain herself from shaking her fist.¹¹² Some people are quite adept at such regulation, while others are not, and people both manifest and mask anger differently.¹¹³ The possibility of effective regulation and the reality of individual variation can frustrate the ability reliably to identify anger. Familiarity helps. One often can tell if one’s spouse is angry, for example, by detecting subtle iciness in her vocal tone, or noticing that he is drumming his fingers heavily.¹¹⁴ Absent such familiarity, masked anger can go undetected.

The possibility of effective masking poses a challenge for identifying judicial anger. Consider a YouTube video of an actual court proceeding, which shows a criminal defendant spitting in a judge’s face.¹¹⁵ The one emotion the judge clearly displays is surprise, and then her face quickly reverts to neutral.¹¹⁶ The judge might have been angry, and might have deliberately kept that anger from showing (perhaps because she believed that is what a judge is supposed to do), but one cannot tell from the video.

A converse problem must also be noted. Because anger is associated with physical aggression, one may assume that when aggression is observed the actor must have been angry. This is not

¹⁰⁸ Paul Ekman, *Facial Expressions*, in HANDBOOK OF COGNITION AND EMOTION at 301-20, 305, 308-09.

¹⁰⁹ PAULA M. NIEDENTHAL ET AL., *PSYCHOLOGY OF EMOTION: INTERPERSONAL, EXPERIENTIAL, AND COGNITIVE APPROACHES* 49-50 (2006) (describing studies showing emotions’ effect on speech).

¹¹⁰ Jonathan Haidt & Dacher Keltner, *Culture and Facial Expression: Open-ended methods find more expressions and a gradient of recognition*, 13 *COGNITION & EMOTION* 225-66 (1999). Evolutionary theorists posit that humans recognize anger expressions most readily because another person’s anger is relatively likely to signal a survival threat. See Berkowitz at 412-14 (describing research on cross-cultural consistency of many anger attributes).

¹¹¹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1501-12 (distilling research).

¹¹² *Id.*

¹¹³ *Id.* at 1541-43 (citing, inter alia, Sander L. Koole, *The Psychology of Emotion Regulation: An Integrative Review*, 23 *COGNITION & EMOTION* 4, 6 (2009)).

¹¹⁴ William Lyons, *The Philosophy of Cognition and Emotion*, in HANDBOOK OF COGNITION AND EMOTION at 21-44, 36 (“one person might display anger by banging the table, shouting, and slamming the door,” while another “might display it by being unusually quiet and undemonstrative, and by closing the door with studied carefulness as he left the room with exaggerated courtesy”).

¹¹⁵ *How to Piss Off the Judge*, <http://www.youtube.com/watch?v=uCNo4ky6GXE>, posted Aug. 13, 2009. Note that the title reflects the poster’s assumption that the act of spitting *did* anger the judge.

¹¹⁶ *Id.* The typical “surprise” face entails a widening of both eyes and the mouth, forming an “O” shape. NIEDENTHAL ET AL. at 126. Particularly in the slow-motion portion of the video, one can see these markers of surprise on the judge’s face for a quick moment.

the case.¹¹⁷ An aggressor may act instrumentally—imagine a calculating paid assassin. One also may be aggressive from motives of self-defense or defense of others. For example, two Florida judges recently gained some infamy for acting aggressively in court. One (whose actions also were captured in a video posted on the internet) jumped off the bench to join others in overpowering a defendant who was attacking a witness;¹¹⁸ the other pulled a gun from under his robe in similar circumstances.¹¹⁹ These judges might have been angry when they acted, or they might have become angry upon reflecting on the events. But because their actions need not have been triggered by anger, they are not evidence of it.¹²⁰

Thus, a judge may be angry and we may not be able to tell, and a judge may act aggressively and not be angry. But anger remains a *relatively* visible target. Where a typical anger trigger is present; where the judge allows typified anger expressions, such as a glowering face or raised voice; and where acts of aggression—not just actual violence, but pointing, shaking or banging a fist, or issuing threats—are accompanied by such facial and vocal clues, we can be fairly sure it is anger we are seeing.

Finally, we do not have to hunt aggressively for such moments, because anger is the emotion judges appear to feel most free to express. Emotional expression generally is highly stigmatized in judges, and long has been.¹²¹ This remains true for anger to some degree. For example, after media reports represented that a judge had spoken angrily to a high-profile defendant—the former New York City Police Commissioner—the judge put himself on the record insisting that he “wasn’t really angry.”¹²² But the stigma attaching to anger is markedly less than to, say, sorrow or fear. One much more readily finds in the caselaw references to judges’ anger than to any other emotion. The media, too, much more frequently report instances of judges expressing ire at lawyers, defendants, and witnesses.¹²³ Indeed, judges sometimes openly own up to even the most extreme bouts of fury: a state-court judge, after being repeatedly cursed at by a

¹¹⁷ Averill at 30-31.

¹¹⁸ Elie Mystal, *Judge of the Day: For Real*, ABOVE THE LAW (Mar. 25, 2009), <http://abovethelaw.com/2009/03/judge-of-the-day-for-real/>

¹¹⁹ David Lat, *Judge of the Day: John Merrett*, ABOVE THE LAW (Mar. 28, 2007), <http://abovethelaw.com/2007/03/judge-of-the-day-john-merrett/>

¹²⁰ In contrast, when a judge of the Western District of Tennessee grabbed the lapels of an attorney, his aggressive was by all accounts motivated by anger. See *Federal Judge Agrees to Six-Month Leave of Absence, Counseling, After Claims He Mistreated Lawyers*, ASSOCIATED PRESS (August 31, 2001).

¹²¹ Maroney, *Persistent Cultural Script*, at 670-71 (citing POSNER, *FRONTIERS OF LEGAL THEORY* at 226).

¹²² Alice McQuillan & Hasani Gittens, *Judge Revokes Kerik’s Bail, Sends Former Commish to Jail*, NBC N.Y. (Oct. 20, 2009), <http://www.nbcnewyork.com/news/local-beat/Judge-Revokes-Bail-Sends-Former-Commish-to-Jail-65005027.html>; Sam Dolnick, *After Delay, Kerik’s Trial to Start on Nov. 9*, N.Y. TIMES, Oct. 26, 2009, A26.

¹²³ Without purporting to attach to it a quantitative value, I base these qualitative statements on the experience of conducting (both alone and with research assistants) many searches for evidence of judicial emotion over the course of five years. Evidence of judicial anger is relatively plentiful. Evidence of other judicial emotions has been, in our experience, much more difficult to find, by several orders of magnitude.

defendant, indicated that the “[r]ecord should reflect” that “if I'd have had a shotgun I need to have shot him but I don't have it today.”¹²⁴

The reputational costs of showing anger, while not zero, thus appear to be markedly less than the costs of showing other emotions. The likely reason for this lesser stigma is a cultural perception of anger as status-enhancing.¹²⁵ Whatever the reason, its effect is to generate relatively more data on judicial anger, data we now may examine.

II. Angry Judges

This Part demonstrates the reality of judicial anger by gathering evidence of its expression. While the ways in which judges express anger vary, the usual objects of that anger are fairly stable: lawyers, litigants and witnesses, and other judges.

Judicial anger is common enough that just a bit of digging reveals its traces. In the caselaw, evidence of judicial anger may be found primarily in connection with allegations of judicial bias, often urged in support of motions for recusal,¹²⁶ appeals from imposition of contempt¹²⁷ and other sanctions against attorneys and parties,¹²⁸ or due process challenges.¹²⁹ Anger may also underlie imposition of sanctions against the judge for violating codes of conduct,¹³⁰ or prompt review of his fitness to serve at all.¹³¹ Judges sometimes also share their experience of work-

¹²⁴ Johnson v. State, 642 A.2d 259, 262 (Md. App. 1994).

¹²⁵ Larissa Z. Tiedens, *Anger and advancement versus sadness and subjugation: the effect of negative emotion expressions on social status conferral*, 80 J. PERSON. & SOCIAL PSYCHOL. 86 (2001) (expressing anger raises social status). This may also be a point of gender differentiation, as male and female anger displays may be differentially assessed in this regard. See n.20, supra.

¹²⁶ Gottlieb v. S.E.C., 310 Fed. Appx. 424, 425 (C.A.2 N.Y. 2009) (plaintiff alleged that the judge “was biased because of ‘the tempest which took place between them ... when they clashed and had words in open court’”); Johnson v. Schnucks Inc., No. 09-CV-1052-WDS-SCW, 2011 WL 219900, at *1 (S.D.Ill. 2011) (plaintiff complained that the judge’s “tone of voice, overall demeanor, and statements ... were angry and hostile”); In re Russell, 392 B.R. 315, 355 (Bkrcty. E.D.Tenn. 2008) (plaintiff alleged the judge “became very angry and used a very harsh tone”)

¹²⁷ 18 U.S.C. § 401 (2002); State v. Hasan, 2009 WL 2475304, at *3 (N.J.Super.A.D., 2009) (attorney appealed a contempt finding by judge who admitted to being outraged by frivolous motions and who apologized for expressing anger); Johnson v. State, 642 A.2d 259, 262 (Md.App.1994).

¹²⁸ FED. R. CIV. P. 11 (2007); Tollett v. City of Kemah, 285 F.3d 357, 362 (5th Cir. 2002) (judge admitted to feeling “insulted” and “angry by the fact that this case would go up on a simple \$5,000” sanction).

¹²⁹ State v. Munguia, 253 P.3d 1082, 1086-87 (Utah 2011) (judge described the defendant’s behavior as “selfish” and “filthy” and said he wished he could have imposed a longer sentence); Galvan v. Ayers, No. CIVS001142DFL DAD P, 2006 WL 657121, at *16 (E.D.Cal. 2006) (judge expressed impatience with defendant’s testimony and had both “exasperated expressions on his face” and was red in the face); Jones v. Luebbers, 359 F.3d 1005, 1009 (8th Cir. 2004) (judge, who admitted to being angry at defense counsel, described as “angry, abusive, and threatening”).

¹³⁰ McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S., 264 F.3d 52, 54-55 (D.C. 2001).

¹³¹ In re Sloop, 946 So.2d 1046, 1051, 1053, 1057 (Fla. 2007) (per curiam); Christopher Danzig, *Ex-Judge of the Day: Yes, Flashing Your Piece in Court is a “Poor Rhetorical Point”*, available at <http://abovethelaw.com/2012/02/ex-judge-of-the-day-yes-flashing-your-piece-in-court-is-a-poor-rhetorical-point/> (judge was “frustrated” with rape victim who was being “disrespectful, combative and unresponsive” during testimony; he pulled out a concealed handgun, pretended to hand it to her, and suggested she shoot her lawyer).

related anger. Los Angeles trial judge Gregory O'Brien, Jr., for instance, recently penned a candid, self-deprecatingly humorous article titled "Confessions of an Angry Judge."¹³² Finally, as the "benchslaps" feature of *Above the Law* suggests, there is a robust market for media reports of judicial anger expressions. These windows into judicial anger reveal important information about its objects.¹³³

A. Anger at Lawyers

Lawyers are the most frequent targets of judges' anger. Anger at attorneys tends to be triggered by perceptions that they are incompetent, interfering with the prompt, orderly and fair hearing of cases, defying the judge's authority, or lying—and sometimes all of these. As Judge O'Brien quipped, not only is attorney incompetence a frequent provocation, but "[w]orse still is impertinence by the incompetent, a combination that persistently remains in fashion."¹³⁴

One of the best-known explosions of judicial wrath came from U.S. District Court Judge John Sprizzo. He ignited a media firestorm when, in 1989, he excoriated prosecutors for having handled a drug case so badly, in his view, that he had no choice but to dismiss charges against half the defendants.¹³⁵ When a prosecutor protested that "heroin traffickers" were about to "walk out the door," Sprizzo responded:

Now, wait. You are not going to lay that one on me. You let heroin traffickers out the door by not proceeding in a competent enough fashion. . . . Do you know what is wrong with your office, and you in particular? You assume all we have to do is say narcotics.... [a]nd the judge will roll over and let the case go to the jury. You people have not been trained the way I have been trained.... I am telling you that in this case you didn't get away with it. If you had been a competent prosecutor, which you are not, you would have hedged against the possibility that maybe the judge would disagree with you. ... on the law. ... If these drug dealers are walking free, it is because you did not hedge against that possibility. Don't lay it at my doorstep. ... [I]f they are

¹³² Gregory C. O'Brien, Jr., *Confessions of an Angry Judge*, 87 JUDICATURE 251, 252 (2004).

¹³³ One important caveat is that these windows are just that: limited openings through which we see evidence of the phenomenon of interest. It is highly unlikely that written opinions, self-disclosures, and media reports capture the entire universe of judicial anger, particularly given the continued traction of the script of dispassion. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (the role of emotion is concealed because judges are criticized for revealing it). Anger against other judges, for example, is unlikely to bubble into public view at anything near the rate at which it occurs, given the infrequency with which judges' dealings with one another are open to public view. Still, these glimpses provide important clues as to what is likely happening more generally.

¹³⁴ O'Brien at 252. See also Keith L. Alexander, *D.C. Superior Court judge declares mistrial over attorney's incompetence in murder case*, WASHINGTON POST, April 1, 2011 (judge, "obviously angry and frustrated, told [lawyer] that his performance in the trial was 'below what any reasonable person would expect in a murder trial'").

¹³⁵ William Glaberson, *Judge Refuses to Open Proceeding*, N.Y. TIMES, Mar. 10, 1989.

walking out of here it is because you people were not competent enough to put in an extra charge in your indictment. Sit down.¹³⁶

The judge’s words were so “scathing” that he promptly sealed the record to prevent media reports from reaching and prejudicing jurors.¹³⁷ As reported in his obituary nearly a decade later, the infamous incident put Sprizzo’s formidable “temper” on public display.¹³⁸

While Sprizzo’s reaction may have been sharp, it was not unique. Ninth Circuit Chief Judge Alex Kozinski has spoken unapologetically about his anger at a federal prosecutor, whom he caught in a lie; indeed, he characterized the incident as perhaps the angriest he has ever been at work.¹³⁹ While Sprizzo chewed the errant lawyer out verbally, Kozinski did it in writing. In his telling, he deliberately included the prosecutor’s name multiple times in a scathing written opinion, removing it only after the U.S. Attorney’s office asked him to do so, and after he was satisfied that his message to that lawyer and his office had been heard.¹⁴⁰

Judicial anger at attorney incompetence and misconduct sometimes comes packaged not in a vicious tongue-lashing but in a thick layer of sarcasm. This varietal is heavily favored in the “benchslap” market. The lawyer-directed benchslap with which this Article began, for example, became a bona fide media sensation. U.S. District Court Judge Sam Sparks, unhappy with lawyers who were seeking to quash certain subpoenas, issued an order directing them to attend a “kindergarten party” in his courtroom.¹⁴¹ At that party, he wrote, they would learn such crucial skills as

- How to telephone and communicate with a lawyer ...
- An advanced seminar on not wasting the time of a busy federal court and his staff because you are unable to practice law at the level of a first year law student.

¹³⁶ Id.

¹³⁷ Sprizzo unsealed the transcript of the proceedings only after being legally challenged by the NEW YORK TIMES. Id.

¹³⁸ Bruce Weber, *John E. Sprizzo, 73, U.S. Judge, Dies*, N.Y. TIMES, Dec. 18, 2008, B12. See also Editorial, *The Judge Who Spoke Too Soon*, N.Y. TIMES, Mar. 18, 1989 (characterizing the judge’s remarks as “heated” and “angry,” and opining that “the judge would not have got involved with this insult to the First Amendment had he had the presence of mind to hold his tongue”).

¹³⁹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1498 (citing Interview with the Hon. Alex Kozinski, Chief Judge, U.S. Court of Appeals for the Ninth Circuit, in Nashville, Tenn. (Feb. 6, 2010)).

¹⁴⁰ Id.; see also John Schwartz, *Judges Berate Bank Lawyers in Foreclosures*, N.Y. TIMES, Jan. 10, 2011 (judges handling shoddily-done foreclosures have begun to “heap some of their most scorching criticism on the lawyers”); Christine Stapleton & Kimberly Miller, *Foreclosure Crisis: Fed-up judges crack down on disorder in the courts*, THE PALM BEACH POST, Apr. 4, 2011 (“angry and exasperated” judges are “hitting back by increasingly dismissing” foreclosure cases and accusing lawyers of “fraud upon the court”); Jonathan Bandler, *Angry Judge Delays Annabi, Jereis Corruption Trial until 2012*, THE JOURNAL NEWS, May 17, 2011 (“angry federal judge lashed out” at prosecutors for bringing charges that could have been brought months earlier).

¹⁴¹ *Morris v. Coker*, No. A-11-MC-712-SS, A-11-MC-713-SS, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011).

Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshalls have beds available if necessary, so you may wish to bring a toothbrush in case the party runs late.¹⁴²

Aggressively snarky,¹⁴³ the kindergarten-party order quickly went viral on the Internet.¹⁴⁴ The judge seems to have been so angry that he wanted not just to change the lawyers' behavior but also to humiliate them.¹⁴⁵

Other judges also use barbed sarcasm to communicate anger to lawyers. Consider *Fox Industries v. Gurovich*, a routine civil case that devolved into a “morass.”¹⁴⁶ Multiple opinions by both the district judge and the magistrate paint a picture of two people being slowly, but effectively, driven crazy by Simon Schwarz, Esq. The judges were infuriated by the lawyer's incompetence, but also by his apparent willingness to defy their authority and lie. In one episode that the judge called the “mystery of the evanescent courthouse,” Schwarz missed a hearing (resulting in a default against his client) and claimed that he and a taxi driver were excusably unable to find the (very large) federal courthouse, despite being in the right (very small) town. Such a mishap, wrote the judge, was plausible only if “Mr. Schwarz and his driver deliberately avoided looking at the courthouse (*cf.* Lot and his daughters fleeing the destruction of Sodom and Gomorrah, *see* Genesis 19:15-17).”¹⁴⁷ Refusing a motion to disqualify himself, the judge agreed that he had “expressed varying degrees of disapprobation, hostility, impatience, dissatisfaction, annoyance, and anger with [Schwarz's] antics,” including by calling various of his statements “‘baloney,’ ‘false,’ ‘fraud,’ ‘impossible,’ ‘incredible,’ and ‘a lie.’”¹⁴⁸ He refused, however, to apologize for his anger, for those statements, or for characterizing Schwarz's briefs as “ejaculations.”¹⁴⁹

¹⁴² Id.

