

# Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?

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*Emotion is a fundamental aspect of human existence. In normal, healthy people, feelings about options exert a powerful influence on choice. Intuition and anecdote suggest that people react more positively toward others whom they like or for whom they feel sympathy than toward others whom they dislike or for whom they feel disgust. Empirical research in the field of psychology confirms that impression. Experiments also show that this effect extends to legal contexts, revealing that emotional reactions to litigants influence the decisions of mock jurors in hypothetical civil and criminal cases. This Article explores the question whether feelings about litigants also influence judges' decisions. Unlike jurors, judges are expected to put their emotional reactions to litigants aside. Can they do it? The first reported experiments on the topic using actual judges as subjects suggest that they cannot.*

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Passion and prejudice govern the world; only under the name of reason.<sup>1</sup>

—Reverend John Wesley

## I. Introduction

Eighty years ago the great American trial lawyer Clarence Darrow observed that: “Jurymen seldom convict a person they like, or acquit one that they dislike. The main work of a trial lawyer is to make a jury like his client, or, at least, to feel sympathy for him; facts regarding the crime are relatively unimportant.”<sup>2</sup> Similarly, United States Circuit Judge Jerome Frank asserted that “Mr. Prejudice and Miss Sympathy are the names of witnesses whose testimony is never recorded, but must nevertheless be reckoned with in trials by jury.”<sup>3</sup> We suspect that these observations are exaggerations but that they also hold some truth.<sup>4</sup> Sympathy and empathy in the jury box can be defended as softening the sometimes sharp edges of our legal system.<sup>5</sup> Judges, however, are supposed to make reasoned

1. Letter from John Wesley to Joseph Benson (Oct. 5, 1770), in *SELECT LETTERS, CHIEFLY ON PERSONAL RELIGION: BY THE REV. JOHN WESLEY* 192, 193 (New York, T. Mason & G. Lane 1839).

2. EDWIN H. SUTHERLAND & DONALD R. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* 431 (8th ed. 1970).

3. *Skidmore v. Balt. & Ohio R.R. Co.*, 167 F.2d 54, 62 (2d Cir. 1948) (quoting ALBERT S. OSBORN, *THE PROBLEM OF PROOF* 112 (photo. reprint 1975) (1926)); see also JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 130 (1949) (“Many juries in reaching their verdicts act on their emotional responses to lawyers and witnesses . . .”).

4. See VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 148 (1986) (“We must conclude that sometimes Mr. Prejudice and Miss Sympathy are sitting in the jury box.”); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 57 (2001) (“Too often, to capture the jury’s emotion is to win the case.”); James Marshall, *Evidence, Psychology, and the Trial: Some Challenges to Law*, 63 COLUM. L. REV. 197, 221 (1963) (“If a juror feels more sympathy for one party, or takes a strong dislike to a witness, that emotional response will affect, if not wholly determine, the weight he gives to the evidence.”). But see Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants’ and Victims’ Characteristics on Jurors’ Verdicts*, in *THE PSYCHOLOGY OF THE COURTROOM* 83, 109 (Norbert L. Kerr & Robert M. Bray eds., 1982) (“[I]t remains difficult to state that extralegal characteristics are of sufficient strength to override the legal evidence presented during a trial.”). See generally DENNIS J. DEVINE, *JURY DECISION MAKING: THE STATE OF THE SCIENCE* 91–121 (2012) (reviewing empirical literature on trial participant characteristics, and recognizing that certain characteristics have been shown to influence juror verdicts).

5. See NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 340 (2007) (praising the “jury’s distinctive approach of commonsense justice” even when a jury diverges from the decision a judge would render). Patrick Henry praised the use of the jury as subjecting defendants to the judgment of “peers” who “are well acquainted with his character and situation in life.” Patrick Henry, *Speech in the Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* (June 23, 1788), in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, in 1787*, at 576, 579 (Jonathan Elliot ed., 2d ed. 1876); see also *Ferguson v. Moore*, 39 S.W. 341, 343 (1897) (“Tears have always been considered legitimate arguments before a jury . . .”).

decisions based on the facts and the law rather than on the basis of enmity or empathy for litigants.<sup>6</sup> Judicial oaths require judges to put their feelings towards litigants aside.<sup>7</sup> But judges are human beings too. Are they any less swayed by their prejudices and sympathies than juries?<sup>8</sup>