¹⁴³ MERRIAM-WEBSTER'S DICTIONARY (2012) (defining “snarky” as “crotchety, snappish; sarcastic, impertinent, or irreverent in tone or manner”).

¹⁴⁴ 2,394 people “liked” or shared the *Above the Law* feature on the “kindergarten party order” on Facebook, and more than 400 people “tweeted” it on their Twitter accounts.

¹⁴⁵ See nn.270-74, *infra* (addressing propriety of seeking to humiliate).

¹⁴⁶ 2006 WL 2882580 (E.D.N.Y.) at *8. The case involved trade secrets and an employment non-compete agreement.

¹⁴⁷ *Fox Industries v. Gurovich*, 323 F.Supp.2d 386 (E.D.N.Y. 2004). The judge continued:

[Schwarz] offers increasingly detailed and fantastic excuses for his absence. *See, e.g.*, Exhibit 17 to Gore's Motion to Disqualify, featuring three photos taken at various locations within Central Islip that purport to demonstrate the invisibility of the mammoth white courthouse. Yet, as a point of epistemology, as Defense Secretary Donald Rumsfeld has observed in other circumstances, “An absence of evidence is not evidence of an absence.” Even if Mr. Schwarz “could not find” it, the Alfonse M. D'Amato United States Courthouse *does* exist and *is* visible to the dozens of other lawyers, as well as hundreds of jurors, witnesses and workers, who arrive here every day. (And, ironically, one of the photos ... actually *does* picture the courthouse.)

Id.

¹⁴⁸ *Fox Industries*, 323 F.Supp.2d at 389.

¹⁴⁹ About the term “ejaculations,” the court wrote:

[T]he Court is at a loss as to how else to describe the sentences in Mr. Schwarz's brief that consist only of the words ‘How ridiculous!’ and ‘How pathetic!’ ... Surely Mr. Schwarz is aware of the alternate definition of “ejaculation”: to wit, a “sudden short exclamation.” THE AMERICAN

Snarky benchslaps draw attention because they are funny—a guilty pleasure, an indulgence in *Schadenfreude*.¹⁵⁰ Indeed, one of the main draws of television judges is their frequent use of over-the-top anger and sarcasm. Judge Judy, with her “iron gavel” and “tough-talking take-downs,” is “ratings gold”¹⁵¹ for her network because people enjoy seeing “bozos loudly castigated.”¹⁵² Of course, whether one finds a benchslap funny depends on whether it seems like the person really is a “bozo” and deserves the derision.¹⁵³ And attorneys on the receiving end, not surprisingly, often protest that they do not deserve it, or that even if they do, their clients should not be the ones to suffer.

When judges make their anger at counsel known those counsel may cry foul, claiming bias or partiality sufficient to damage their clients’ interests.¹⁵⁴ Challenged benchslaps involve not just sarcasm but also raised voices, red faces, yelling, insults, and threats. Courts, however, are reluctant to grant relief on this basis. Importantly, they are reluctant precisely because they believe such anger to be exceedingly commonplace. As one reviewing court explained:

[T]here is one form of professional predisposition all judges share that may be classified as a kind of bias: expressions of dissatisfaction with deficient lawyering, overbearing advocacy and deceptions that stretch judicial patience to its outer boundaries. These practices often arouse manifestations of frustration, annoyance and even anger on the part of judges. But, even if short-tempered, such reactions alone are not sufficient to disqualify a judge from a case because they are not necessarily wrongful or inappropriate; indeed, at times they may be called for or understandable.¹⁵⁵

HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed.2000). The Court obviously did not intend an alternative available meaning.

Fox Industries, 323 F.Supp.2d at 388 n.2. See also Fox Industries, 2006 WL 2882580, at *8-9 (magistrate furious over lawyer’s usurpation of court’s authority in matter of subpoenas).

¹⁵⁰ MERRIAM-WEBSTER’S DICTIONARY (2012) (“enjoyment obtained from the troubles of others”).

¹⁵¹ Cynthia McFadden et al., *Judge Judy Rules No-Nonsense Court*, go.com (May 18, 2010).

¹⁵² Brendan Koerner, *Judge Judy*, slate.com (May 27, 2005) (viewers love Judge Judy “because she offers them a fantasy of how they’d like to see the justice system to operate”). Of course, Judy Sheindlin acted the same way when she was a real judge in the Manhattan Family Court. Getlin, *Tart, tough-talking Judge Judy Sheindlin*, supra (“Scheidlin runs her court with an impatience that borders on rage” and speaks “with a hint of fury”). But when she was a real judge, that angry manner drew “scathing criticism,” not adoration. *Id.* (lawyers complained that she was “needlessly cruel and sarcastic, a loose cannon in the halls of justice”).

¹⁵³ Cf. J. GILES MILHAVEN, *GOOD ANGER* 72-74 (1989) (noting humor value in seeing someone get his “comeuppance”). Indeed, some of the pleasure a reader might take in seeing the apparently incompetent Schwarz get his comeuppance dissipates upon learning that he suffered from a serious brain disease, which might have contributed to his infuriating behavior. Fox Industries v. Gurovich, 2006 WL 941791 (E.D.N.Y.).

¹⁵⁴ At least in the context of a recusal motion or due process challenge, judicial bias against a lawyer is legally meaningful only if it inures to the detriment of the client. See, e.g., *Avitia v. Metropolitan Club of Chicago, Inc.*, 1990 WL 205278 (N.D. Illinois); *U.S. v. Kahre*, 2007 WL 2110500 (D. Nev. 2007).

¹⁵⁵ *Teachers4Action v. Bloomberg*, 552 F.Supp.2d 414 (SDNY 2008) (“[O]rdinarily frustration or anger are spontaneous reactions, often provoked by some objectively discernible cause.... In this category would fall expressions of dissatisfaction, frustration or anger that stem from the judge’s response to what he or she regards as poor or excessive performance of counsel or inappropriate behavior of parties.”).

Thus, where counsel repeatedly failed to meet deadlines and submitted markedly inferior work product, it was perhaps “infelicitous or unmellicious” for the judge to refer to his pleadings as “junk” and “garbage”; but these and other expressions of anger were to be expected, and did not give rise to a claim of bias.¹⁵⁶

That judges’ anger at lawyers is common and pervasive, then, is shown by the fact that legal doctrine assumes this to be so. As the Supreme Court declared in the leading case of *Liteky v. United States*:

Not establishing bias or partiality ... are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.¹⁵⁷

Other courts also have given judges ample room within which to express anger at attorneys for making “misrepresentations” and speaking in “half-truths before the court,”¹⁵⁸ as well as for asking improper questions and making baseless arguments.¹⁵⁹ Reviewing courts sometimes express discomfort with particularly vehement expressions, such as a judge commanding a lawyer to sit down and shut up,¹⁶⁰ and are particularly chagrined when benchslapping happens in front of the jury.¹⁶¹

The very ubiquity of such anger, however, makes it hard to condemn. As the Second Circuit has noted:

¹⁵⁶ *Id.*

¹⁵⁷ *Liteky v. U.S.*, 510 U.S. 540, 555-56 (1994).

¹⁵⁸ *Avitia v. Metropolitan Club of Chicago, Inc.*, 1990 WL 205278, at *3 (N.D. Illinois) (attorney with history of rude behavior was trying to judge-shop by prompting intemperate displays that he could use to justify a recusal motion).

¹⁵⁹ *U.S. v. Kahre*, No. 2:05-CR-0121-RCJ-RJJ, 2007 WL 2110500, at *2 (D. Nev. 2007).

¹⁶⁰ *Taylor v. Abramajtyts*, 20 Fed.Appx. 362, 364 (6th Cir. 2001) (lawyer was trying to provoke judge into outburst; court declined to find trial judge ran afoul of *Liteky* standard, though it was displeased with anger displays before jury).

¹⁶¹ *Francolino v. Kuhlman*, 224 F.Supp.2d 615, 647 (SDNY 2002). The trial judge in a Mafia case was outraged at the defense for delivering a lengthy opening statement that she believed was full of irrelevancies and “vented her anger” at these and other perceived missteps in front of the jury. She also got angry at defendant, calling him a “prima donna,” and accused defense counsel of making objections “rudely,” threatening that “I will do things you don’t like when you treat me in a way that I don’t like.” Though the reviewing court declined to award habeas relief, it expressed its displeasure with those anger displays.

Judges, while expected to possess more than the average amount of self-restraint, are still only human. They do not possess limitless ability, once passion is aroused, to resist provocation.¹⁶²

A courtroom video posted on YouTube provides a vivid example. A Kentucky state-court judge can be seen blowing his top when a smug lawyer accuses him of condoning jury tampering and threatened an investigation. The judge's voice raises, he curses and becomes visibly agitated, and at one point he smashes the bench with his fist and declares, "I'll yell all I want, this is my court."¹⁶³

Very few such judicial anger displays are found to warrant relief, in no small part because doing so would upend such a large number of cases. But judges do sometimes indulge in displays of anger that are sufficiently extreme as to prompt corrective measures.¹⁶⁴ In one criminal case, a trial judge created a poisonously "acrimonious" environment through repeated clashes with the defense attorney, at one point implying that he would physically harm the attorney were he able.¹⁶⁵ But even though it overturned the defendant's conviction, the appellate court expressed sympathy for the judge:

[T]rials in the district courts are not conducted under the cool and calm conditions of a quiet sanctuary or an ivory tower, and [] enormous pressures are placed upon district judges by an ever increasing criminal docket and a demand ... for speedier trials of criminal defendants. These pressures can cause even conscientious members of the bench ... to give vent to their frustrations by displaying anger and partisanship, when ordinarily they are able to suppress these characteristics. But grave errors which result in serious

¹⁶² *In re Bokum Resources Corp.*, 26 B.R. 615, 622 (1982) (rejecting bankruptcy attorney's request that the judge be recused because he was so angry as to be "red in the face"). See also *Green v. Court of Common Pleas*, No. 08-1749, 2008 WL 2036828, at *4 (E.D. Pa. May 30, 2008) (rejecting habeas claim; judge had been very angry at defense counsel for disobeying order, but did not act irrationally); *United States v. Weiss*, 491 F.2d 460, 468 (2d Cir.) (1974).

¹⁶³ *Prosecutor Makes Threats to a Judge?*, http://www.youtube.com/watch?v=Dk6y5n_1-Yo&feature=related, posted on Feb. 19, 2009.

¹⁶⁴ *U.S. v. Candelaria-Gonzalez*, 547 F.2d 291, 297 (5th Cir. 1977) (trial "judge's sarcasm, his frequent interruptions and his antagonistic comments in the jury's presence," all directed at counsel, deprived defendant of fair trial).

¹⁶⁵ *U.S. v. Nazzaro*, 472 F.2d 302, 311 n.10 & 312 (2nd Cir. 1973). The entire colloquy was as follows:

Mr. Schwartz: [The Assistant U.S. Attorney] promised me those papers for fourteen months, that's why I moved [for dismissal on speedy-trial grounds], not because of your Honor. I think you have disliked me since that time.

The Court: If you want to get on an emotional basis, you may.

Mr. Schwartz: I don't. I want to take out the personal feelings between us. I don't want to have any personal feeling.

The Court: Counselor, the jury box is empty, and I will tolerate some things that come close to being contemptuous-

Mr. Schwartz: I am only talking to your Honor without the jury.

The Court: You have now interrupted me four times. You are about twenty-five or thirty-five years my junior and I have not got the strength to cope with you, but I do have the power—so just stop it.

prejudice to a defendant cannot be ignored simply because they grow out of difficult conditions.¹⁶⁶

In sum, judges' anger at lawyers is an inevitable, even ordinary occurrence. The degree to which this is so is reflected in the doctrine that has evolved in response: only the most extreme manifestations of judge's anger at lawyers trigger oversight, even if quotidian manifestations prompt occasional chagrin.

B. Anger at Parties and Witnesses

Judges' anger also is directed at parties and witnesses.¹⁶⁷ Compared with lawyers, these participants in the courtroom drama have fewer opportunities to display incompetence. The more common triggers for this group are defiance of judicial authority, insulting the judge, lying, and (particularly for criminal defendants) having committed the acts underlying the case.

Disobeying direct orders is a particularly efficient route to judicial anger.¹⁶⁸ In *U.S. v. Gantley*, for example, the trial judge had ruled a polygraph examination of the defendant inadmissible; when the defendant tried on cross-examination to bolster his credibility by referring to that polygraph, the judge had an immediate angry outburst. Though he dismissed the jury and "cooled down," he ordered a mistrial.¹⁶⁹ Another trial judge became enraged at an expert witness. He knew that the witness, one Taylor, would in his testimony be quoting someone who had used the word "goddamned," and he asked Taylor not to repeat that word. In his testimony, Taylor replaced "goddamned" with "GD," which made the judge apoplectic: he excused the jury, chewed Taylor out, and then told the jury that Taylor had disobeyed him on purpose.¹⁷⁰

Criminal defendants, in particular, run into problems when a judge perceives defiance. One defendant, for example, was talking out of turn.¹⁷¹ The judge sent the jury out and attempted to

¹⁶⁶ *Id.*

¹⁶⁷ See, e.g., *Judge Apologizes for Yelling, Says He Wants to Keep "Gossip" Out Of Trial*, San Diego Source, Jan. 2, 1998 (judge acknowledged "that he had become 'emotional'" when yelling at defense witnesses). In one anecdotal measure of how much more frequently judges become angry with lawyers as compared with litigants, Judge O'Brien barely mentions litigants in his account of what used to make him angry. O'Brien at 252 (complaining only about "stress" caused by trials of pro se litigants).

¹⁶⁸ See Carol Marbin Miller, *Barahona judge goes after gag-order violators*, THE PALM BEACH POST, Oct. 21, 2011 (judge angry at child welfare workers for apparently leaking to media information about case in which they were witnesses, despite a gag order).

¹⁶⁹ 172 F.3d 422, 431 (6th Cir. 1999) (upholding declaration of a mistrial because the "jury's observation of Judge Forester's understandable, if short-lived, anger ... is likely to have caused some level of unfair jury bias").

¹⁷⁰ *Cappello v. Duncan Aircraft Sales of Florida, Inc.*, 79 F.3d 1465 (6th Cir. 1996) (finding furious response inappropriate, as witness was trying to comply with judge's order, but calling it harmless error). Defiance also may be found in *Fox Industries*, in which the civil defendant, Gore, appeared to be doing nearly as much to drive the judge and magistrate crazy as his lawyer. Gore repeatedly violated court orders not to compete with plaintiff's business. Even after being found in contempt he insisted (implausibly) that the judge had not found his conduct to be willful, leading the court to comment drily on the lack of evidence that Gore had been "having an out-of-body experience." *Fox Industries, Inc. v. Gurovich*, 2004 WL 2348365, at *2 (E.D.N.Y. 2004).

¹⁷¹ *Shaw v. State*, 846 S.W.2d 482, 485 (Tx. Ct. App., 14th Dist., 1993).

explain to the defendant why he was not permitted to speak. When the defendant protested, he and the judge engaged in the following colloquy:

Court: Listen to me now. ... We are going to have order. ...I have asked you kindly to please speak through your attorney. What ... I may have to do is have you bound and gagged

Defendant: I asked kindly to speak to you.

Court: Listen to me.

Defendant: I sure did.

Court: ... The jury is going to sit there and see you bound and gagged before them, and they are going to determine you are dangerous person right before they go out and determine whether to give you life. Do you really think that's an intelligent thing to do?

Defendant: *Do you think what you are doing is an intelligent thing to do?*

Court: I'm not going to discuss it any further with you. If you will conduct yourself as a gentleman, we will proceed.

Defendant: I've been trying. I've been trying.

Court: Let's get the tape.¹⁷²

The judge then had the defendant bound and gagged. One gets the distinct sense that the defendant's cheeky rejoinder was for the judge the last straw.¹⁷³

As that colloquy suggests, judges may get particularly angry when they perceive that a party or witness has insulted them. In yet another episode of the *Fox Industries* saga, the judge was none too pleased to hear tape recordings in which the civil defendant referred to his orders as "a joke" and described them with "an earthy term"¹⁷⁴ that the judge tactfully translated as "*merdique*."¹⁷⁵ Consider, too, the defendant in *Mayberry v. Pennsylvania*.¹⁷⁶ On trial for holding hostages in prison, he was found guilty of criminal contempt for calling the presiding judge a "dirty sonofabitch", "dirty tyrannical old dog," "stumbling dog," and "fool"; accusing him of "running a

¹⁷² Id. at 485-86 (emphasis added).

¹⁷³ Id. at 486 ("[e]ven from our appellate perch, we acknowledge that the patience of the trial judge is often pushed to the limit, however, judicial patience is part of the job"). See also *Judge angry at mouthy criminal*, krqe.com, http://www.youtube.com/watch?v=uWXFbVpF_pQ.

¹⁷⁴ 323 F.Supp.2d 386, 388 (2004).

¹⁷⁵ 2004 WL 2348365, at *2 (E.D.N.Y.). *Merdique* translates as "shitty." <http://dictionary.reverso.net/french-english/merdique>.

¹⁷⁶ *Mayberry v. Pennsylvania*, 91 U.S. 499, 505 (1971).

Spanish Inquisition”]; and telling him “to ‘Go to hell’ and ‘Keep your mouth shut.’”¹⁷⁷ Though the judge at whom these abuses were directed tried to “maintain calm,” the Court found it necessary to have the contempt proceedings overseen by a different judge “not bearing the sting of these slanderous remarks.”¹⁷⁸

Similarly, in *Ungar v. Sarafite*¹⁷⁹ the Court noted that some criticisms are “so personal and so probably productive of bias that the judge must disqualify himself.” Though the majority did not find that to be such a case,¹⁸⁰ the dissenters opined that the defendant’s outbursts created

a head-on collision between the judge and a witness The bias here is not financial but emotional. . . . Judges are human; and judges caught up in an altercation with a witness do not have the objectivity to give that person a fair trial. . . . An impartial judge, not caught up in the cross-currents of emotions enveloping the contempt charge, is the only one who can protect all rights and determine whether a contempt was committed or whether the case is either one of judicial nerves on edge or of judicial tyranny.¹⁸¹

Thus, the Court has recognized that judges would have to be superhuman to avoid being angered when insulted. Judge Marvin Frankel admitted as much in his widely-read 1973 book on sentencing, in which he recounted the following story:

Judge X . . . had tentatively decided on a sentence of four years’ imprisonment. At the sentencing hearing [t]he defendant took a sheaf of papers from his pocket and proceeded to read from them, excoriating the judge, the “kangaroo court” in which he’d been tried. . . . Judge X said, “I listened without interrupting [and] I simply gave the son of a bitch five years instead of the four.”¹⁸²

Lying also is a potent trigger.¹⁸³ For example, in response to harsh words spoken at sentencing by a judge who found defendant’s testimony to have been “totally unbelievable and preposterous,” the reviewing court wrote that even if the remark were improper,

¹⁷⁷ Id.

¹⁷⁸ Id.

¹⁷⁹ 376 U.S. 575, 583 (1964).

¹⁸⁰ *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964) (“We cannot assume that judges are so irascible and sensitive that they cannot fairly and impartially deal with resistance to their authority or with highly charged arguments about the soundness of their decisions.”); id. at 585-86 (“Neither in the courtroom nor in the privacy of chambers did the judge become embroiled in intemperate wrangling with petitioner. . . . petitioner’s final intemperate outburst provoked no emotional reflex in the judge.”).

¹⁸¹ Id. at 601-02 (Douglass, J. dissenting).

¹⁸² MARVIN FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 18 (1973).

¹⁸³ Ron Arnold, *Angry federal judge rips ‘false testimony’ of federal scientists*, WASHINGTON EXAMINER, Sept. 9, 2011 (in “searing opinion,” judge “ripped two Interior Department scientists for giving ‘false’ and ‘incredible’ testimony).

it should be recognized that a judge is only human, being ordinarily imbued with a strong sense of duty and responsibility to the community. In his or her conscientiousness, the judge will sometimes speak out in frustration and even anger.¹⁸⁴

Much as it has in the anger-at-lawyers context, then, doctrine has evolved in recognition of the inevitability of judicial anger against parties and witnesses because of their behavior during the litigation.

Finally, judges get angry at persons for having committed the acts that gave rise to the litigation. As the *Litkey* Court noted, “[t]he judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person.”¹⁸⁵ Both civil and criminal parties draw judicial ire on this basis. For example, local television coverage reposted on YouTube shows an Alabama Family Court judge yelling at a mother accused of neglect. After she mutters something in response to his statement that she might deserve jail time, he smacks his hand on the bench and barks, “You’re not taking care of your child *now*, ma’am!” Asked by the reporter to reflect on his outburst, the judge said, “I reacted humanly; I try not to do that.”¹⁸⁶

A judge may become “ill-disposed toward” non-parties as well. Another YouTube reposting of local news coverage shows a judge, presiding over the sentencing of a man convicted of child sexual abuse, loudly berating the victims’ mother. She had left the children accessible to the boyfriend despite having been sexually assaulted by him herself. Visibly angry, with a red face, raised voice, and shaking finger, the judge tells the mother that her behavior is “despicable,” and that she is “disgusting,” “an atrocious mother,” and “not a victim.”¹⁸⁷

Though anyone whose behavior is implicated can draw the judge’s wrath, this is particularly an issue for criminal defendants. First, anger at defendant’s offense conduct might increase the potency of some other provocation. For instance, one Minnesota judge reported the following incident:

I said, “Sir, you are going to prison, and that’s where animals like you belong.” And I usually don’t say that but, if you get called a MF [expletive abbreviated] ten times, and it was by someone who raped a step-daughter, and he’s in your face . . . And I felt bad later. I thought, “OK, you lost your cool.”¹⁸⁸

¹⁸⁴ Carr v. Senkowski, 2007 WL 3124624 (W.D. New York, Oct. 23, 2007). See also Campbell v. U.S., 2010 WL 1379992 (S.D. West Virginia, Mar. 10, 2010), discussed at pp.40-41, *infra*.

¹⁸⁵ *Litkey*, 510 U.S. at 550-51.

¹⁸⁶ *Judge Naman Yells at Mom*, http://www2.wkrq.com/news/2009/may/14/judge_naman_yells_at_mother-ar-2128758/, May 14, 2009. The judge later expressed embarrassment. *Id.*

¹⁸⁷ *We Need More Judges Like This*, posted Jul. 23, 2007, <http://www.youtube.com/watch?v=jbfZGSy-ydY&feature=related> (sentencing in Fulton County, Georgia, reported on Local News 2).

¹⁸⁸ Mary Lay Schuster & Amy Propen, *Degrees of Emotion: Judicial Responses to Victim Impact Statements*, 6

The combination of personal attack and a particularly egregious offense may explain why this judge was unable to maintain his composure. Similarly, another YouTube video shows a judge becoming irate while sentencing a man convicted of shooting at police officers, because the man openly mocked him, smiled, and laughed during the hearing.¹⁸⁹

But defendants' offense behavior alone may be sufficient, and the moment at which judges tend to give voice to that sort of anger is at sentencing.¹⁹⁰ Judicial anger at sentencing is a special sort of anger, because it is the most likely to be unapologetically acknowledged, its expression both deliberate and controlled. At sentencing, judges may perceive that it is part of their role to express anger—not just on their own behalf, but on behalf of the victims and the public.¹⁹¹ Reflecting others' anger is part of the expected script at sentencing, particularly in high-profile and death-penalty cases.¹⁹²

It would be a mistake to assume that judges are merely acting as mouthpieces, however; they may well feel the anger themselves. Indeed, it is extremely common for the media, in reporting on judges' remarks to the defendant at sentencing, to refer to those judges as angry.¹⁹³ Speaking candidly about sentencing, Judge Denny Chin has acknowledged that “there is a lot of emotion

LAW, CULTURE & HUMANITIES 75, 93 (2010).

¹⁸⁹ *Judge, Defendant Spar During Sentencing*, Associated Press, Mar. 24, 2009, available at <http://www.youtube.com/watch?v=X7Z4LQO6B58> (judge threatened to gag defendant, threw a folder onto his desk, imposed the maximum sentence—to which the defendant replied “thank you, I’ll take another”—and waved mockingly at the defendant while saying “bye bye”). See also *Vancouver judge yells at convict, then apologizes*, SEATTLE TIMES, March 3, 2011 (judge spars with defendant and mockingly calls out “bye bye”).

¹⁹⁰ Anthony McCartney, *Angry Sentencing for Murray*, ASSOCIATED PRESS, Nov. 30, 2011 (judge delivered a “tongue lashing” to doctor convicted of involuntary manslaughter in death of Michael Jackson).

¹⁹¹ In the words of a judge of the Iowa Court of Appeals:

I see absolutely nothing wrong, and as a matter of fact I think it should be encouraged, in a judge speaking freely, openly and expansively to the defendant, lecture, cajole, empathize, sympathize, show compassion, warmth, and comprehension, show anger, umbrage, ire and indignity. These are human emotions that are meaningful to the person before the court, emotions they understand and easily comprehend. To go by rote in an emotionless ritual loses its human values and is less effective [Sentencing is] a ‘show-down’ where society, as represented by the judge, confronts a defendant for his antisocial conduct ... The time of sentencing is a desirable place for the judge to let his feeling be known[.]

State v. Bragg, 388 N.W.2d 187, 194 (Donielson, J., specially concurring) (Iowa App. 1986). The view that judicial anger at sentencing communicates a deserved moral message is unabashedly retributivist. See Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655 (1989) (“retribution cannot be neatly divested of anger,” and it is “hard to imagine a sentencer finding that an offender deserves a severe punishment” without calling on anger); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 331-36 (1993) (sentencing judge’s role includes task of “correcting” defendant’s “false statement” of his worth relative to that of the victim) (discussing JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988)). However, anger expression also can serve utilitarian aims. See *Bragg*, 388 N.W.2d at 190, 192 (harsh words meant to encourage the defendant to “alter his conduct” and become a “productive, useful citizen”).

¹⁹² Pillsbury, *Emotional Justice*; see also Benjamin Weiser, *Madoff Judge Recalls Rationale For Imposing 150-Year Sentence*, N.Y. TIMES, June 29, 2011, A1 (Judge Chin “seemed to find a way to translate society’s rage into a number.”).

¹⁹³ See, e.g., Martha Neil, *Judge Detains 2 Teens, Puts Ankle Monitor on Boy, 11, for Flash Mob Attack on Law Student and Others*, ABA JOURNAL, Aug. 19, 2011 (describing sentencing by “angry juvenile court judge”).

involved.”¹⁹⁴ Anger appeared to play an important role in his decision to impose a heavy sentence against a defendant convicted of passport fraud and trying to fake his own death in the 9/11 attacks, actions Chin called “despicable and selfish.”¹⁹⁵ Anger may have played a similar role in his decision to sentence disgraced financier Bernard Madoff to 150 years in prison.¹⁹⁶ Similarly reflecting on the high emotionality of sentencing, Judge Bennett wrote that some of the sentencing allocutions he has heard from defendants “have pulled at my heartstrings and even brought me to tears, while others have given me heartburn and elevated my already too high blood pressure;” he placed into the latter category “infuriatingly insincere nonsense from sophisticated, highly educated white collar defendants.”¹⁹⁷

When judges get angry at parties and witnesses, then, it often is because those persons act disrespectfully, lie, buck the court’s power, insult the judge or the legal system, or have committed acts (sometimes in court, sometimes just proven there) that lead the judge to conclude they are “thoroughly reprehensible.”¹⁹⁸

C. Anger at Other Judges

Finally, judges get angry at one another. This permutation of judicial anger is the least visible, and tends to draw the most attention when it surfaces. In news coverage of *Bush v. Gore*, for example, a commentator noted that evident procedural wrangling within the Supreme Court over whether a Florida recount should go forward laid bare the “tension and anger that the court had managed to contain under a veneer of civility.”¹⁹⁹

On multi-judge courts, dissents provide one window into such anger. Dissent, of course, follows disagreement. While disagreement is unpleasant, it need not be a cause for anger. “Principled disagreement”²⁰⁰ is highly valued in our system of law, and judges often go to great pains to

¹⁹⁴ Benjamin Weiser, *A Judge’s Education, a Sentence at a Time*, N.Y. TIMES, Oct. 7, 2011, MB1 (quoting Judge Chin as saying that “[e]motion comes into play in every sentencing decision”).

¹⁹⁵ Id.

¹⁹⁶ Weiser, *Madoff Judge Recalls Rationale* (“Two years later, [Chin’s] recollections resurrect all the anger, shock and confusion that surrounded Mr. Madoff’s crimes[.]”). Cf. Richard F. Doyle, *A Sentencing Council in Operation*, 25 FED. PROBATION 27 (1961) (sentencing introduces a “human element” because different judges respond differently “in the presence of emotionally charged situations personally pleasing or especially repugnant to them”).

¹⁹⁷ Bennett, *Heartstrings or Heartburn*, at 26. Another apparently infuriating allocution was as follows: “I addressed the defendant: ‘I note in paragraph 45 of the PSR report that you knocked your then live-in girlfriend off the front porch and broke her jaw in seven places and her leg in three places. Why would you do that to her?’ He responded: ‘She deserved it.’ I countered: ‘Excuse me, I don’t think I heard your answer.’ His follow up: ‘I said she deserved it.’ I don’t know what you could have said that would have helped you, but this really, really hurt you! He received an extra 10 months per word.” Id.

¹⁹⁸ *Liteky v. U.S.*, 510 U.S. 540, 550-51 (1994).

¹⁹⁹ Linda Greenhouse, *Bush v. Gore: Election Case A Test and A Trauma for Justices*, N.Y. TIMES, Feb.20, 2001, A18. Judges are not the only court personnel at whom judges get angry. Don Von Natta, *Dispute of Court Officers and Judges Escalates*, N.Y. TIMES, Nov. 22, 1995 (detailing “high-volume clash laced with personal attacks and, at times, profanity” between New York City judges and uniformed court officers).

²⁰⁰ *Gutter v. Bollinger*, 288 F.3d 732, 752 (6th Cir. 2002) (Moore, J. concurrence) (“Dissenting opinions typically present principled disagreements with the majority’s holding[, which are] perfectly legitimate and do not undermine

express respect for one another even as they clash over legal and factual interpretation. But dissents sometimes reveal disagreements with a more personal tone, and these tend to come dipped in particularly biting rhetoric.

Perhaps no one has perfected the art of the angry dissent more than Justice Antonin Scalia.²⁰¹ Linda Greenhouse has described Scalia as “enraged” and “dyspeptic,” particularly when writing in dissent,²⁰² another commentator describes Scalia’s writing as “equal parts anger, confidence, and pageantry,” such that his opinions—particularly dissents—“read like they’re about to catch fire from pure outrage.”²⁰³ Of course, Scalia is far from the only Justice to use that forum to rail against his fellows’ perceived misdeeds.²⁰⁴ Nor need anger always be deduced from words on the page. As Adam Liptak has noted, choosing to read a dissent from the bench—as Justice Stevens did in *Citizens United*—allows a Justice to “supplement[] the dry reason on the page with vivid tones of sarcasm, regret, anger and disdain.”²⁰⁵

A look beyond the Supreme Court reveals other instances of judges making public their anger at one another. The Sixth Circuit’s handling of challenges to the University of Michigan’s race-conscious admissions policies provides an example.²⁰⁶ A divided *en banc* court disagreed sharply over the policies’ constitutionality.²⁰⁷ Nothing remarkable there. What was remarkable was Judge Boggs’ decision in dissent to accuse colleagues of deliberately manipulating the composition of the panel in order to determine the result.²⁰⁸ The charged language on both sides left little doubt as to the high emotional pitch.²⁰⁹ Judge Moore, one of the accused judges, wrote that Boggs had caused “grave harm” to them, the court, and “the Nation as a whole,” declaring that his “shameful” opinion would “irreparably damage the already strained working

public confidence in our ability as judges to do what we have sworn to do [and which] can be phrased in strong terms without damaging the court’s ability to function as a decision-making institution in a democratic society. Judges criticize their colleagues’ reasoning all the time, and, if they are to carry out their oaths of office, they must do so. This robust exchange of ideas sharpens the focus and improves our analysis of the legal issues.”)

²⁰¹ LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISION MAKING: IS PSYCHOLOGY RELEVANT? 20-21 (1999) (Scalia frequently demonstrates both anger and contempt).

²⁰² Linda Greenhouse, *Justice Scalia Objects*, N.Y. TIMES, Mar. 9, 2011, Opinionator Blog.

²⁰³ Conor Clark, *How Scalia Lost His Mojo*, SLATE, July 5, 2006 (Scalia’s dissent in *Planned Parenthood v. Casey* “achieved a level of frustrated fury usually reserved for undersea volcanoes and small dogs tied to parking meters”).

²⁰⁴ *Webster v. Reproductive Health Services*, 492 U.S. 490, 538-47 (1989) (Blackmun, J., dissenting) (railing against majority’s opinion as “[b]ald assertion masquerad[ing] as reasoning,” and claiming majority was “deceptive” and “disingenuous”).

²⁰⁵ Adam Liptak, *In a Polarized Court, Getting the Last Word*, N.Y. TIMES, Mar. 8, 2010, A12 (Justice Stevens’ angry dissent in *Citizens United v. Federal Election Com’n*, 130 S. Ct. 876, 929 (2010) (J. Stevens dissenting), gained significant power through his decision to read it aloud, despite obvious physical and mental strain); http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.html.

²⁰⁶ *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002). The cases ultimately were resolved by the U.S. Supreme Court. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²⁰⁷ *Grutter*, 288 F.3d 732 (splitting 5-4 in favor of constitutionality of race-conscious admissions policy).

²⁰⁸ *Id.* at 810 (Boggs, J., dissenting).

²⁰⁹ For example, Judge Clay decried Boggs’ decision “to stoop to such desperate and unfounded allegations.” *Id.* at 772.

relationships among the judges of this court.”²¹⁰ Nor did the rancor dissipate. When a report (prepared by one of the dissenters) later concluded that the Chief Judge had committed misconduct, he disputed its methods and conclusions to THE NEW YORK TIMES—a rare public move, the reporter wrote, evidencing “continued strained relations.”²¹¹

The Fifth Circuit, too, has exposed its fair share of collegial relations strained by anger. A long-running feud involving District Judge John McBryde—reputed to have a “particularly nasty temper, even for a judge”²¹²—blossomed in the mid-1990s into one of “the biggest, rawest brawls in the history of the Federal judiciary.”²¹³ At the feud’s pinnacle, a Special Investigative Committee of the Fifth Circuit Judicial Council investigated charges that McBryde had abused lawyers, witnesses, and a court clerk.²¹⁴ The lengthy, rancorous, and public proceedings²¹⁵ revealed serious inter-judge conflict. McBryde once became “angry and lashed out at a fellow judge who joked about” his impatience; he called two fellow judges “despicable”; and he ordered a visiting state-court judge removed from his courtroom without even asking why he was there.²¹⁶ It came to light that the Chief Judge of his District, Jerry Buchmeyer, had written a satirical song about McBryde, and his wife had sung it at a bar revue performance.²¹⁷ The

²¹⁰ Id. at 752-58 (Moore, J., concurring) (Boggs’ dissent “marks a new low point in the history of the Sixth Circuit”). The personal element of the discord was underscored by Moore’s assertion that Boggs had “refused to accept” personal assurances that “we did not engage in the manipulation of which he has accused us.” Id. at 753 n.2.