Whether judges can make dispassionate decisions or not, politicians and the public expect and even demand that they do so. When United States Supreme Court Justice David Souter announced his retirement, for example, President Barack Obama stated that he was searching for a replacement who would embrace emotions in at least some settings. As the President put it: “I view that quality of empathy, of understanding and identifying with people’s hopes and struggles, as an essential ingredient for arriving a[t] just decisions . . . .”<sup>9</sup> Innocuous as it might seem to suggest that a Supreme Court Justice should try to understand the perspectives of those who appear before her, the statement ignited a firestorm of criticism.<sup>10</sup> Some suggested that the President’s emphasis on empathy was tantamount to abandoning the rule of law.<sup>11</sup> Equating empathy with partiality, Senator

6. See *People ex rel. Union Bag & Paper Corp. v. Gilbert*, 256 N.Y.S. 442, 444 (Sup. Ct. 1932) (“Every litigant is entitled to nothing less than the cold neutrality of an impartial judge who must possess the disinterestedness of a total stranger to the interests of the parties involved in the litigation . . . .”); *Ranger v. Great W. Ry. Co.*, (1854) 10 Eng. Rep. 824 (H.L.) 831 (appeal taken from Eng.) (“[A] judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other.”); MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 19 (1986) (describing how a judge often “acquires the capacity of anesthetizing his heart”); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 630 (2011) (“Insistence on emotionless judging—that is, on judicial dispassion—is a cultural script of unusual longevity and potency.”).

7. See, e.g., 28 U.S.C. § 453 (2012) (“I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons . . . .”).

8. See HANS & VIDMAR, *supra* note 4, at 148 (“[I]t is clear that Mr. Prejudice and Miss Sympathy cannot account for most of the disagreement between judge and jury.”). Valeria Hans and Neil Vidmar were referring to the research of Harry Kalven and Hans Zeisel, who concluded that in roughly 20% of the criminal cases in which judges and juries disagreed on verdicts, the source of the disagreement was the sympathies of the jury. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 217 (1966).

9. President Barack Obama, Press Briefing on Justice Souter’s Retirement (May 1, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09](http://www.whitehouse.gov/the_press_office/Press-Briefing-By-Press-Secretary-Robert-Gibbs-5-1-09), archived at <http://perma.cc/6W6M-673F>; see also Robert Alt, *Sotomayor’s and Obama’s Identity Politics Leave Blind Justice at Risk*, U.S. NEWS & WORLD REP., May 27, 2009, <http://www.usnews.com/opinion/articles/2009/05/27/sotomayors-and-obamas-identity-politics-leave-blind-justice-at-risk>, available at <http://perma.cc/AX85-W442> (“[W]e need somebody who’s got the heart—the empathy—to recognize what it’s like to be a young teenage mom[,] . . . to be poor or African American or gay or disabled or old—and that’s the criteria by which I’ll be selecting my judges.”).

10. See Maroney, *supra* note 6, at 636–40 (describing the reaction to President Obama’s statements about judicial empathy and recognizing that criticism of empathy as undisciplined and undemocratic came primarily from those who saw empathy as an emotional standard).

11. See, e.g., Stephen G. Calabresi, Op-Ed., *Obama’s “Redistribution” Constitution*, WALL ST. J., Oct. 28, 2008, <http://online.wsj.com/articles/SB122515067227674187>, archived at <http://perma.cc/C24B-X82R> (“To the traditional view of justice as a blindfolded person weighing

Charles Grassley asserted that “the most critical qualification of a Supreme Court Justice [is] the capacity to set aside one’s own feelings so that he or she can blindly and dispassionately administer equal justice for all.”<sup>12</sup>

Most judges embrace Senator Grassley’s views and routinely reject the idea that emotions should influence their decisions. Asked about the proper role of a judge during her Senate confirmation hearing, United States Supreme Court Justice Sonia Sotomayor responded: “[J]udges can’t rely on what’s in their heart. . . . [I]t’s not the heart that compels conclusions in cases. It’s the law.”<sup>13</sup> Subsequently, President Obama’s second nominee to the Supreme Court, Elena Kagan, articulated the same view during her own Senate confirmation hearings. When asked whether it was ever appropriate for a judge to rely on his or her feelings, even in extremely close cases, she replied, “it’s law all the way down.”<sup>14</sup> Other judges commonly echo these claims. A recent nominee to the United States District Court for the Northern District of Georgia, Judge Michael Boggs, testified before the Senate Judiciary Committee: “The comforting part about being a judge is that that the law should prevail in each and every case. Sympathy for the party, empathy for the party has no role.”<sup>15</sup> Similarly, United States Circuit Judge Denny Chin stated: “Empathy, of course, should play no role in a judge’s determination of *what* the law is. . . . We do not determine the law or decide cases based on ‘feelings’ or emotions or whether we empathize with one side or the other.”<sup>16</sup>

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legal claims fairly on a scale, he wants to tear the blindfold off, so the judge can rule for the party he empathizes with the most.”).

12. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 17 (2009) (statement of Sen. Charles Grassley, Member, S. Comm. on the Judiciary) [hereinafter *Sotomayor Confirmation Hearing*]; 155 CONG. REC. 20,706 (2009) (statement of Sen. Charles Grassley) (“Justice is blind. Empathy is not. Empathetic judges take off the blindfolds and look at the party instead of merely weighing the evidence in light of what the law is.”).

13. *Sotomayor Confirmation Hearing*, *supra* note 12, at 120.

14. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 103 (2010). Justice Kagan was alluding to the “turtles all the way down” anecdote. See generally Stephen Hawking, *A Brief History of Time 1* (10<sup>th</sup> anniversary ed. 1998) (providing a well-known version of the turtle story wherein a woman asserts the world sits on the back of a turtle, which in turn sits on another turtle, and thus “it’s turtles all the way down.”).

15. Alisa Chang, *Obama Judicial Nominee Gets a Hostile Reception from Democrats*, NPR (May 13, 2014, 4:05 PM), <http://www.npr.org/2014/05/13/312197619/obama-judicial-nominee-gets-a-hostile-reception-from-democrats>, archived at <http://perma.cc/W2ZN-8ZJR>. The Senate never confirmed Judge Boggs. Peter Sullivan, *Obama Drops Nominee Opposed by CBC*, BRIEFING ROOM, HILL (Dec. 31, 2014, 9:50 AM), <http://thehill.com/blogs/blog-briefing-room/228303-obama-drops-controversial-nominee-opposed-by-black-caucus>, archived at <http://perma.cc/T5FG-63XV>.

16. Denny Chin, Essay, *Sentencing: A Role for Empathy*, 160 U. PA. L. REV. 1561, 1563–64 (2012).

Judges have good reason to adopt a dispassionate perspective. Senator Grassley's concern that empathy equates to partisanship has some bite to it: judges might well feel more empathy for those whose positions in litigation resonate more closely with their own political or cultural views. The idea that one set of rules applies to the sympathetic litigant and another set applies to the unsympathetic litigant is not consistent with the rule of law. Furthermore, cases set precedent. If judges decide cases of first impression based on ephemeral sympathies, then their emotions can direct the course that law follows.<sup>17</sup>

United States Supreme Court Justice William Brennan stands out as a rare exception to the judicial party line on emotion. In a widely discussed article, he expressed deep skepticism about the wisdom of insisting that judges cast aside their emotions.<sup>18</sup> He claimed that “[s]ensitivity to one’s intuitive and passionate responses . . . is . . . not only an inevitable but a desirable part of the judicial process . . . .”<sup>19</sup> In an open embrace of emotion in judging, Justice Brennan credited one of his most famous opinions, *Goldberg v. Kelly*,<sup>20</sup> to his empathy for the plight of welfare beneficiaries who might improperly face termination of their benefits.<sup>21</sup> The precedent that *Goldberg* created has resonated through ensuing decades, suggesting that judicial emotion influence the evolution of the law.

Justice Brennan’s praise for judicial “passion” sparked debate in the academy,<sup>22</sup> but one searches in vain for other judicial endorsements of his views. In addition to rejecting emotional influences as a general matter, as Justices Kagan and Sotomayor did, judges commonly deny the influence of emotion in specific cases, even as they admit the circumstances tug at their heartstrings. For example, an Ohio appellate judge expressed deep sadness for “the tragic loss of life this case presents” but then added that “when I put on the robe as judge, I must not let my feelings, my emotions . . . influence my review and application of the law.”<sup>23</sup> Another judge noted that even though a juvenile defendant’s “life circumstances ma[d]e [her]

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17. See Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883–84 (2006) (expressing the concern that common law judges focus on the “this-ness” of each case, and if a case is not representative of the full array of events that a rule or principle will cover, the judge’s ruling may lead to a distortion in lawmaking).

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

19. *Id.* at 10.

20. 397 U.S. 254 (1970).

21. See Brennan, *supra* note 18, at 20 (“*Goldberg* can be seen as injecting passion into a system whose abstract rationality had led it astray.”).