²¹¹ Adam Liptak, *Court Report Faults Chief Judge in University Admissions Case*, N.Y. TIMES, June 7, 2003.

²¹² Christine Biederman, *Temper, Temper*, DALLAS OBSERVER, Oct. 2, 1997.

²¹³ *One Federal Judge Does Battle with 19 Others*, N.Y. TIMES (May 1, 1996).

²¹⁴ The Committee held a 9-day hearing with 55 witnesses; tried (unsuccessfully) to persuade McBryde to accept psychiatric treatment; found a pattern of abuse; and recommended sanctions, which eventually were upheld by the D.C. Circuit. Judge McBryde’s disciplinary history, of which this is just one example, is long. See *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S.*, 264 F.3d 52 (D.C. Cir. 2001); *In re: Matters Involving United States District Judge John H. McBryde, Under the Judicial Conduct and Disability Act of 1980*, No. 95-05-372-0023 (Jud. Council 5th Cir. Dec. 31, 1997); Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde (Dec. 4, 1997).

²¹⁵ 264 F.3d 52 at 304-05.

²¹⁶ Id. at 321-22 (“Because of the chilling effect of Judge McBryde’s rules and his manner of enforcement ... attorneys, fearing humiliation or embarrassment, forego actions they believe are in their clients’ best interests and fail to preserve issues for appeal.”).

²¹⁷ The Wall Street Journal, Law Blog Obituary: U.S. District Judge Jerry Buchmeyer, <http://blogs.wsj.com/law/2009/09/23/law-blog-obituary-us-district-judge-jerry-buchmeyer/>. The song, set to the meter and tune of “King Herod’s Song” from *Jesus Christ Superstar*, contained these lyrics:

Lawyers I am overjoyed
That you’re all here today.
Now listen very carefully
To what I have to say.
Stupid lawsuits, motions wasting time,
That’s gonna stop, ‘cause I’m your God,
And I’ll treat you just like slime.
Yes! I’m the Judge,
I’m the Great John McBryde,
Miss a deadline like a fool,
I’ll send you to reading school[!]

acrimony between the two men was pronounced enough to warrant mention in Buchmeyer’s obituary.²¹⁸

Given cultural fascination with “dirty laundry,” public attention to nasty judicial infighting tends to be colored with more than a shade of titillation. This is even more so when judges lash out at each other in ways that are more outré. When Chief Judge Jones publicly told her Fifth Circuit colleague to “shut up” because she perceived him to be hogging oral argument time, it was perceived as truly shocking.²¹⁹ Even more shocking are allegations of physical violence, such as those swirling around the Wisconsin Supreme Court. That court in 2011 was asked to rule on a controversial bill curtailing the collective bargaining rights of public employees. Chief Justice Shirley Abrahamson prepared a “stinging” dissent accusing Justice David Prosser of partisanship.²²⁰ The night before the opinion’s release, a number of the Justices gathered in the chambers of Justice Ann Walsh Bradley. “The conversation grew heated,” and Bradley asked Prosser to leave after he made “disparaging” remarks about Abrahamson. While accounts here diverge, Bradley claims that Prosser choked her.²²¹ The choking allegation (currently under investigation) has a history: Bradley has complained of Prosser’s periodic “flashes of extreme anger,” and Prosser, for his part, admits to having once called Abrahamson a “total bitch” and vowing to “destroy her.”²²²

In sum, judges get angry, sometimes very angry. Anger at lawyers is both the most commonplace, and the least frequently condemned, manifestation. Anger at others in the *dramatis personae* of any given case, though less ubiquitous, is nonetheless common. It also is increasingly visible, given the proliferation of cameras in courtrooms and the ease of online video circulation. Judges’ fury at one another occasionally surfaces, too, despite both incentives to keep it under wraps and layers of secrecy that facilitate such discretion.

Biederman, *Temper, Temper*. The reference to “reading school” reflects an instance in which McBryde “bludgeoned” a “hapless” attorney into attending “reading comprehension classes” and filing “demeaning affidavits” of attendance when she (for good reason) failed to follow the letter of a standing order related to depositions. *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S.* 264 F.3d 52, 68 (D.C. Cir. 2001).

²¹⁸ The Wall Street Journal, Law Blog Obituary: U.S. District Judge Jerry Buchmeyer (“for our money, the most entertaining thing Buchmeyer ever wrote was directed at a fellow jurist, U.S. District Judge John McBryde.”). Many years later, McBryde remains on the bench, and complaints still roll in at a regular clip. See, e.g., Jonathan Turley, *Texas Judge Clears Attorneys After Judge McBryde Refers Them for Possible Criminal Prosecution After They Sought His Removal from Case*, Jan. 13, 2001, available at <http://jonathanturley.org/2011/01/13/texas-judge-refers-attorneys-for-possible-criminal-prosecution-after-they-seek-his-removal-from-case/>

²¹⁹ For a representative example, see <http://abovethelaw.com/2011/09/benchslap-of-the-day-chief-judge-jones-tells-judge-dennis-to-shut-up/>.

²²⁰ *Justices’ feud gets physical*, MILWAUKEE-WISCONSIN J. SENTINEL, June 25, 2011.

²²¹ *Id.*

²²² *Id.* See also *Supreme Court Debate Focuses on Rancor Among Current Justices*, MILWAUKEE-WISCONSIN J. SENTINEL, Mar. 21, 2011.

The following Part proceeds from this knowledge base as to how judicial anger is and takes on the question of how it ought to be.

III. The Righteously Angry Judge

Exposing judicial anger, the project of the preceding Part, is interesting not only for what it reveals about its objects but also for what it reveals about its audience. How such anger is evaluated by that audience—be it a reviewing court, a journalist, a member of the public, or the anger’s target—appears to revolve around two essential axes: *justification* and *manifestation*.

Justification captures the “why” of the anger, while manifestation refers to the way in which it is experienced by the judge and expressed to others. Some instances of judicial anger seem both to be wholly justified and to be experienced and expressed in an appropriate way. For example, lawyers and parties sometimes are seen as bringing the judge’s wrath upon themselves, and it may seem entirely proper for the judge to let that anger show.²²³ Some wrath might seem justified, as might expression of it, but we might nonetheless worry about its impact on the judge herself: if the anger responds to a personal insult, for example, perhaps she will act rashly out of a desire for score-settling.²²⁴ Sometimes only the manner of expression seems inappropriate, such as when understandable ire is vented before the jury.²²⁵ In other instances, the anger itself seems unjustified—for example, being angry at counsel for imagined wrongs—and thus *any* experience or expression of it is deemed inappropriate.²²⁶ In capturing how we actually think about judicial anger, then, these elements emerge as the critical ones.

As this Part asserts, those are the correct elements, and it is possible to conceptualize them in a coherent way—though we to date have not done so. Relying on the elements of justification and manifestation helps us to more tightly draw the distinction between acceptable and unacceptable judicial anger. Recalling Aristotle’s counsel, they allow us to give substance to the idea—otherwise just a platitude—that judges ought to be angry “at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way.”²²⁷

The Part takes on justification first. It draws on concrete examples to elaborate the distinction between good and bad reasons for judicial anger, and argues that a good reason is one that is accurate, relevant, and reflects good values. The Part then takes on the question of manifestation. It explores the various behavioral impacts of judicial anger, such as increased reliance on heuristics. These impacts represent both opportunities and dangers for judges. I

²²³ See, e.g., *Campbell v. U.S.*, 2010 WL 1379992 (S.D. West Virginia, Mar. 10, 2010); *U.S. v. Kahre*, 2007 WL 2110500 (D. Nev. 2007).

²²⁴ See, e.g., *Mayberry v. Pennsylvania*, 91 U.S. 499, 505 (1971).

²²⁵ See, e.g., *Taylor v. Abramajtyts*, 20 Fed.Appx. 362 (6th Cir. 2001); *Francolino v. Kuhlman*, 224 F.Supp.2d 615 (SDNY 2002).

²²⁶ See, e.g., *In re McBryde*, 117 F.3d 208, 213 (5th Cir. 1997); *U.S. v. Nazzaro*, 472 F.2d 302 (2nd Cir. 1973).

²²⁷ AVERILL at 82(quoting ARISTOTLE, NICHOMACHEAN ETHICS 1106B20, IN THE BASIC WORKS OF ARISTOTLE 958 (R. McKeon ed., 1941)).

again draw on concrete examples to demonstrate how we might distinguish the former from the latter in theory, and argue that strong emotion-regulation skills help judges enact that distinction in practice. Adequate justification and appropriate manifestation together comprise righteous judicial anger.

A. Being Angry “with the Right Motive”

Justification captures Aristotle’s concern that anger be underlain by a correct “motive,” in the sense that it is directed at the right persons and for good reasons. Righteous judicial anger rests on accurate premises; is relevant; and reflects worthy beliefs and values.

1. Righteous Judicial Anger Reflects Factually Accurate Premises

The most straightforward of these inquiries is the first, going to accuracy. If a judge is angry at a lawyer for having lied to him, for example, it is relevant whether the lawyer really lied. To be more precise, it matters whether the statement actually was untrue, whether the lawyer believed it to be untrue, and whether the lawyer intended to mislead. The judge’s assessment of the truth-status of any of these questions might be literally wrong.²²⁸

This was precisely the issue underlying one of the many allegations of misconduct against Judge McBryde. McBryde had angrily accused an Assistant United States Attorney of being “engaged in falsehood and deception” when she asserted that certain information, which he wanted her to produce, had been ordered sealed by another judge.²²⁹ The Circuit found the accusation to have been baseless.²³⁰ It eventually imposed a three-year ban barring McBryde from hearing cases involving certain lawyers, apparently out of concern that he was unable accurately to judge reality where they were concerned.²³¹ At least as to those persons, the Circuit seemed to worry, the judge was liable to become angry for no reason.

McBryde is not unique in this regard; other judges get angry for reasons that prove ephemeral.²³² A Florida judge, for example, became enraged with a group of jurors whom he thought had disobeyed their orders to appear. It turned out that a court officer had led them to the wrong courtroom, where they were waiting as instructed.²³³ In another incident, captured on video and posted on the internet, a judge appears to have become angry at a litigant who sat

²²⁸ Cf. Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 869-77 (2009) (evaluating truth-status of judges’ assertions about emotion).

²²⁹ *In re McBryde*, 117 F.3d 208, 213 (5th Cir. 1997).

²³⁰ *Id.* at 217 (“Judge McBryde’s attack on AUSA Darcy A. Cerow and Postal Inspector Rex Whiteaker and his accusations against them of lying and contempt of court were baseless, threatening irreparable damage to the professional reputations and careers of both”). According to Janet Napolitano, then the United States Attorney for the District of Arizona, McBryde’s rash accusation hindered a grand jury investigation, and meant that several persons would likely avoid prosecution entirely. *Id.* at 216.

²³¹ *Id.*

²³² *Cappello v. Duncan Aircraft Sales of Florida, Inc.*, 79 F.3d 1465 (6th Cir. 1996).

²³³ *In re Sloop*, 946 So.2d 1046 (Fla. 2007).

down slowly when court was called into session.²³⁴ The judge likely thought the man was refusing to sit, but it appears from the video that the man was confused about whether he was supposed to sit or stand, as the judge had just called out the man’s name. Judges can, of course, make mistakes.

The fact of a mistake does not impugn her qualifications or character, particularly if it is an honest one—but it does rob her anger of justification. This is particularly so if the mistake could have been noticed and corrected. We do not expect judges to be factually correct as if by magic. We expect them, rather, to exercise due diligence as to facts, and to be prepared to subject angering facts to an appropriate, even heightened, level of scrutiny.²³⁵

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

2. Righteous Judicial Anger is Relevant

If a judge becomes angry for reasons having nothing to do with the matter at hand, that anger is irrelevant.²³⁶ It may stem from a reason, even a good reason, but because it does not pertain to legally or morally salient features, it is not a good reason for the purposes of judicial action in that instance.

Liteky offers a constructive parallel, as it reflects a concern with irrelevance.²³⁷ The primary issue in that case was whether disqualifying bias could be found only if a judge’s ill opinion of a party, witness, or attorney stemmed from an “extrajudicial source”—that is, one rooted in events outside the four corners of the case.²³⁸ Though it declined such a holding, the Court did opine that bias is more likely where the ill-will stems from such a source. Its prime example was not anger but hatred—specifically, hatred of Germans.²³⁹ If a judge, entrusted with a case involving a German defendant, begins with a fixed hatred of Germans—based, for example, on his military service—that hatred is likely to undergird a disqualifying bias. Though the Court was not

²³⁴ http://wn.com/Judge_loses_it_on_cam_jails_man_for_sitting_too_slow.

²³⁵ See Part III.B.2 (demonstrating how anger itself can curtail such diligent scrutiny).

²³⁶ Unlike other iterations of judicial anger, it is difficult to see reflections of truly irrelevant anger in the caselaw or media reports. Judges are highly unlikely to recognize, let alone admit to, such anger as a basis for action, and it would be difficult for an outside observer to deduce hidden sources of anger. This therefore is one instance in which the window on judicial anger is unduly limited. See n.133, *supra*. We can get intermittent hints, including from the secondary literature. See, e.g., *Former Judge Newton reprimanded by court*, FLORIDA BAR NEWS, Jun. 15, 2000 (judge made “threatening and abusive” comments to lawyer who had filed recusal motion, saying “judges can make or break attorneys” and “clients come and go, but you have to work with the same judges year in and year out. You better learn who your friends are.”); Bennett, *Heartstrings or Heartburn*, at 26 (“Another poor [sentencing] allocation came from a defendant who, after a lengthy trial, told me what a terrible and unfair judge I was. Hmmm ... Who do you think the trial judge on your § 2255 petition is going to be?”).

²³⁷ *Liteky v. U.S.*, 510 U.S. 540, 550 (1994).

²³⁸ *Id.*

²³⁹ *Id.*

explicit as to precisely why, the apparent concern is that the emotion reflects a category judgment preventing the judge from responding adequately to the defendant’s individuality.

A similar argument might be made about anger. Anger from an irrelevant source might color the judge’s perceptions and opinions in diverse and subtle ways.²⁴⁰ Indeed, the analysis of the following Section shows that this often is true.²⁴¹ A person who is angry for one reason may attribute ambiguous signals (like slowness to sit) to deliberate wrongdoing. Such anger seems obviously unfair if its trigger has literally no relevance: perhaps the judge was ticked off at the obnoxious lawyer who argued the previous case, and took it out on the next person to appear. It may also seem unfair even if rooted in the case but misapplied within it. A judge might find cause for anger with a litigant when she is really mad at his lawyer. Even if the lawyer is the target both times, the judge might find fault with some current, relatively blameless act because she is seething over an earlier misstep. In still other instances, the judge might have access to information that she ought not to have, as when a party improperly raises extraneous and prejudicial information, or that she ought to put aside for the moment, as when she learns facts during a suppression hearing that are not at issue at trial. Anger also may be irrelevant because it relates only to an issue delegated to another decision-maker, such as the jury.

In none of these instances is a judge’s anger justified, even if it is entirely understandable.

3. Righteous Judicial Anger Reflects Good Beliefs and Values

Perhaps most importantly, anger that is anchored to an accurately perceived, relevant event may nonetheless be unjust, if the evaluation of that event’s significance reveals undesirable beliefs and values.²⁴²

Liteky again provides a starting point for that deeper level of inquiry. In defining the distinction between an “unfavorable opinion” of a party, which may be allowable, and bias against that party, which is not, the Court wrote:

One would not say, for example, that world opinion is biased or prejudiced against Adolf Hitler. The words connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*[.]²⁴³

²⁴⁰ *Id.*

²⁴¹ Part III.B.2., *infra*.

²⁴² ROBERT C. SOLOMON, *A PASSION FOR JUSTICE* 271 (1990) (“Our emotions betray our philosophies, whether they are petty, pathetic and narrowly self-serving or expansive, compassionate, principled, and bold.”); Maroney, *Emotional Common Sense*, at 873-75 (judges’ emotions reflect their underlying beliefs and values, which may be normatively assessed).

²⁴³ *Liteky*, 510 U.S. at 550 (emphases in original). The Court went on to quote Jerome Frank thus: “Impartiality is not gullibility. Disinterestedness does not mean child-like innocence. If the judge did not form judgments of the actors in those court-house dramas called trials, he could never render decisions.” *Id.* at 551 (quoting *In re J.P. Linahan, Inc.*, 138 F.2d 650, 654 (2nd Cir. 1943)). Frank, the famous early-twentieth-century legal realist, was one

As the *Liteky* Court wrote, the unfavorable opinion would be wrong only if it is “undeserved.”²⁴⁴ In that instance, the Court was implying that hatred of Hitler is deserved, as it represents an appropriate response to evil.