22. E.g., Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 796–97 (1991).

23. *State v. Cutts*, No. 2008CA000079, 2009 WL 2170687, at \*36 (Ohio Ct. App. July 22, 2009) (Hoffman, J., concurring).

heart weep,” she had to set that aside.<sup>24</sup> Suppressing emotion seems like a professional imperative. As one scholar put it, “to call a judge emotional is a stinging insult, signifying a failure of discipline, impartiality, and reason.”<sup>25</sup> Similarly, United States Supreme Court Justice Felix Frankfurter asserted that judges must “submerge private feeling on every aspect of a case,”<sup>26</sup> even as he expressed doubts about judges’ ability to do so.<sup>27</sup> United States Supreme Court Justice Robert Jackson represents a rare exception to the party line. He described “dispassionate judges” as mythical beings like “Santa Claus or Uncle Sam or Easter bunnies.”<sup>28</sup>

Unlike Justices Frankfurter and Jackson, however, most judges claim that they can effectively put emotion aside. In a book on advocacy, Justice Antonin Scalia and his coauthor warned litigants that “[a]ppealing to judges’ emotions is misguided because . . . [g]ood judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities, including most especially their emotions.”<sup>29</sup> In a well-regarded book on judging, Connecticut Superior Court Judge Robert Satter asserted that “[c]learly I do not decide a case on the basis of my liking one party more than the other.”<sup>30</sup> In writing about the judicial experience, United States Circuit Judge Frank Coffin acknowledged the tug of emotion when he stated that “[j]udges, no less than lay persons, are subject to instant responses to inflammatory stimuli . . . includ[ing] repugnance to or liking [of] a party” but concluded that “[s]uch reactions do not, in most judicial chambers, flourish under the light of intense study . . . .”<sup>31</sup> United States Circuit Judge Richard Posner agreed that “most judges are (surprisingly to nonjudges) unmoved by the equities of the individual case,” although he also conceded that “few judges are fully inoculated against the siren song of an emotionally compelling case.”<sup>32</sup> Judge Posner ultimately concluded that emotions influence judges, but only in rational ways.<sup>33</sup>

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24. *Commonwealth v. White*, 910 A.2d 648, 658 (Pa. 2006) (internal quotation marks omitted).

25. Maroney, *supra* note 6, at 631.

26. *Pub. Util. Comm’n v. Pollak*, 343 U.S. 451, 466 (1952) (statement of Frankfurter, J.).

27. *Id.* (“But it is also true that reason cannot control the subconscious influence of feelings of which it is unaware.”).

28. *United States v. Ballard*, 322 U.S. 78, 94 (1944) (Jackson, J., dissenting).

29. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 32 (2008).

30. ROBERT SATTER, *DOING JUSTICE: A TRIAL JUDGE AT WORK* 78 (1990).

31. FRANK M. COFFIN, *ON APPEAL: COURTS, LAWYERING, AND JUDGING* 255 (1994).

32. RICHARD A. POSNER, *HOW JUDGES THINK* 119 (2008).

33. *Id.* at 106 (“[Emotion] is triggered by, and more often than not produces rational responses to, information.”).

Despite such assertions, we suspect that for judges it is not truly “law all the way down.” Courts are emotional places.<sup>34</sup> Judges are exposed to the full spectrum of emotions, many of them unpleasant. Lawyers make impassioned pleas on behalf of their clients, some of whom judges find sympathetic and some of whom judges find repugnant. Judges see gruesome photographs of injuries and crime scenes, witnesses sob while testifying, and spouses fight bitterly for custody of their children. One judge described his work as “seeing absolute misery passing in front of you day in, day out, month in, month out, year in, year out . . . .”<sup>35</sup> At times, the judge’s moral intuitions may conflict with the outcome dictated by the law. Indeed, one judge lamented that “sometimes . . . [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.”<sup>36</sup> Only rarely do judges depart from the usual judicial script, however, and admit that emotion influences their judgments.

Concern that judges cannot actually decide cases based entirely on the law rather than on their feelings about litigants has resonated with many non-judge commentators since the dawn of legal realism nearly a century ago.<sup>37</sup> Legal realists argued that judges’ moods, emotions, and reactions to litigants influence, or even determine, their judgments.<sup>38</sup> As one scholar put it, “of the many things which have been said as to the mystery of the judicial process, the most salient is that decision is reached after an emotive experience in which principles and logic play a secondary part.”<sup>39</sup> The belief that judges cannot be as dispassionate as their roles demand is widespread.<sup>40</sup> Indeed, the assertions by Justices Sotomayor, Kagan, and

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34. See *United States v. Wexler*, 79 F.2d 526, 529–30 (2d Cir. 1935) (“It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion.”).

35. Sharyn Roach Anleu & Kathy Mack, *Magistrates’ Everyday Work and Emotional Labour*, 32 J.L. & SOC’Y 590, 611 (2005).

36. *Carrington v. United States*, 503 F.3d 888, 899 (9th Cir. 2007) (Pregerson, J., concurring in part and dissenting in part) (quoting GERRY SPENCE, *OF MURDER AND MADNESS* 378 (1983)); see also Terry A. Maroney, *Angry Judges*, 65 VAND. L. REV. 1207, 1208 (2012) (“Judges get angry.”).

37. See, e.g., Maroney, *supra* note 6, at 652–57 (“The realist take on judicial emotion, though thin, revolved around two core ideas: it exists, and it exerts greater influence over the processes and products of judging than previously had been acknowledged.”).

38. See Jerome M. Frank, *Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave Like Human Beings*, 80 U. PA. L. REV. 17, 25 (1931) (noting the Holmesian argument that “[t]he personal element is unavoidable in judicial decisions”); Maroney, *supra* note 6, at 652–53 (describing the “emotional element” of legal realism).

39. Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 480 (1928).

40. See LOUIS P. GOLDBERG & ELEANORE LEVENSON, *LAWLESS JUDGES* 7 (1935) (“It is puerile to imagine that by the assumption of the ermine a judge is transformed from an ordinary human being of flesh, blood, passions and learnings, to a cold, calculating and disinterested

Scalia bear a striking resemblance to the claims of formalism that most judges and scholars now reject as implausible.<sup>41</sup>

Despite the longstanding debate about whether judges can adhere to their dispassionate roles, little hard data exists on the role emotions play in judging. Numerous studies suggest that judges' political orientation affects their judgment.<sup>42</sup> Research also suggests that judges seem attuned to their public images.<sup>43</sup> One recent study also indicates that judges' affinity for their children affects their decisions.<sup>44</sup> But research on judges' emotional reactions to litigants is lacking. Does Clarence Darrow's pronouncement on sympathy and juries apply to judges as well? This Article provides—for the first time—experimental research using over 1,800 state and federal trial judges as research subjects in an attempt to answer that question. We conclude that judges' feelings about litigants influence their judgments.

## II. How Emotion Can Influence Judicial Decision Making

As we noted above, Judge Posner and others have argued that judges either suppress or convert their emotions into rational decisions.<sup>45</sup> If so, then a judge's affinity or dislike for a litigant is unlikely to be a source of

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applier of the law.”); Shirley A. Abrahamson, *A View from the Other Side of the Bench*, 69 MARQ. L. REV. 463, 491 (1986) (“Judges, like jurors, have personal predilections and values.”); Maroney, *supra* note 6, at 640–42 (noting the “apparent futility of the script of judicial dispassion”); Soia Mentschikoff, *The Significance of Arbitration—A Preliminary Inquiry*, 17 LAW & CONTEMP. PROBS. 698, 701 (1952) (“The felt drive for the just result, even when hidden below the manipulation of prior cases and statutes, has always been present.”); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 665–66 (1989) (labeling the idea that judgment in criminal cases is dispassionate as a “myth”).

41. See Brennan, *supra* note 18, at 4 (labeling as “almost unimaginable today” the early twentieth-century formalist conception of the judge as “a legal pharmacist, dispensing the correct rule prescribed for the legal problem presented”).

42. See LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 65–85 (2013) (reviewing the literature on political orientation and judicial decision making). See generally JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 115–77 (2002) (summarizing how the political orientation of justices has influenced Supreme Court decisions through various periods of United States history); CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (presenting a detailed study of the voting patterns of Democratic and Republican appointees on federal appellate courts).

43. See LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 4 (2006) (arguing that judges may try to gain approbation of particular audiences through their decisions and policies).

44. See Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37, 38 (2015) (demonstrating that “judges with at least one daughter vote in a more liberal fashion on gender issues than judges with sons”).

45. See *supra* notes 29–33 and accompanying text.

concern. We have our doubts, however. Emotions are ubiquitous.<sup>46</sup> They wash across the human brain like water on a flat rock. Joy, anger, disgust, and fear ignite quickly in the mind and easily consume reason.<sup>47</sup> Emotions influence what information people process,<sup>48</sup> what they remember,<sup>49</sup> and how they react.<sup>50</sup> The reach of emotions is also difficult to detect<sup>51</sup> and hard to control.<sup>52</sup> Consequently, even with effort, powerful emotional content can easily influence what otherwise appear to be rational judgments in several different ways. For judges, this means that factors unrelated to the primary legal judgment—including race and gender of the litigants—that trigger emotional responses can creep into their decisions.