Drawing again the parallel to anger, judicial anger would be deserved if it responds to evil,²⁴⁵ but undeserved if the triggering action is not properly characterized as wrongful, and its result not properly considered an unwarranted harm (or any sort of harm at all). These determinations often are quite different in the judging context than in other areas of life, for actions that constitute wrongful infliction of harm in other contexts might lack that status in law. Pleading not guilty to a crime one actually did commit, for example, might constitute a “lie” in a colloquial sense, but it is not properly treated as a lie by a judge. Judicial anger at a defendant for having pleaded not guilty never would be appropriate, because the judge who treats as a lie the decision to put the state to its proof has chosen to devalue something that law commands her to value. Deeming reasons as “bad” or “good” for purposes of judicial anger, then, requires that we keep firmly in mind both the legal context and the judge’s role within it.²⁴⁶

Contrast, for example, *Shaw*, the earlier-described case in which a judge had the defendant’s mouth taped shut,²⁴⁷ with *Lewis v. Robinson*.²⁴⁸ In *Lewis*, the defendant, after having his motion to represent himself denied multiple times, shouted profanities at his attorney and hit him, causing the attorney to bleed.²⁴⁹ The judge ordered the defendant shackled and his mouth taped shut. In both cases, a reviewing court noted that the judge appeared to be angry at the defendant when he issued the order to apply the tape.²⁵⁰ However, in *Shaw* the judge was angry because the defendant had talked back to him, while in *Lewis* the defendant had become violent. What distinguishes the cases is the judge’s entitlement to be angry, based on normative conceptions of what represents an unacceptable affront to the judge and others within his zone of care. Violence clearly is such an affront; being “mouthy” generally is not, however irritating and unwise it may be.²⁵¹

of the first to argue that judges’ emotions do, and perhaps should, play a role in their decision making. Maroney, *Persistent Cultural Script*, at 654-56.

²⁴⁴ *Liteky*, 510 U.S. at 550.

²⁴⁵ Gillette at 99 (Augustine held that anger, “when it is a reaction against evil,” is “not to be lightly dismissed”).

²⁴⁶ O’Brien at 252 (a judge is supposed to “have thick skin and remain calm, neutral, friendly, and courteous,” even though “in a non-judicial setting I might be commenting on the horse counsel rode in on”).

²⁴⁷ *Shaw v. State*, 846 S.W.2d 482, 485-86 (Tx. Ct. App., 14th Dist., 1993).

²⁴⁸ 67 Fed.Appx. 914 (6th Cir. 2003).

²⁴⁹ *Id.* at 917.

²⁵⁰ *Id.* at 923 (“statements by the trial judge ... clearly expressed impatience, dissatisfaction, annoyance, and also anger”); *Shaw*, 846 S.W.2d at 487.

²⁵¹ *Shaw*, 846 S.W.2d at 485-86 (court distinguished judge’s reaction to back-talking from cases in which the defendant is reasonably believed to be a danger if unrestrained). Being “mouthy” generally will not provide an adequate reason because litigants have the right to assert their points of view, even if they do so poorly and to their ultimate detriment. While a judge has a responsibility to police and channel such expressions as a matter of courtroom management, she does not have the power to shut them down completely. See also *Clark County Judge Shouts Down Defendant*, KHQQ6, Mar. 5, 2009, available at <http://www.khq.com/story/9953585/clark-county->

Similar issues arise when a party successfully appeals a ruling and appears before the same judge on remand. In one such case, in which a race-discrimination plaintiff won reversal of a directed verdict, the trial judge complained that the Sixth Circuit had put “egg on my face.”²⁵² Though he immediately went on to insist that he was “not mad about it,” when the case again went up on appeal the Circuit seemed clearly to disbelieve that disclaimer.²⁵³ As the Fifth Circuit succinctly declared in a different case, “a litigant’s taking an appeal of right should not be a source of ‘insult’ or ‘anger’ for a district judge.”²⁵⁴

As these and other cases²⁵⁵ reveal, one recurring “bad” reason for judicial anger is that the anger-object has done something she is entitled to do. Unjust anger may also be triggered when the anger-object does something she is *required* to do. In *Harrison v. Anderson*, for example, a murder victim had, before her death, mentioned a local judge’s name in connection with a drug operation closely related to the attack that caused her eventual demise.²⁵⁶ When that judge was assigned to the homicide trial, the attorney for the accused sought recusal. The judge became enraged at the suggestion that he was involved in drug dealing. If, however, the attorney had potentially credible information that the judge’s personal interests were implicated, he was required as a matter of professional responsibility to seek the recusal. Indeed, the case makes clear why, because the judge went on to make a series of rulings against the defense that seemed designed primarily to keep his name out of the story.²⁵⁷ While any judge would be upset at the suggestion of serious criminal wrongdoing, no judge is entitled to be angry at an attorney for doing her job.²⁵⁸ Even were the allegations in the recusal motion to cause reputational harm, that would not be an unwarranted harm; the professional obligation provides the warrant.

[judge-shouts-down-defendant](#) (judge apologized, saying incident was “the worst I’ve ever had happen in a courtroom with someone being mouthy”); Michelle Caruso and Helen Kennedy, *She Doesn’t Know When To Shut Up: Motor-mouth McDougal Ticks Off Judge*, N.Y. DAILY NEWS, Sept. 10, 1998 (judge yelled “Are you physically unable to keep your mouth closed?” at defendant who whispered loudly during the prosecution’s opening statement); *N.J. court punishes judge for yelling at woman*, NJ.com (June 17, 2011) (judge told party, “Don’t you dare talk back to me.”).

These cases also implicate not just the reasons for the judges’ anger but their actions in response. A good deal of the difficulty in *Shaw* is that the judge’s reactions seem overblown, even though his anger had some basis. See Part III.B. (addressing appropriate anger manifestation).

²⁵² *Anderson v. Sheppard*, 856 F.2d 741 (6th Cir. 1988).

²⁵³ *Id.* The district judge also appeared to be angry at the plaintiff because he had resisted settlement offers toward which the judge was pushing the parties.

²⁵⁴ *Tollett v. City of Kemah*, 285 F.3d 357 (5th Cir. 2002). See also *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969) (imposition of greater penalty based upon a successful appeal violates due process).

²⁵⁵ See Alicia Cruz, *N.J. Judge Max Baker Reprimanded for Yelling at Mother During Family Court*, N.J. NEWSROOM, June 17, 2011 (judge yelled at party while she was trying to answer a question).

²⁵⁶ *Harrison v. Anderson*, 300 F.Supp.2d 690 (SD Indiana 2004).

²⁵⁷ *Id.*

²⁵⁸ See also *U.S. v. Nazarro*, 472 F.2d 302 (2d Cir. 1973) (trial judge became progressively more angry with the defense attorney as he made reasonable efforts to protect the defendant’s interests); cf. *Draughn v. Johnson*, 120 Fed.Appx. 940 (4th Cir. 2005) (noting and reversing lower-court decision granting state prisoner’s claim on habeas that the trial judge “gave the appearance of anger” when the prisoner asked his attorney to move for recusal on the ground of racial bias).

Judicial anger, then, may be undeserved by reason of being directed at persons who have exercised a right or lived up to an obligation. However, a judge’s ire sometimes hits just the right mark.

Contrast these cases with one in which a prisoner had made false allegations of serious government misconduct.²⁵⁹ Those allegations had to be thoroughly investigated before being debunked. As the reviewing court correctly concluded, the judge presiding over that case was “appropriately angered” by the prisoner’s conduct, as he had sought to waste time and divert law-enforcement resources.²⁶⁰ Similarly, federal judges in New York reportedly were “outraged” when they observed police officers telling blatant lies while under oath.²⁶¹ In such instances, anger is directly responsive to a blameworthy harm, and the objects are the persons who committed those harms. The victims, such as criminal defendants harmed by the lies of government actors, fall within the judge’s zone of care, for she is responsible for protecting their legal rights. The judge herself is a victim in many such cases, as when her reliance on lawyers’ or police officers’ good faith is abused. The offender’s wrongful actions may also make the judge an unwilling partner in a wrong, as when she lacks power to improve the performance of a borderline-incompetent lawyer who is harming his client’s interests.²⁶² More broadly, the fair administration of justice itself is within the judge’s zone of care. Insults to justice are insults about which the judge is entitled to be angry.²⁶³

Judicial anger at criminal sentencing often can be justified as well, and for a similar set of reasons.²⁶⁴ By the time of sentencing, blameworthy conduct already has been shown. Assuming, as the judge must, the accuracy of that finding, the judge is entitled to respond emotionally to any harm the defendant has caused. Expressing anger vividly demonstrates to victims and their survivors that they are within the judge’s zone of care. It communicates, in a way that other demonstrations could not, that they are members of the valued community.²⁶⁵ It also demonstrates judicial respect for the defendant. As one feels anger only where a human agent has chosen to inflict an unwarranted harm, showing anger reveals the judge’s assessment that the defendant is a fellow human possessed of moral agency. By using his authoritative

²⁵⁹ Campbell v. U.S., 2010 WL 1379992 (S.D. West Virginia, Mar. 10, 2010).

²⁶⁰ Id. See also Maroney, *Emotional Regulation and Judicial Behavior*, at 1498 (Kozinski became livid upon learning that a federal prosecutor had lied to him).

²⁶¹ Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES (May 12, 2008).

²⁶² See, e.g., Carrington v. United States, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., dissenting) (“[S]ometimes ... [t]he judge has to just sit up there and watch justice fail right in front of him, right in his own courtroom, and he doesn’t know what to do about it, and it makes him feel sad.... Sometimes he even gets angry about it.”) (quoting GERRY SPENCE, OF MURDER AND MADNESS: A TRUE STORY 490 (1983)).

²⁶³ Potegal & Novaco at 18 (“In classical Athens ... [a] frequent trope is that law itself was angry at the accused.”).

²⁶⁴ See nn.190-97, supra.

²⁶⁵ This message may be particularly important for victims whose interests have been diminished not only by the defendant’s actions but also by relative societal disadvantage or scorn. See Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 568 (1998) (quoting judge who actively denigrated gay Asian-American homicide victim).

position to send moral messages to the wrongdoer, the judge ideally frees others in society from feeling a need to do so themselves, including through vigilante action.²⁶⁶

In contrast, judicial anger might be used not to send deserved moral messages but to belittle, humiliate, or dehumanize. This is a particular danger in criminal sentencing, but is by no means limited to that setting. For example, rather than force the defendant to hear both an account of the harm he has caused and the judge's moral condemnation of those acts,²⁶⁷ she might call him a "lowlife" or "scumbag."²⁶⁸ Insults, gratuitous displays of power, extreme sarcasm, mocking, and demeaning language all reflect that judicial anger is no longer operating in isolation: instead, it has become corrupted with contempt.²⁶⁹ Contempt, like anger, reflects a judgment that a fellow human has acted badly. Unlike anger, it goes on to value that fellow human as "vile, base, and worthless."²⁷⁰ It explicitly positions its target as an inferior,²⁷¹ and motivates public declarations of that inferior status.²⁷² When judicial anger becomes intertwined with contempt, it loses its claim to justification, for it has internalized a fundamentally bad judicial value: superiority.

²⁶⁶ CAROL TAVRIS, *ANGER: THE MISUNDERSTOOD EMOTION* 48 (1983) ("in the absence of a formal judiciary, anger operates as a personal" emotion, driving individuals to "see to it that their rights are respected and justice seen to").

²⁶⁷ Benjamin Weiser, *Judge Explains 150-Year Sentence for Madoff*, N.Y. TIMES, June 28, 2011 ("In a society governed by the rule of law, [Judge Chin] wrote, the message had to be sent that Mr. Madoff would be 'punished according to his moral culpability.'").

²⁶⁸ See *In re Merlo*, 4 A.3d 932, 972 (Pa.Ct. Jud. Disc. 2011) (judge "in a tirade" called defendant a "low life" and "a scumbag"); *In re Lokuta* 964 A.2d 988, 1054 (Pa.Ct. Jud. Disc. 2008) (judge screamed at the defendant that she was "nothing but a fat pig, whore, lowlife"); cf. *Milmir Const. v. Jones*, 626 So.2d 985, 986 (Fla. App. 1 Dist., 1993) (judge called attorney a "scumball").

²⁶⁹ See nn.96-97, *supra* (anger often co-occurs with other emotions). See, e.g., *Morris v. Coker*, 2011 WL 3847590, at *1 (W.D. Tex. Aug. 26, 2011); *Taylor v. Abramajtyts*, 20 Fed.Appx. 362 (6th Cir. 2001); *In re: Moore*, 464 Mich. 98, 626 N.W.2d 374 (Mich. 2001); Alicia Cruz, *N.J. Judge Max Baker Reprimanded for Yelling at Mother During Family Court*, N.J. NEWSROOM, June 17, 2011 ("I'm a Superior Court judge that demands the respect of my position, and you will give it to me."); Dorian Block, *Bronx Supreme Court judge Joseph Dawson calls for proper attire in court*, N.Y. DAILY NEWS, July 28, 2009. One striking aspect of Judge McBryde's opinions is the frequency with which he points out the spelling and grammar errors of pro se litigants, which seems unnecessary and belittling. *Scales v. Texas*, 2007 WL 1341926, *1-2 (N.D. Tex. 2007) (repeating three times in the space of a page that the defendant submitted a document entitled "A Writ of Mandams"); *Berry v. Bridgeport Pre Release Center*, 2003 WL 21529726 (N.D. Tex. 2003) (quoting defendant's allegation that during an ankle surgery "the other side was life along," and stating that he "assumes" this was intended to convey that one side of the ankle was fixed and the other was left alone). Cf. *Fox Industries, Inc. v. Gurovich*, 2006 WL 941791 (E.D.N.Y.), at *2 (poking fun at attorney for complaining he needed additional time because of "the 'onslaught of the Sabbath'").

²⁷⁰ Cendri Hutcherson, *The Moral Emotions: A Social-Functionalist Account of Anger, Disgust, and Contempt* 11 (dissertation, 2008) (differentiating anger and contempt). Contempt sometimes is conceptualized as a mixture of anger and disgust. ROBERT PLUTCHIK, *EMOTIONS: A PSYCHOEVOOLUTIONARY SYNTHESIS* (1980).

²⁷¹ Robert C. Solomon, *THE PASSIONS: EMOTIONS AND THE MEANING OF LIFE* (1993) (anger is directed toward an equal status individual, contempt toward a lower status individual); Paul Ekman, *Antecedent Events and Emotion Metaphors*, in *THE NATURE OF EMOTION*, at 147 (contempt has a distinct facial expression, characterized by curling the lip on one side of the mouth).

²⁷² Claude H. Miller, *How Dare You! A Measure of Indignation* (Unpublished manuscript, U. Oklahoma, 2008) (importance of "publicized expression of low regard for the objects held in contempt"). Contempt therefore is uniquely destructive to relationships of equality. In marriage, for example, evidence of contempt is an especially destructive force that predicts marital conflict and dissolution. MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007) (discussing research to that effect by John Gottman).

Diagnosing the corrupt values underlying anger that has become intertwined with contempt delineates a sort of judicial anger that is particularly unjustified. But the analysis thus far also has suggested two situations in which judicial anger is most likely to be justified. One is obvious moral wrongs against society; the other is obvious moral wrongs against the legal system.

Law and morality need not (and often do not) overlap, but they sometimes do.²⁷³ Further, even in a democratic society in which a wide diversity of moral judgments is permitted, certain acts of disregard for others offend virtually everyone, demonstrating the persistence of a moral baseline.²⁷⁴ It is at these moments of convergence—where we share a strong moral instinct as to what constitutes an unwarranted wrong, what it means to act culpably, and who is a member of the valued community—that judicial anger is at its peak level of justification. This can explain not just the tolerance, but the expectation, of judicial anger at criminal sentencing, especially in cases involving *malum in se* offenses. The same can be said of judicial anger at insults to the legal system itself. Those not operating within the machinery of law are unlikely to have a strong sense of precisely what constitutes an unwarranted harm inflicted upon it, particularly as we have delegated to judges the authority to police the legal sphere. But the broader categories into which such harms fall—lying, cheating, taking advantage, insulting—often do offend a shared moral sense. The most unambiguously justified judicial anger, then, arises at the clear intersection of law and morality.

In sum, judicial anger is unjustified if its underlying reasons are literally incorrect or irrelevant; if the anger-object has acted within the zone of his rights or obligations; or if anger becomes infected with contempt. In contrast, judicial anger may be justified if it is based on an accurate perception of reality, if it is relevant to the issues properly before the judge at that moment, and if it reflects a correct judgment that the offender has inflicted an unwarranted harm on someone or something within the judge’s zone of care—particularly if that assessment coheres with widely-shared moral values.

B. Being Angry “In the Right Way”

Justified judicial anger, even though felt “with reference to the right objects, towards the right people, and with the right motive,” should be interrogated a second time, to determine if it is manifested appropriately²⁷⁵—in Aristotle’s words, whether it is felt “in the right way.” The mechanism for feeling and expressing judicial anger neither “too violently nor too weakly,”²⁷⁶

²⁷³ “Hard positivists” maintain that there is no necessary connection between morality and the category of “law.” “Inclusive positivists” agree, but maintain that in any given system of law, law might sometimes depend on, or at least overlap with, morality. See Jules L. Coleman, *Beyond Inclusive Legal Positivism*, 22 *RATIO JURIS* 359 (2009).

²⁷⁴ See, e.g., *Liteky*, 510 U.S. at 550 (condemnation of Hitler is the paradigmatically easy case); Paul H. Robinson, *Empirical Desert*, in *CRIMINAL LAW CONVERSATIONS* 29 (Paul H. Robinson et al. eds., 2009) (presenting theory of punishment rooted in empirical evidence of “shared intuitions of justice”).

²⁷⁵ O’Brien at 251 (describing learning to act differently despite that fact that the “reasons for [his] anger were real enough”).

²⁷⁶ Averill at 82 (quoting ARISTOTLE, *NICHOMACHEAN ETHICS*).

given the context, is emotion regulation. If well-regulated, judicial anger does not detract unduly from the work at hand, nor does its expression unduly disrupt either the mechanisms or image of justice. In fact, well-regulated judicial anger can benefit those interests, not merely fail to harm them.²⁷⁷

If justification relied heavily on philosophical accounts, manifestation relies heavily on affective psychology. The empirical data indicate that anger creates both opportunities and dangers for judges; effective regulation can maximize the former and minimize the latter.

1. The Behavioral Benefits of Judicial Anger

It may seem odd to speak of anger as having any benefits, given the negativity with which it often is regarded—even within psychology, it historically has been referred to as one of the “negative” emotions.²⁷⁸ But all emotions confer at least some benefits in some circumstances, and anger is no different.²⁷⁹ Anger can be constructive and prosocial.²⁸⁰ Certain of anger’s effects, particularly its tendency to facilitate judgment and motivate responsive action, make it useful to judges.

First, anger facilitates judgment. It does this in part by narrowing and focusing attention.²⁸¹ Angering events are vivid and compelling. The emotion is a signal that something of import is taking place, and it helps keep attention directed at the offending person and the situation he has brought about.²⁸² Once attention is focused on those objects, anger predisposes one to approach them.²⁸³ Whereas some emotions have a strong tendency toward withdrawal—for example, disgust makes one back away, whether literally or metaphorically—anger keeps one engaged.²⁸⁴ And, of course, anger is strongly associated with attributions of blame. Blame runs through the

²⁷⁷ It is important to note that unjustified anger, too, must be regulated. Just because anger is not warranted does not mean that judges will not feel it. People often feel emotions they should not. Maroney, *Emotional Regulation and Judicial Behavior*, at 1503. A judge may know that he is not entitled to be angry at a lawyer or party for having appealed, but may feel his temper rising nonetheless. O’Brien at 251 (“No one enjoys receiving notice of a writ or published reversal,” and “[t]here is no salt in the wound worse than that of a smug petitioner/appellant helpfully informing me in front of a crowded courtroom of a just-issued writ or reversal.”). The regulatory strategies discussed at a later juncture, see Part III.B.3., therefore also are relevant to unjustified anger. The primary focus here, however, is on the effects that even *justified* anger can have on judicial behavior.

²⁷⁸ Lerner & Tiedens at 129-31 (anger might properly be regarded as a positive emotion).

²⁷⁹ Maroney, *Persistent Cultural Script*, at 670 n.4 (emphasizing “emotion’s capacity for flexible adaptation to changing conditions”) (citing Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, in HANDBOOK OF EMOTION REGULATION, 47-68 (James J. Gross ed., 2007); Marie Vanderkerckhove et al., *Regulating Emotions: Culture, Social Necessity, and Biological Inheritance*, in REGULATING EMOTIONS 1, 1-12 (Marie Vanderkerckhove et al. eds., 2008)). Whether anger’s effects are on balance helpful or unhelpful depends on context, and should not be presumed to be negative. Litvak et al. at 301-04.

²⁸⁰ Potegal & Novaco at 19 (“‘righteous anger’ is not necessarily constructive and prosocial, but depends on who is getting angry, what they do about it, and who is telling the story”).

²⁸¹ Litvak et al. at 298; Lerner & Tiedens at 116.

²⁸² Litvak et al. at 288 (anger commands attention and is a strong judgment cue).

²⁸³ Id. at 291.

²⁸⁴ Hutcherson (noting disgust’s withdrawal tendency).

entire experience: anger will not be triggered unless the initial appraisal of the situation suggests a blameworthy actor, and will not persist unless that appraisal does as well. Thus, through the experience of anger one’s attention is focused on the offender and the harm he has caused; one is motivated to approach the situation, which provides an opportunity for a closer look; and if that closer look confirms the attribution of blame, one reaches a judgment.

Second, anger motivates responsive action. It is associated not only with judgments of injustice, but also with a motivation to restore justice.²⁸⁵ An angry person tends to have a strong desire to change the unjust situation for the better.²⁸⁶ And because “anger exacerbates risk seeking and causes people to perceive less risk,” angry persons are likely to take chances in order to bring about that change.²⁸⁷ Further, because the emotion is associated with optimism and feelings of being in control,²⁸⁸ angry people have heightened confidence in their ability to succeed, which also helps them take those chances.²⁸⁹ Experientially, anger generates the energy necessary to enact change.²⁹⁰ The physiological changes that cause one to feel “hot” or “boiling”²⁹¹ literally prepare the muscles and mind for action.²⁹² Indeed, experimental studies show that people tend to prefer being in an angry state when faced with a confrontational task, because the anger helps them both take on and succeed at the confrontation.²⁹³

Third, anger carries expressive benefits. Anger expressions—raised voice, clenched eyebrows, narrowed eyes, scowls, tensed muscles—are extraordinarily potent communicative devices.²⁹⁴

²⁸⁵ Litvak et al. at 301.

²⁸⁶ Id. at 291; Lerner & Tiedens at 116 (anger makes one “eager to act”). The way in which one strives to make the situation better may take the shape of actions that are destructive in the short term, like aggression and fighting. Nico Fridja, P. Kuipers, & E. ter Schure, *Relations among emotion, appraisal, and emotional action readiness*, 57 J. PERSON. & SOCIAL PSYCHOL. 212 (1989).

²⁸⁷ Litvak et al. at 296-97; Lerner & Tiedens at 123-24; Jennifer Lerner & Dacher Keltner, *Fear, Anger, and Risk*, 81 J. PERSON. & SOCIAL PSYCHOL. 146 (2001).

²⁸⁸ C.A. Smith & P.C. Ellsworth, *Patterns of Cognitive Appraisal in Emotion*, 48 ATTITUDES AND SOCIAL COGNITION 813 (1985); Cai Xing, *The Effects of Emotion and Motivation on Attentional Patterns in the Decision-Making Process 2-3* (dissertation, Brandeis University Dept. of Psychology, 2009).

²⁸⁹ Litvak et al. at 295, 296-97, 303 (“Anger co-occurred with appraisals of individual control and triggered continuing perceptions of such control,” not “just in the immediate situation but in novel situations.”); Jennifer S. Lerner et al., *Effects of fear and anger on perceived risks of terrorism: a national field experiment*, 14 PSYCHOL. SCI. 144 (2003) (angry and happy persons have similar levels of optimism about the self; angry people tend to believe they can control and improve a situation, and conquer obstacles); Lerner & Tiedens at 125 (anger triggers “a bias toward seeing the self as powerful and capable”).

²⁹⁰ Lerner & Tiedens at 130 (“studies have found that angry people often sense themselves as ‘more energized’ to assault the cause of their anger”).

²⁹¹ NUSSBAUM, UPHEAVALS OF THOUGHT at 60-61; ARISTOTLE, ON THE SOUL, quoted in WHAT IS AN EMOTION? at 49 (the “substance” of anger is “the boiling of the heart’s blood and warmth”).

²⁹² Nico Fridja, *Action Readiness*, in THE OXFORD COMPANION TO EMOTION AND THE AFFECTIVE SCIENCES, at 1.

²⁹³ Litvak et al. at 303; see also id. at 297 (presenting experimental evidence supporting conclusion that “anger could produce better judgments and choices than neutrality in situations where risk aversion is inappropriate.”)

²⁹⁴ Id. at 287.

Such physical manifestations command the attention of others and convey seriousness of purpose.²⁹⁵ Anger, simply put, conveys power.²⁹⁶

These attributes of anger are of obvious utility to judges—indeed, one is tempted to say they are necessary to judging. Given the welter of stimuli to which judges are exposed, they may need the assistance of anger to flag possible misconduct and direct attention to it. Given the wearying nature of the job, particularly in the high-volume courts where most judges work,²⁹⁷ they may need anger’s boost to keep attention from sagging. And, clearly, the most critical task with which we entrust our judges is that of rendering judgment. Anger helps them perceive what their judgments are, for the emotion is a clear sign of the underlying appraisal.²⁹⁸ It then helps them muster both the desire to do what has to be done and the energy to get it done. Moreover, the expressive benefits are considerable. The object of judicial anger is on immediate notice: her attention, too, is more sharply focused, and the judge’s message has substantially greater power. And when a member of the public sees the judge’s outrage, she can immediately perceive the nature of the underlying judgment, serving transparency interests. If that judgment coheres with her own, she is assured that the judge is a worthy steward, one who cares deeply about the things about which she wants him to care.

Finally, judicial anger can be particularly helpful because making attributions of blame can be risky. Judges sometimes have to alienate powerful interests, upset potential voters, even jeopardize public safety. Recall, for example, Judge Sprizzo’s scathing indictment of prosecutors’ incompetence, which required him to free a number of people who likely were high-level narcotics dealers.²⁹⁹ Such a decision takes resolve, which anger can fortify. Similarly, some judges who concluded that police officers had committed perjury hesitated in enacting that judgment, out of fear of ruining careers or conferring an undeserved benefit on criminal defendants.³⁰⁰ Outrage can help judges push past those fears. It also will make the costs of action seem more worthwhile. The angry judge has a greater sense of his potency; that, combined with a more optimistic outlook, helps to reassure him that his actions can bring about

²⁹⁵ Id. at 287-88.

²⁹⁶ WALTER B. CANNON, *BODILY CHANGES IN PAIN, HUNGER, FEAR, AND RAGE* (1915) (“Anger is the emotion preeminently serviceable for the display of power.”); Potegal & Novaco at 10 (“While community members may experience anger at the social deviance of others, expressing that anger is the particular province of dominant individuals and leaders who are deemed to be justified in doing so.”); Lerner & Tiedens at 116; Litvak et al. at 296; Larissa Z. Tiedens, *Anger and advancement versus sadness and subjugation: the effect of negative emotion expressions on social status conferral*, 80 J. PERSON. & SOCIAL PSYCHOL. 86 (2001) (expressing anger raises social status).

²⁹⁷ Anleu & Mack at 612 (“judges’ emotional labor can entail significant costs on judges themselves, including ‘distress and emotional exhaustion’”).

²⁹⁸ Ellen Peters et al., *Affect and Decision Making: A “Hot” Topic*, 19 J. BEHAV. DECISION MAKING 79, 80 (2006) (“affect can act as information: at the moment of judgment or choice, decision makers consult their feelings about a choice and ask, ‘How do I feel about this?’”) (citing N. Schwarz & G. Clore, *Mood as information: 20 years later*, 14 PSYCHOL. INQUIRY 294 (2003)).

²⁹⁹ N.136, *supra*.

³⁰⁰ Benjamin Weiser, *Police in Gun Searches Face Disbelief in Court*, N.Y. TIMES, May 12, 2008.

an ultimately positive outcome, even if the repercussions feel negative in the short term. Further, if the judge chooses to broadcast his anger, he significantly increases the power of his message. Thus, as scholars have noted, anger triggered by injustice generates the “zeal” necessary for difficult action in service of social betterment³⁰¹—zeal judges can put to good use.

2. The Behavioral Dangers of Judicial Anger

Anger’s effects, however, are not uniformly positive. Just as all emotions confer benefits in some circumstances, they create dangers in others.³⁰² For judges, the main dangers of anger are that it may trigger relatively shallow patterns of thought; lead to premature or overly punitive decisions; bleed over into unrelated contexts; and manifest in a grossly disproportionate way.³⁰³

First, anger triggers relatively shallow thought patterns.³⁰⁴ Other ostensibly “negative” emotions, such as sadness, tend to spur deeper information processing.³⁰⁵ Anger tends to have the opposite effect. An angry person, like a happy one, will tend to skate more on the surface of available information.³⁰⁶ Anger is strongly associated with greater use of heuristics, or short-cut guides to interpreting stimuli.³⁰⁷ It also is associated with reliance on other sorts of readily “accessible cognitive scripts,”³⁰⁸ such as stereotypes. Anger therefore increases the odds of interpreting others’ behavior and intentions in conformance with pre-conceived ideas about how one expects

³⁰¹ Potegal & Novaco at 19 (noting popular notion that good works can be triggered by anger, and giving as an example movement to abolish slavery); MALCOLM X, *THE AUTOBIOGRAPHY OF MALCOLM X* 366 (1966) (“They called me ‘the angriest Negro in America.’ I wouldn’t deny that charge. ... I believe in anger. The Bible says there is a time for anger.”).

³⁰² Maroney, *Persistent Cultural Script*, at 642.

³⁰³ This was one of Seneca’s primary concerns. ANDERSON, *ANGER IN JUVENAL AND SENECA* at 169 (to Seneca, anger does not suit the “role of ruler and judge”; anger “should as much as possible be routed from the mind of [the] judge,” lest he “commit the most outrageous injustice in the name of righteous wrath; and, stubborn in his anger, he will refuse to bend before criticism”).

³⁰⁴ Litvak et al. at 293 (distinction between anger’s process and outcome effects), 298-99 (depth-of-processing effects). Note, however, that at least one study shows this tendency is not invariable. “Because anger is associated with the desire to confront, oppose, and argue,” angry persons may “become particularly vigilant about creating oppositional arguments,” in the course of which they examine evidence carefully and “engaged in better hypothesis testing.” Id. at 299 (citing M.J. Young & L.Z. Tiedens, *Mad enough to see the other side: The effect of anger on hypothesis disconfirmation* (working paper, 2009)).

³⁰⁵ Xing, *The Effects of Emotion and Motivation on Attentional Patterns in the Decision-Making Process* (sadness associated with systematic decision-making).

³⁰⁶ Litvak et al. at 299; Xing (anger associated with faster decisions and reliance on heuristics).

³⁰⁷ Larissa Z. Tiedens & S. Linton, *Judgment under emotional certainty and uncertainty: the effects of specific emotions on information processing*, 81 *J. PERSON. & SOCIAL PSYCHOL.* 973 (2001) (anger “activated heuristic processing (e.g., greater reliance on the superficial cues of the message and less attention to the argument quality)”); Larissa Z. Tiedens, *The effect of anger on the hostile inferences of aggressive and non-aggressive people*, 25 *MOTIVATION AND EMOTION* 233 (2001) (anger activated “heuristic processing (e.g., use of chronically accessible scripts)”).

³⁰⁸ Litvak et al. at 299 (“Angry persons tend more to find explanations for behavior in accessible cognitive scripts, rather than consider alternatives.”); Lerner & Tiedens at 126.

people of that sort—whatever the salient category—to act.³⁰⁹ Anger-fueled shallowness of thought can be characterized not only by taking shortcuts but also by quick endorsement of information that confirms the initial anger appraisal.³¹⁰ The angry person also will be disproportionately persuaded by angry arguments.³¹¹ Thus, though the emotion’s approach tendency ensures some closer look, that closer look may be relatively cursory, biased, and self-reinforcing.³¹²

Second, anger might lead to premature decisions. The heightened sense of certainty it brings can make one feel confident in the correctness of her decisions at a relatively early stage, discouraging consideration of alternatives.³¹³ This decisional effect is the natural outcome of the process effects described above. Script-driven, shallow processing enables quick decision-making.³¹⁴ Similarly, a disinclination to second-guess oneself allows for fast responsive action. While these tendencies confer obvious advantages in situations in which further deliberation will be of no utility, they are just as obviously disadvantageous where information-gathering and reflection would disrupt an unwarranted assumption, uncover a subtle point, or otherwise bring the ultimate judgment in line with a more factually grounded or desirable one.³¹⁵

Third, and as suggested in the previous Section, anger can have bleed-over effects. The fact of being angry at one person, for one set of reasons, can dramatically increase the odds of becoming angry at another person, for another set of reasons.³¹⁶ Such incidental anger effects have been

³⁰⁹ Anger thus can activate prejudice. D. DeSteno et al., *Prejudice from thin air: The effect of emotion on automatic intergroup attitudes*, 15 *PSYCHOL. SCI.* 319 (2004); D.M. Mackie et al., *Intergroup emotions: explaining offensive action tendencies in an intergroup context*, 79 *J. PERSON. & SOCIAL PSYCHOL.* 602 (2000).

³¹⁰ This bias toward emotion-confirming information is not unique to anger. Litvak et al. at 298. It also is true of most decision making; once one has come to an initial hypothesis one selectively attends to and privileges evidence that confirms it. See Keith Findley, *Tunnel Vision*, in *CONVICTION OF THE INNOCENT: LESSONS FROM PSYCHOLOGICAL RESEARCH* 303-24 (Brian L. Cutler ed. 2012).

³¹¹ D. De Steno et al., *Discrete emotions and persuasion: the role of emotion-induced expectancies*, 86 *J. PERSON. & SOCIAL PSYCHOL.* 43 (2004); Lerner & Tiedens at 125.

³¹² Litvak et al. at 290 (describing a feedback dynamic, in which the more anger one feels, the more one perceives others to be responsible for a negative event, and the more one perceives others to be responsible for a negative event, the more anger one feels) (citing B.M. Quigley & J.T. Tedeschi, *Mediating effects of blame attributions on anger*, 22 *PERSONALITY & SOCIAL PSYCHOL. BULL.* 1280 (1996)).

³¹³ Litvak et al. at 299 (certainty “gives people the meta-level sense that they already have enough information to feel confident in their judgment”).

³¹⁴ *Id.* at 289 (emotions automatically trigger a set of responses that enable a person to deal quickly with problems or opportunities).

³¹⁵ *Id.* at 299 (though angry persons “will be more biased than neutral individuals in a judgmental context in which additional mental resources will aid decision-making,” in “some contexts, more thinking can produce worse judgments”; for example, “induced sadness increased reliance on arbitrary anchors in judgment,” showing that the “decreased depth of processing associated with anger may be a boon in some situations” (citing G.V. Bodenhausen et al., *Sadness and susceptibility to judgmental bias: The case of anchoring*, 11 *J. PSYCHOL. SCI.* 320 (2000)).