Previous research we have conducted on the role of judicial intuition suggests that judges—like most adults—do not easily convert their emotional reactions into orderly, rational responses.<sup>53</sup> Judges too often rely on their intuitive, emotional reactions without subjecting them to “the light of intense study” that is supposed to produce rational choices.<sup>54</sup> Our conclusion rests both on our own empirical investigations and on the widely accepted view that people make decisions in two distinct modes: intuitively (using what psychologists often call “System 1”) and deliberately (using what psychologists often call “System 2”).<sup>55</sup> Intuitive or emotional

46. See R.B. Zajonc, *Feeling and Thinking: Preferences Need No Inferences*, 35 AM. PSYCHOLOGIST 151, 153 (1980) (“There are probably very few perceptions and cognitions in everyday life that do not have a significant affective component . . .”).

47. See *id.* (explaining that emotional reactions can precede deliberative thought processes).

48. See R.J. Dolan, *Emotion, Cognition, and Behavior*, 298 SCIENCE 1191, 1191–92 (2002) (describing how emotional stimuli influence perception separate from attentional mechanisms).

49. See Seymour Epstein, *Integration of the Cognitive and the Psychodynamic Unconscious*, 49 AM. PSYCHOLOGIST 709, 716 (1994) (“When a person responds to an emotionally significant event . . . [t]he experiential system automatically searches its memory banks for related events . . .”).

50. See Dolan, *supra* note 48, at 1194 (suggesting that “emotion-related processes can advantageously bias judgment and reason”).

51. See Joshua D. Greene, *The Secret Joke of Kant’s Soul*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS AND DEVELOPMENT 35, 36 (Walter Sinnott-Armstrong ed., 2008) (“[P]eople make choices for reasons unknown to them, and they make up reasonable-sounding justifications for their choices, all the while remaining unaware of their actual motives and subsequent rationalizations.”); Piotr Winkielman & Kent C. Berridge, *Unconscious Emotion*, 13 CURRENT DIRECTIONS PSYCHOL. SCI. 120, 120 (2004) (suggesting that entirely unconscious emotional processes may drive a person’s behavior and reactions).

52. See Ronald de Sousa, *Here’s How I Feel: Don’t Trust Your Feelings!*, in EMOTIONS AND RISKY TECHNOLOGIES 17, 22 (Sabine Roeser ed., 2010) (“Even in our attempts to reason rigorously, we are susceptible to the influence of emotions.”); Zajonc, *supra* note 46, at 156 (“Unlike judgments of objective stimulus properties, affective reactions . . . cannot always be voluntarily controlled.”).

53. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 6–9 (2007).

54. See *supra* note 31 and accompanying text.

55. See generally DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (Shelly Chaiken & Yaacov Trope eds., 1999) (delineating the history of the dual-process model); DANIEL

judgments are “spontaneous, intuitive, effortless, and fast.”<sup>56</sup> Deliberative processes are “deliberate, rule-governed, effortful, and slow.”<sup>57</sup> Because intuitive judgments are faster and effortless, people often rely too heavily on intuition alone.<sup>58</sup> Our research indicates that judges also commonly favor compelling intuitive reactions over careful deliberative assessments—even when the intuitive reactions are clearly wrong.<sup>59</sup> Furthermore, judges even make these kinds of mistakes when performing familiar job-related tasks.<sup>60</sup>

The well-known “Linda the Bank Teller” problem, created by psychologists Amos Tversky and Daniel Kahneman, illustrates nicely how excessive reliance on intuition can lead to poor judgment.<sup>61</sup> Tversky and Kahneman described “Linda” as follows: “Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear demonstrations.”<sup>62</sup> When asked to rank various statements concerning Linda by the likelihood that they are true, people ranked the statement “Linda is a bank teller and is active in the feminist movement” as more likely than “Linda is a bank teller.”<sup>63</sup> Because the former is necessarily a subset of the latter, this is illogical. The stereotypical script for someone with Linda’s characteristics at that moment in American culture, however, fit well with commonly held beliefs about women who were active in the feminist movement. People relied on this intuitive social script to assess statements about Linda’s characteristics, rather than relying on deductive logic.<sup>64</sup> Linda does not *sound* like

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KAHNEMAN, THINKING, FAST AND SLOW 20–26 (2011) (explaining this dual-process model of thinking). The labels “System 1” and “System 2” were first used by psychologists Keith Stanovich and Richard West. Keith E. Stanovich & Richard F. West, *Individual Differences in Reasoning: Implications for the Rationality Debate?*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 421, 436 (Thomas Gilovich eds., 2002).

56. Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 55, at 49, 49; *see also* KAHNEMAN, *supra* note 55, at 24 (“System 1 continuously generates . . . impressions, intuitions, intentions, and feelings.”).

57. Kahneman & Frederick, *supra* note 56, at 49.

58. *See* Daniel T. Gilbert, *Inferential Correction*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT, *supra* note 55, at 167, 167 (“[O]ne of psychology’s fundamental insights is that judgments are generally the product of nonconscious systems that operate quickly, on the basis of scant evidence, and in a routine manner, and then pass their hurried approximations to consciousness, which slowly and deliberately adjusts them.”).

59. Guthrie, Rachlinski & Wistrich, *supra* note 53, at 13–19.

60. *Id.* at 27–28.

61. Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCHOL. REV. 293, 297 (1983).

62. *Id.*

63. *Id.*

64. *See* KAHNEMAN, *supra* note 55, at 158 (noting that the Linda problem “had pitted logic against representativeness, and representativeness had won”). As Daniel Kahneman noted, the

someone who is only a bank teller, but she does sound like she might be a *feminist* bank teller.<sup>65</sup>

We have found that judges react similarly in responding to a problem involving a litigant we named “Dina El Saba.”<sup>66</sup> We told the judges that Dina worked as an administrative assistant but was fired, despite receiving good employment evaluations. We described Dina’s behavior in the workplace as consistent with that of an observant Muslim and indicated that she brought a complaint against her employer for unlawful discrimination. When we asked the judges to rank the likelihood of various statements about the case, most of the judges ranked the compound statement “[t]he agency actively recruited a diverse workforce but also unlawfully discriminated against Dina based on her Islamic beliefs” as at least as likely as the separate components.<sup>67</sup> As with the story of Linda, an account of an employer that adopts reasonable policies but fails to implement them seems like a compelling script. Judges—like most adults—find stories that fit into their preexisting beliefs to be emotionally compelling<sup>68</sup> and hence rate a more detailed account as more likely, in defiance of deductive logic.

Responding to a compelling social script like those in the Linda or Dina problems is a form of intuitive, System 1 reasoning.<sup>69</sup> The sense that Linda seems like a bank teller, or that Dina seems like she was a target of discrimination, arises quickly with little effort. Intuitions like these are not necessarily wrong. Intuitive reasoning is often helpful, and sometimes even

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Linda problem is “a magnet for critics,” but it has nevertheless withstood numerous efforts to discredit the basic result that people use the intuitive social script rather than deductive logic to respond to the question. *Id.* at 164–65.

65. See STEPHEN JAY GOULD, *BULLY FOR BRONTOSAURUS: REFLECTIONS IN NATURAL HISTORY* 469 (1991) (“I know that the [combined] statement is least probable, yet a little homunculus in my head continues to jump up and down, shouting at me—‘but she can’t just be a bank teller; read the description.’”).

66. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 *DUKE L.J.* 1477, 1510–12 (2009).

67. *Id.* at 1511.

68. Cf. Nancy Pennington & Reid Hastie, *Evidence Evaluation in Complex Decision Making*, 51 *J. PERSONALITY & SOC. PSYCHOL.* 242, 253–55 (1986) (arguing that jurors use stories to assess and organize complicated evidence, particularly in criminal trials).

69. See ROBIN M. HOGARTH, *EDUCATING INTUITION* 65 (2001) (“Emotions and affect are clearly part of our intuitive processes . . .”); DAVID G. MYERS, *INTUITION: ITS POWERS AND PERILS* 38 (2002) (“Some of our emotional reactions apparently involve no deliberate thinking.”); Hayley Bennett & G.A. Broe, *Judicial Decision-Making and Neurobiology: The Role of Emotion and the Ventromedial Cortex in Deliberation and Reasoning*, 31 *AUSTL. J. FORENSIC SCI.* 11, 15–16 (2010) (explaining that emotions will be accessed automatically by the ventromedial cortex as an aspect of System 1 processing). *But see* de Sousa, *supra* note 52, at 22 (“In relation to the mind’s two tracks, emotions are intrinsically hybrid. . . . They belong to both the Intuitive and the Analytic Systems.”).