³¹⁶ Litvak et al. at 287-88. See ALSO NUSSBAUM, *UPHEAVALS OF THOUGHT* at 98 (“Given one and the same induced physiological condition, subjects will identify their emotion as anger if placed in a situation in which they are given reasons to be angry (e.g., at the experimenters for their insulting and intrusive questions).”)

robustly demonstrated.³¹⁷ The angry person is likely to interpret ambiguous stimuli consistently with an anger hypothesis, even in entirely unrelated situations.³¹⁸ Given the centrality of blame to anger, one common outcome of this phenomenon is that “anger triggered in one situation can automatically elicit a motive to blame in other situations.”³¹⁹ For example, experimentally-induced irrelevant anger has been shown in mock-jury studies to correlate with more punitive judgments of tort defendants, as well as with greater levels of punishment.³²⁰ Thus, anger can—and often does—spill over, leading the already-angry person to find additional reasons to be angry, assign blame, and take punitive action. This incidental effect is clearly disadvantageous if the new anger-objects have done nothing to deserve it.

Finally, anger can manifest in a grossly disproportionate fashion. Though the emotion is not always associated with hostility and aggression, it often is.³²¹ It can drive urges to yell, strike out, and injure. When such urges pass a tipping point, they can feel literally involuntary—hence the vernacular description of rage as “losing it.”³²² And even when anger does not boil over into verbal or physical aggression, it can make one “indiscriminately punitive.”³²³ The powerful nature of the emotion is in this instance one of its greatest liabilities. Further, the sense of personal power anger entails might combine uncomfortably with judges’ actual power over other people. Power that goes to a judge’s head, particularly if combined with the feelings of superiority attending contempt, can foster arrogance and abuse. A judge may act like an

³¹⁷ Lerner & Tiedens at 116 (anger has “infusive potential,” in that it “commonly carries over from past situations to infuse normatively unrelated judgments and decisions”).

³¹⁸ One psychological hypothesis for why this would be so is the “Appraisal Tendency Framework,” which proposes that the “original appraisal patterns associated with each emotion triggered distinct appraisal tendencies in the subsequent judgments,” meaning the subsequent judgment is likely to be consonant with the first. Litvak et al. at 295, 288-89.

³¹⁹ Id. at 289.

³²⁰ Lerner & Tiedens at 119 (angry persons’ judgments of criminals and unjust behaviors are likely to be relatively harsh; the emotion also reduces generosity); D.A. Small & J. Lerner, *Emotional Politics: Personal sadness and anger shape public welfare preferences* (unpublished manuscript, 2005) (induced-anger subjects provided less assistance to welfare recipients than sad subjects); Neal Feigenson et al., *The Role of Emotions in Comparative Negligence Judgments*, 31 J. APPLIED SOCIAL PSYCHOL. 576 (2001); Neal R. Feigenson, *Emotions, Risk Perceptions, and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003).

³²¹ Lerner & Tiedens at 116.

³²² This is an interesting point of gender divergence. Men typically see anger expression as a way of taking control, while women tend to see it as loss of self-control. One hypothesis is that women are more reluctant to express anger and do it only when anger is at a higher intensity, when they are more likely to feel they already have lost control. Litvak et al. at 304. See n.20, supra (previewing future focus on emotion and female judges).

³²³ Lerner & Tiedens at 116, 123.

“absolute monarch,”³²⁴ or declare—in the words of one trial judge—“I am God in my courtroom.”³²⁵

If the previously-described cluster of anger attributes is necessary to judging, this cluster seems anathema to it. We hope judges will engage in deep thinking and analysis if the legal or factual issues before them are at all complex. We expect them to consider alternatives and resist simplistic conclusions. Stereotypes, particularly very pernicious ones based on factors like race or gender, would seem to have no proper place.³²⁶ An angry judge might cut off deliberation and argument before important ideas and information have time to emerge. A strong sense of certainty can blind her to a more complicated reality.

It seems clear, too, that we hope judges will assess people, issues, and cases on their own merits. Most judges juggle many cases at once, meaning anger triggered in one easily can infect multiple others. Litigated cases usually are comprised of a long series of interactions between the judge and a large cast of characters, meaning grievances easily can accumulate and relevant distinctions become muddy.³²⁷ Bleed-over effects therefore pose a concrete danger in the real world of judging.

Moreover, it nearly goes without saying that we would rather our judges not engage in violent anger displays.³²⁸ When a judge truly “loses it,” she has also lost control over the courtroom, impairing both her ability to project authority and popular perceptions of justice. Indeed, it is precisely these displays that draw the most media attention. We hope, further, that judges will be punitive only to the degree called for by the situation, particularly as they serve as a hedge against popular calls for disproportionate punishment. Finally, we hope that judges will use their considerable power responsibly, but anger’s extraordinary strength might push them to abuse it.

³²⁴ *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of Judicial Conference of U.S.* 264 F.3d 52, 68, (D.C. Cir. 2001) (quoting *Chandler v. Judicial Council of Tenth Circuit of U. S.*, 398 U.S. 74, 84, (1970)). See also *id.* at 66 (“Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt.”); *Ungar v. Sarafite*, 376 U.S. 575, 601-02 (1964) (Douglas, J. dissenting) (expressing concern with judicial “tyranny”).

³²⁵ *Gottlieb v. S.E.C.*, 310 Fed.Appx. 424, 425 (2d Cir. 2009). This particular danger of judicial anger is acute in judges with high levels of trait anger. In the Article to follow, focused on poor judicial temperament, see n.20, *infra*, I will argue that judges who deploy their anger in a relentlessly top-down fashion have aggrandized to themselves the wrath typically reserved for gods and kings. See Potegal & Novaco at 9-12 (divine wrath a feature of virtually every known religious system); ARISTOTLE, RHETORIC, quoted in WHAT IS AN EMOTION?, at 44-52 (the “anger of divine king is mighty”); Averill at 86-87 (tracing accounts of anger in Old and New Testaments of the Christian Bible). See also *Ungar v. Sarafite*, 376 U.S. 575, 601-02 (1964) (Douglas, J. dissenting) (expressing concern with judicial “tyranny”); n.217, *supra* (Judge McBryde compared to both God and a king).

³²⁶ Lerner & Tiedens at 123 (“the mere experience of anger can automatically activate precursors to prejudice”).

³²⁷ Recall the consistently infuriating Mr. Schwarz of *Fox Industries*. Nn. 147-50, *supra*.

³²⁸ See Rene Stutzman, *Judge Shea to be Reprimanded by Florida Supreme Court for Yelling at Attorneys*, ORLANDO SENTINEL, June 1, 2011.

In sum, because judges often work under difficult conditions in which the ideals of deliberation, impartiality, and calm already are besieged, it seems that adding anger to the mix might sound the death knell for those ideals.³²⁹

One recent case, *Sentis Group v. Shell Oil*,³³⁰ provides a rich example of many of these potentially deleterious effects. In that case, a district court judge dismissed plaintiffs' case with prejudice as a sanction for discovery abuse. The Eighth Circuit's careful dissection of the path to that dismissal, performed under the doctrinal auspices of a judicial-bias allegation, provides the raw material from which we may discern a judicial anger spiral in action.

The judge³³¹ in *Sentis* had ample grounds for anger. The plaintiffs played games with discovery, provided misleading information, and seemed to be looking for ways to evade orders.³³² Once triggered, though, that anger took the judge down a very bad road. He became predisposed to interpret every new dispute consistently with his anger baseline. Possible lies became clear ones; investigation seemed unnecessary.³³³ He became disproportionately receptive to arguments pointing to willful wrongdoing, even though defendants (sensing an opportunity) seemed deliberately to be "fanning the flames" of his outrage.³³⁴ Conversely, he became curtly dismissive of contrary evidence.³³⁵ These phenomena came to a head in an in-chambers hearing, a portion of which reads as follows:

THE COURT: Have you produced the 58 documents that were the original request that's generated the trip to the Eighth Circuit[?]

MR. STARRETT [Plaintiffs' counsel]: To them?

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

[...]

THE COURT: I kept telling you to produce stuff.... You ducked. You wove. You did everything to keep from producing them. You go to the Eighth Circuit. They tell

³²⁹ O'Brien at 251 ("It is hard to suffer fools gladly when my courtroom is packed with people wanting my urgent attention.")

³³⁰ 559 F.3d 888 (8th Cir. 2009).

³³¹ In a telling move, the Circuit appears studiously to have avoided naming the judge, referring to him only as "the court" or "the district court." 559 F.3d at 888-905. The decision not to call the judge out personally reflects its oft-noted "sympathy" for the judge and its unwillingness to "condemn" his anger, even as it found its effects unacceptable. *Id.* at 891. Contrast this move with other courts that have chosen specifically to name the offending persons, so as to make the anger more pointed. Cf. *Maples v. Thomas*, No. 10-63, Slip op. Jan. 18, 2012 (Court, ruling that death-row inmate did not lose opportunity to appeal because of gross negligence by Sullivan & Cromwell, repeatedly called out two of that firm's associates by name).

³³² 559 F.3d at 891-98 (recounting plaintiff's actions taken that "provoked" the defense and district court).

³³³ *Id.* at 897 (demonstrating certainty that all allegations of plaintiff misconduct were true).

³³⁴ *Id.*

³³⁵ *Id.* (judge interrupted plaintiff's counsel when he offered contrary information to explain plaintiff's conduct).

you to produce them, and you still goddamn don't produce them. Now what the hell do you not understand? You must produce them. Jesus Christ, I don't want any more ducking and weaving from you on those 58 documents. That's unbelievable. That gives credence to everything I just heard from the defense. Now, tell me why else you don't think that I ought to dismiss this case You better tell me. I'm about ready to throw this thing out. When you tell me that you still haven't produced those goddamn 58 documents after four times, four times I've ordered you to produce them. You are abusing this Court in a bad way. Now tell me.

MR. STARRETT: Well, may I start with the fact—

THE COURT: Yes.

MR. STARRETT: —that you have not ruled four times to give them those 58 documents—

THE COURT: That's it. I'm done. I'm granting the defendant's motion to dismiss this case for systematic abuse of the discovery process. Mr. Harris [defense counsel], I direct you to prepare a proposed order with everything you've just put on that presentation. I'll refine it and slick it up. [Plaintiff's witness] has abused this court, has misled you, has lied on his deposition. It's obvious he's lying about that e-mail. This case is gone. ... What a disgrace to the legal system in the Western District of Missouri. ... We're done. We are done, done, done. What a disgrace. ... We're done.

As the initial exchange shows, the judge had a short fuse. To be sure, counsel's "To them?" is asinine, even taunting—to whom would they produce discovery if not the defendants?—but at an earlier juncture it might have been merely irritating. By that point in the litigation, though, it was all that was required to set the judge off. His language quickly became hostile and unbounded. The final straw was counsel's effort to explain that not all of the documents had been ordered four times. Though perhaps tin-eared, and certainly poorly-timed, the assertion was true; counsel's distinction between discovery that had and had not been subject to particular orders was accurate and potentially relevant.³³⁶ But that technical distinction had ceased to have meaning to the judge. The simple cognitive schema of discovery abuse, and the flat characterization of plaintiffs and their attorneys as liars, appeared to supply sufficient answers. All discussion was cut off; the judge was simply "done." And once he was "done," he went straight to the most punitive response possible: dismissal of the entire action, with prejudice.

The Circuit went to great pains not to condemn the judge for what appears to have been an understandable human reaction to trying circumstances. The initial point here is the same; good judges sometimes will lose it,³³⁷ and while such moments do not impugn them as people, neither

³³⁶ Id. at 902-03.

³³⁷ Maroney, *Emotional Regulation and Judicial Behavior*, at 1542.

does the fact that they had good reasons always salvage the situation. And though the Circuit carefully ruled only on the basis that the judge’s anger spiral created an *appearance* of partiality,³³⁸ the second point here is deeper: it created *actual* partiality. More, it did so in an entirely predictable way, a way that likely is operative in many cases, very few of which will be so closely dissected. This is precisely what judicial anger, even when it has a legitimate starting point, can do if left unchecked—hence Judge Posner’s caution to “beware” the angry judge.³³⁹

3. Regulating Judicial Anger To Maximize Benefits and Minimize Dangers

So at this juncture we find ourselves back on the horns of our original dilemma. Anger giveth and anger taketh away. Justified anger is necessary to critical aspects of judging, but simultaneously has tendencies that can impair judging.³⁴⁰ We therefore have come to the juncture at which judges need to call upon emotion regulation. Emotion regulation is the mechanism by which humans “fine-tune” our emotional responses to serve situational demands.³⁴¹ Strong regulation skills enable judges to draw on the unique features of anger when they are helpful and to minimize them when they are not.³⁴²

In previous work, this author has outlined a theory of judicial emotion regulation that provides the relevant theoretical model.³⁴³ Rather than repeat that analysis, the purpose of this Section is succinctly to encapsulate the model’s fundamentals, to demonstrate its applicability to anger, and to offer additional insights about anger management.

What I have called the *engagement model* of judicial emotion regulation is comprised of three core components: preparing realistically for emotion, responding thoughtfully to it, and integrating lessons about (and from) emotion into one’s judging. Insistence on emotionless judging, in contrast, encourages denial and suppression. That approach not only fails to extinguish undesired emotions, it tends instead to magnify emotions’ effects and to needlessly consume cognitive resources. Much of the psychological literature on which this model relies has to do with anger.³⁴⁴ The empirical evidence is particularly persuasive in showing that anger suppression consumes resources such as memory; distorts social judgment; risks ironic emotion “rebound” effects; and increases physiological arousal.³⁴⁵ Engagement thus provides a solid model for judicial anger management.

³³⁸ 559 F.3d at 891.

³³⁹ POSNER, HOW JUDGES THINK at 110.

³⁴⁰ Lerner & Tiedens at 132 (“The emerging portrait of the angry decision maker is more complex than one might have expected.”).

³⁴¹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1504 & n.117 (citing Vandekerckhove et al., at 3).

³⁴² Id. at 1492 (analogizing to heuristics, which are beneficial in some instances and detrimental in others).

³⁴³ See id. at 1531-32.

³⁴⁴ See, e.g., id. at 1527.

³⁴⁵ Id. at 1511 (cataloging experimental evidence showing negative effects of anger suppression).

First, judges can prepare realistically for anger by acknowledging that many of the people they encounter in the course of their work are bound to make them mad. A given judge's anger triggers will, upon introspection, break into relatively stable categories, such as lying, cheating, and abusing others.³⁴⁶ Using a regulation technique known as anticipatory cognitive reappraisal, a judge may think in advance about how those recurrent triggers relate to her professional goals and obligations.³⁴⁷ For example, she may realize that she tends to get snappy when a party has prevailed against her on appeal.³⁴⁸ The judge can remind herself that just as she has a job to do, so too does the lawyer; that just as she is trying to do her job well, so too is the lawyer; and that dealing with error correction is part of being a judge in a system with appellate review, a system that confers many benefits, not just to society but also to her. The judge thus can precommit to a set of ideas that robs a recurring situation of its angering significance. When that situation arises, it is far less likely to make her angry.³⁴⁹

Judges will, of course, continue to get angry. Not all stimuli can be anticipated or rethought. More fundamentally, judges are not “icebergs,”³⁵⁰ and if they remain open to the dramas unfolding before them they cannot help but react at least some of the time. Fortunately, anger can be cognitively reappraised midstream as well as in advance.³⁵¹ The judge can choose to re-interpret a provocative stimulus in a way that will disrupt or replace the emotion. For example, if an attorney appears to be gloating over his appellate victory, the judge can decide to chalk up his obnoxious manner to social ineptitude. That attribution may prompt annoyance, or even sympathy, but is unlikely to trigger anger.

If cognitive reinterpretation is not realistic—the lawyer really *is* gloating—the judge can introspect, looking squarely at her anger to interrogate its basis.³⁵² She might ask, for example, if she is truly angry at this lawyer, for this incident, or whether anger has cumulated or crept in from elsewhere. She would do well, too, to ask herself what is it that she feels has been harmed. If it is her reputation or dignity, does this lawyer's conduct pose any real threat to those goods? Even if it does, the judge can ask whether responding with anger reflects normatively defensible values.³⁵³ Ought she, for example, prize her public reputation to such a degree, or ought she

³⁴⁶ See Part I.A; O'Brien at 251 (thus describing first step in handling his anger: “I first had to articulate the causes”).

³⁴⁷ Maroney, *Emotional Regulation and Judicial Behavior*, at 1508-09, 1514-17 (defining cognitive reappraisal and collecting evidence of its efficacy).

³⁴⁸ O'Brien at 251.

³⁴⁹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1514-15 (just as a doctor learns to examine a gruesome wound for clinically relevant evidence, the judge may learn to examine a gruesome autopsy photo for legally relevant criteria; both come to experience such stimuli as not disgusting but informational).

³⁵⁰ Id. at 1537 (quoting judge in *People v. Carter*, No. C053369, 2009 WL 626113 (Cal. Ct. App. Mar. 12, 2009)).

³⁵¹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1522-23.

³⁵² Id. at 1524-25. Experimental data suggests that simply noticing that one is angry, and openly acknowledging the anger, can lessen anger's behavioral effects. Litvak et al. at 292-93.

³⁵³ O'Brien at 253 (“The rules are rules. They are not commandments. It may be a sin to break a commandment, but a rule is simply a rule.”)

find her sense of dignity and worth elsewhere? She may also ask herself honestly whether she has come to regard the offending lawyer as literally beneath her, a moral inferior—indicating the corrosive presence of contempt. Determining that anger lacks an adequate basis, or reflects values that the judge has reason to reject, can effectively diffuse the feeling.

Even assuming that anger passes all these checkpoints, the judge can ask herself whether it is relevant to the task at hand, and what impact giving voice to it might have.³⁵⁴ Being disrespected by a gloating lawyer is unlikely to be directly relevant to any concrete legal issue. It may be relevant to courtroom management, as it poses a public challenge to the judge’s authority, but a loud or hostile response might be counterproductive. Such a response might, for example, model for others bad behavior the judge would then have to expend energy controlling.³⁵⁵ She therefore may choose to mask her wrath, smile, and calmly move on to business. On the other hand, one way to diffuse anger is to change the offender’s behavior. Displaying anger could prompt such a change. To that end, rather than mask anger completely, the judge may want to find a controlled way to express it directly to the lawyer, letting him know that disrespect is not appreciated and will have consequences. Expressing anger may prompt an apology, which would diffuse the present situation,³⁵⁶ or it may convince the lawyer that it is in his interest to find a different way of interacting, which may forestall future clashes.

No matter whether or how the judge chooses to express anger within the four corners of the case, she may pursue other forms of disclosure. She may choose to discuss angering experiences with family, friends, other judges, or even the public.³⁵⁷ While disclosing anger may not diffuse it, is often makes it easier to live with.³⁵⁸ Finally, when efforts at regulation fail—when, say, the judge loses composure when she wishes she had not, or continues to feel anger she knows she should not—she can choose to be forgiving of her own humanity and seek to learn from the experience.³⁵⁹ She may find it necessary sometimes to apologize herself.³⁶⁰ She also may decide to focus on the satisfying aspects of her job, and to regard occasional turmoil as the price of gaining the many benefits of being a judge.³⁶¹

³⁵⁴ Maroney, *Emotional Regulation and Judicial Behavior*, at 1540-41.

³⁵⁵ Id. at 1540 & n.325 (explaining how judges regulate emotion in order to model courtroom behavior for others) (citing Anleu & Mack at 603, 607-11). If in a different situation the judge’s anger is based in reality, defensible, and relevant, she might nonetheless choose to mask it—for example, because she wants to hide her opinions from a jury. Id. at 1540-41.

³⁵⁶ Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85 (2004) (explaining power of apology).

³⁵⁷ Maroney, *Emotional Regulation and Judicial Behavior*, at 1527-30.

³⁵⁸ Id. at 1527-30.

³⁵⁹ Id. at 1535-36 n.295 (“[T]he most productive step for the judge might be simply to notice the emotion, accept its existence, and disengage from any judgment of it, including a negative self-judgment.”).

³⁶⁰ *Vancouver judge yells at convict, then apologizes*, SEATTLE TIMES, March 3, 2009, (judge shouted “shut your damn mouth” at defendant, then apologized).

³⁶¹ O’Brien at 253 (“Judging is one of the world’s great jobs. We are independent, relatively well compensated, and ... have box seats to the great game of life. The knowledge that this is so puts the stresses of the job into proper perspective.”).

As this analysis reveals, judicial engagement with anger promises to be as helpful as is judicial engagement with emotion more generally. It is important to emphasize that the model is not a rigid checklist, nor could it be. The most critical element in judicial anger management, as with all emotion regulation, is flexible responsiveness to context.³⁶² Considering several regulatory challenges unique to anger helps demonstrate how this is so.

Research involving the well-known “ultimatum game” paradigm provides an instructive example.³⁶³ In a simple ultimatum game, an experimental subject is told that a game partner will be given a sum of money, and will choose what portion of it to offer the subject. If the subject accepts the partner’s offer, she receives that sum; if she rejects the offer, neither gets anything. Accepting any offered amount therefore is economically advantageous. Subjects tend, however, to reject offers they perceive to be unfair.³⁶⁴ Tellingly, they disproportionately reject unfair offers when they believe the game-partner to be a human being (rather than a computer program), and those rejections are associated with a strong response in brain areas correlated with anger.³⁶⁵ Such studies demonstrate that anger can motivate principle-driven decisions, even when those decisions are disadvantageous from the perspective of pure utility.³⁶⁶ That is, it seems to take particular effort to override an anger response where doing so would confer a concrete benefit—such as some money over no money—at the cost of a moral benefit.

The fact that anger has this characteristic, though, does not dictate any particular response from the perspective of judicial emotion regulation. Favoring principle-driven decisions over utilitarian ones is of obvious benefit where this is just the calculus we expect of our judges. One might, for example, thus characterize the recent decision of a federal district judge to reject what he assessed to be a patently unfair settlement proposal between the Securities and Exchange Commission and Citigroup.³⁶⁷ While accepting the settlement would have conferred some financial benefit to harmed parties, and would have saved the judge future time and effort (not to mention criticism), anger may have enabled him to assume those costs. If the deal was actually unfair, those costs are worthwhile, as the parties now have an incentive to craft a fairer one. In

³⁶² Maroney, *Emotional Regulation and Judicial Behavior*, at 1510-11, 1514 (“competent judicial emotion regulation, ... depends upon flexibility and judgment in responding to a full array of real-time challenges”) (citing Vandekerckhove et al. at 3; Richard J. Davidson et al., *Neural Bases of Emotion Regulation in Nonhuman Primates and Humans*, in HANDBOOK OF EMOTION REGULATION, at 47).

³⁶³ See Martin A. Nowak et al., *Fairness Versus Reason in the Ultimatum Game*, 289 SCIENCE 1773, 1773 (2000) (describing ultimatum games).

³⁶⁴ Samuel M. McClure et al., *Conflict Monitoring in Cognition-Emotion Competition*, in HANDBOOK OF EMOTION REGULATION, 204, 211-12.

³⁶⁵ Id. The fact that humans are far more likely to be angered at another human, as opposed to an inanimate object (unless it is anthropomorphized), drives home the salience of anger as the driving force in enacting fairness judgments.

³⁶⁶ Id.

³⁶⁷ *S.E.C. v. Citigroup Global Markets*, 2011 WL 5903733, *4 (S.D.N.Y. 2011) (“the Court concludes, regretfully, that the proposed Consent Judgment is neither fair, nor reasonable, nor adequate, nor in the public interest”).

other instances, elevation of moral principle over practicality is not what we ask of our judges. If, for example, a judge were presented with a carefully-brokered *Alford* plea³⁶⁸ that would free three almost-certainly innocent inmates, we would not want her to reject it because she is angry that the state stubbornly refuses to vacate the convictions.³⁶⁹ The deal may be unfair, but so too is the consequence of rejecting it.³⁷⁰ If the inmates are competent they should be the ones to make that choice, given that they would be the ones to bear the costs. We therefore would expect the judge to find a different manner in which to channel her anger.

Other aspects of anger that affect its regulation profile similarly point to the importance of context. Because of anger's strong tendency to motivate and fuel approach, it may take particular effort to halt its physical concomitants. These tendencies are perfectly suited to some situations, terribly to others. If a lawyer begins to make a wildly improper argument in front of the jury, the judge may need to react quickly and forcefully to forestall a mistrial—she may need to raise her voice, smack the bench, point at the lawyer to get his attention, and force him immediately to stop talking. In other instances she will have (or can create) time and space within which to choose a different reaction.³⁷¹ Similarly, anger's certainty renders the processes of cognitive reappraisal less accessible and more effortful. Avoiding reappraisal prevents waffling, which confers a distinct advantage in some situations.³⁷² But other situations call for deliberation and introspection, even aggressive skepticism about one's initial conclusions, even if the judge is facing criticism as a “waffle” and is under pressure to reach a fast conclusion.

These distinctions necessarily depend on context, substance, and particulars. They depend, in other words, on reasoned analysis, self-reflection, and normative justification, tasks that rest in the non-algorithmic mental processes of human judges. Judges must invest time and thought in recognizing what tends to make them angry, how they tend to act when angry, and how anger

³⁶⁸ *North Carolina v. Alford*, 400 U.S. 25 (1970) (finding constitutional the entry of a guilty plea from a defendant who protests his innocence).

³⁶⁹ This example is drawn from the case of the “West Memphis Three.” See Campbell Robertson, *Deal Frees “West Memphis Three” in Arkansas*, N.Y. TIMES, Aug. 20, 2011, at A1. One may be tempted to say the judge should use that anger to motivate an act of courage in dismissing the charges himself, but in many jurisdictions—including Arkansas—he may lack that authority, see Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes “Actual Innocence,”* 22 U.A.L.R. LAW REV. 629 (2000), meaning he has the choice of taking the *Alford* plea or consigning the inmates to continued incarceration.

³⁷⁰ WEST OF MEMPHIS (Fearless Films, Amy Berg Dir., 2012) (documentary showing path to the *Alford* pleas, as well as hearing in which pleas entered, despite one defendant's reluctance to take any action suggesting responsibility; quoting that defendant's friend as saying, “This deal sucks,” but showing he took it in order to free co-defendant from death row).

³⁷¹ Maroney, *Emotional Regulation and Judicial Behavior*, at 1584 n.287 (“[A] retired judge ... reported that he did sometimes walk out of his courtroom if something happened to make him “really upset.” He would take some time to calm down and think, then walk back in and respond to whatever had happened.”).

³⁷² O'Brien at 251 (“most decisions from the bench must be made without benefit of preparation, reflection, or consultation”); Lerner & Tiedens at 132 (“anger can buffer decision makers from indecision, risk aversion and over analysis”).

has worked to help or hinder their judging. Even where triggers are legitimate, judges will be far better prepared to manifest them constructively if they commit to engagement rather than suppression.³⁷³ These skills, fortunately, can be practiced and learned.³⁷⁴ Anger management is a process that, while never perfected or finished, should grow far easier over time.

In sum, judicial anger lacks a necessarily negative tilt: not only it can be put to good or bad ends, depending on its underlying reasons, but it can be expressed poorly or well, depending on how closely its regulation matches situational demands.

C. A New Model of Judicial Anger

This Part has proposed a new model for judicial anger, that of the righteously angry judge. Rooted in the core themes of anger itself—a judgment that a rational agent has committed an unwarranted wrongdoing, which generates a desire to affix blame and assign punishment, and facilitates action to carry out that desire—the model may be encapsulated as follows.

Righteous judicial anger is, first, based on an accurate perception of reality. It is responsive to actual, not imagined, acts, committed by persons who had some meaningful level of choice, and who have caused real harms, not ephemeral or insignificant ones. The righteously angry judge strives to be as open as possible to accurate perception of these elements, to be diligent in her search for truth, and to prevent anger from coloring her view or blocking her ability to update information.

Second, righteous judicial anger is relevant. It bears on issues properly before the judge and sheds light on how those issues should be evaluated. The righteously angry judge strives to perceive the causes of her anger—whether, for example, it reflects the seriousness of an attorney’s defiance of court orders, or whether it stems from that attorney’s consistently abrupt manner, or from an unrelated insult suffered earlier in the day. If the anger is irrelevant, or only marginally relevant, the judge seeks to ground her actions in other factors.

Third, righteous judicial anger reflects beliefs and values that are worthy of a judge in a democratic society. The righteously angry judge seeks to avoid anger at attorneys, witnesses, and parties for taking actions they have a right, or even an obligation, to take. She seeks to do so even though such actions might be highly irritating, entail acts that are oppositional to the judge and her decisions, open her to the possibility of criticism and reversal, and make her work significantly harder. The righteously angry judge also seeks to avoid contempt, as that emotion reflects an unwarranted claim of superiority. Finally, the worthiness of the beliefs and values

³⁷³ O’Brien at 251 (“I used to be an angry judge. The reasons for my anger were real enough. Being a judge is stressful. For the past 10 years, though, I have been mellow. In deciding to change, I first had to articulate the causes of my stress and then to determine which were within my ability to minimize. (If some of my complaints sound petty, or unreasonably harsh, they in fact were. That was part of my self-discovery.)”)

³⁷⁴ Maroney, *Emotional Regulation and Judicial Behavior* at 1522-23, 1555.

underlying judicial anger is at its peak where it reflects widely-shared moral sentiments of harm, culpability, and shared community.

Righteous judicial anger not only is accurate, relevant, and reflective of good values, it also is experienced and expressed in an appropriate way. The righteously angry judge is aware of both the benefits and dangers of anger, and seeks to maximize the former and minimize the latter. She seeks to draw on anger's certainty and power to make fast, difficult, even risky, decisions, when that is what justice requires, and to resist its pull where the situation merits greater scrutiny and caution. She interrogates her punitive impulses to see if they are well-grounded and commensurate to the harm. She considers the impact on others of expressing her anger, and seeks to embody only those reactions as will further some legitimate interest—such as stopping destructive behavior, broadcasting authority, or channeling society's moral messages.

Finally, righteous judicial anger is enabled by strong emotion-regulation skills, which can be learned and must be continually practiced. The righteously angry judge seeks to prepare realistically for anger, for it is certain to come; to respond thoughtfully to anger, for she may be able to rethink the situation or select a different response to it; and to integrate anger into her behavior and decision making, by making use of it when it is righteous and by finding other outlets—such as disclosure to a trusted colleague—when it is not. The judge must not deny or suppress her anger; rather, she must face it honestly and engage with it closely. She must also accept that she is fallible. She will make mistakes, allow anger to bleed from one situation to another, value things like her pride more than she ought, and indulge in displays she wishes she had not. The righteously angry judge faces these failings and seeks to learn from them.

When judicial anger has all these characteristics, feeling and expressing it serves the ends of justice—indeed, in the Aristotelian view it *is* justice. As the Greek tradition would hold, when “law itself is angry,” so too should be the judge.³⁷⁵

Conclusion

As this Article has shown, judicial anger is inevitable, and its manifestation both frequent and obvious. We cannot get away with ignoring it. Interestingly, it also has shown that despite the historical party line against any judicial experience or expression of emotion, anger escapes blanket condemnation in practice. The close look shows why anger would be treated specially: in the real world, people in contact with law often act in ways that would make any reasonable person—including a reasonable judge—angry. Fellow judges are reluctant to impose on others feeling rules they could not possibly live up to themselves. Nor *should* they live up to such a standard. Courts' reluctance to condemn judicial anger is deepened by a strong sense that it is

³⁷⁵ Potegal & Novaco at 18.

sometimes warranted, such that failing to feel it would be suspect. If a judge were to feel entirely unmoved by lying, scheming, derailing legal proceedings, and harming others for no reason, we might question whether she has lost touch with reality in some fundamental, career-ending way. As Robert C. Solomon, the eminent contemporary philosopher of the emotions, has written, we cannot “have a sense of justice without the capacity and willingness to be personally outraged.”³⁷⁶

On the other hand, even though we cannot look away from judicial anger, we might sometimes wish we could. Angry judges scream, flail about, threaten, and insult lawyers, parties, and one another; in the most extreme instances, they physically attack. Just as the absence of anger seems fundamentally at odds with our aspirations for judges, unbounded anger does as well. While the YouTube-viewing or Judge Judy-loving public might consume such incidents with glee, those who care deeply about justice and its image cannot help but wince.

While adherence to the ideal of dispassionate judging places us on record as Stoics, then, reality has made us accidental Aristotelians. Law is of two minds about judicial anger for good reason.³⁷⁷ Our legal culture simply cannot eschew judicial anger, any more than it could applaud all its iterations. We therefore have no choice but to ask whether it stems from good reasons and is felt in the right way.

However, because we have not come to this place deliberately or transparently, our analyses tend to be shallow and undertheorized. Indeed, it is typical in the caselaw for a reviewing court to recite the evidence of anger, quote the general principles of cases creating a generous buffer zone, and simply conclude that the anger was (or, far less frequently, was not) within the buffer. Just as often, courts dodge the issue entirely—for example, by quickly characterizing the display as harmless error. Popular assessments of judicial anger are even less coherent, as they tend to swing on whose ox is being gored. This Article has demonstrated that our evaluation can be more disciplined and principled. By focusing tightly on questions of justification and manifestation, we can test judicial anger for righteousness.

We should entertain no illusions that this will be easy. Judges will not find it easy to feel only righteous anger, nor will those of us who judge the judges find it easy to diagnose righteousness. Indeed, we should expect these tasks to be hard.³⁷⁸ This is particularly so as—despite a shared

³⁷⁶ ROBERT C. SOLOMON, A PASSION FOR JUSTICE: EMOTIONS AND THE ORIGINS OF THE SOCIAL CONTRACT 34, 42 (1990) (“negative” emotions” such as “outrage” have “an essential place in the cultivation of justice”); *id.* at 243 (“Our sense of justice is not just the product of New Age sentiments but a dynamic engagement in a world which we ourselves know to be often offensive and unfair ... a world we accordingly resent and act to change.”).

³⁷⁷ Lerner & Tiedens at 132 (anger might take a decision maker in a bad direction sometimes, a good direction in others); Peters et al. at 83 (emotion “can have frightening effects on decision making,” but also can assist “decision makers to integrate disparate information and to make sense out of a complex world”).

³⁷⁸ Lerner & Tiedens at 132 (“angry decision makers may then, as Aristotle suggested long ago, have a difficult time being angry at the right time, for the right purpose, and in the right way”).

moral baseline—we are unlikely ever to be in true consensus as to the normative values underlying all instances of judicial anger. As Aristotle wrote,

it is not an easy task to delineate how, at whom, at what, and for how long one should anger, nor at what point justifiable anger turns to unjustifiable. He who swerves a bit toward excess of anger is not to be blamed[, but] [h]ow far and how much one has to swerve before he becomes ... blameworthy is not easy to specify.³⁷⁹

Faced with this difficulty, we need not throw up our collective hands, rely on vague intuitions, or deal with anger episodes as a disconnected series of one-offs. The model set forth in this Article provides us with theoretical tools with which to imagine righteous judicial anger and practical tools with which to achieve it. Except in extreme circumstances, and there will be some, judges who fall short of this ideal merit not condemnation but guidance. Righteously angry judges, in contrast, merit our approval and thanks.

³⁷⁹ ARISTOTLE, NICOMACHEAN ETHICS, quoted in WHAT IS AN EMOTION?, at 51.