essential, to sound judgment.<sup>70</sup> But complacency about the adequacy of intuition is the doorway through which emotion sneaks in.<sup>71</sup> Social scripts about people who seem like bank tellers or bank robbers can and do influence judgment if left unexamined. Safeguarding against sympathy and prejudice requires active effortful reflection.<sup>72</sup> Our previous research on judges supports Justice Brennan's admonition that "the judge who is aware of the inevitable interaction of reason and passion, and who is accustomed to conscious deliberation and evaluation of the two, is the judge least likely in such situations to sacrifice principle to spasmodic sentiment."<sup>73</sup>

In some cases, an emotional response can completely determine people's judgments, preempting any rational or deliberative choice.<sup>74</sup> Emotions like sympathy or disgust toward a person occur rapidly and powerfully.<sup>75</sup> They can cause people to make immediate snap judgments. Psychologists refer to wholesale reliance on an emotional response to make a judgment as "the affect heuristic."<sup>76</sup> In effect, "people [sometimes] make judgments and decisions by consulting their emotions: Do I like it? Do I

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70. See ANTONIO R. DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* 51 (1994) (concluding that the inability to experience feelings rendered an otherwise normal person incapable of making sound decisions).

71. See KAHNEMAN, *supra* note 55, at 103 (explaining that "[i]n the context of attitudes . . . System 2 is more of an apologist for the emotions of System 1 than a critic of those emotions—an endorser rather than an enforcer"). Essentially, System 2 searches for information in a way "consistent with existing beliefs," so an "active, coherence seeking System 1" can provide answers to an "undemanding System 2." *Id.* at 103–04. This proposition is consistent with Kahneman's assertion that "[a]s we navigate our lives, we normally allow ourselves to be guided by impressions and feelings, and the confidence we have in our intuitive beliefs and preferences is usually justified. But not always." *Id.* at 4.

72. See Sang Hee Park, Jack Glaser & Eric D. Knowles, *Implicit Motivation to Control Prejudice Moderates the Effect of Cognitive Depletion on Unintended Discrimination*, 26 *SOC. COGNITION* 401, 402 (2008) (noting that biases cannot always predict behavior because "[i]ndividuals who are both biased and high in egalitarian motivation deliberately prevent their biases from resulting in overt manifestations").

73. See Brennan, *supra* note 18, at 11–12.

74. See Eldar Shafir, Itamar Simonson & Amos Tversky, *Reason-Based Choice*, 49 *COGNITION* 11, 32 (1993) ("People's choices may occasionally stem from affective judgments that preclude a thorough evaluation of the options."). See generally Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT*, *supra* note 55, at 397, 400 ("In the process of making a judgment or decision, people consult or refer to an 'affect pool' containing all the positive and negative tags consciously or unconsciously associated with the representations.").

75. See Paul Slovic et al., *Rational Actors or Rational Fools: Implications of the Affect Heuristic for Behavioral Economics*, 31 *J. SOCIO-ECON.* 329, 329 (2002); see also WILLIAM WUNDT, *OUTLINES OF PSYCHOLOGY* 216 (Charles Hubbard Judd trans., 1897) (noting that "the clear apprehension of ideas in acts of cognition and recognition is always preceded by special feelings"); William H. Ittelson, *Environmental Perception and Contemporary Perceptual Theory*, in *ENVIRONMENT AND COGNITION* 1, 16 (William H. Ittelson ed., 1973) ("The first level of response to the environment is affective.").

76. Slovic et al., *supra* note 75, at 329–30.

hate it? How strongly do I feel about it?”<sup>77</sup> Emotion might dictate our choices of what car or home to buy, with rationality only an epiphenomenal afterthought.<sup>78</sup>

Reliance on the affect heuristic is not always a mistake. Rapid emotional responses doubtless have played a vital role in our evolutionary survival and in our continued success as a species.<sup>79</sup> Ancestors who immediately ran from a predator, rather than pausing to reflect on whether the cost of flight was worth the benefit, remained in the gene pool. Even in a modern setting, affective responses can help us make quick decisions that can be accurate in many circumstances, especially where the choice is complex and the decision maker is constrained by time, fatigue, or cognitive load.<sup>80</sup> There are times when we would be clueless—or even incapable of making any decisions—without relying on our emotions.<sup>81</sup> The danger of the affect heuristic, however, like most forms of intuitive reasoning, lies in unexamined reliance on it in inappropriate circumstances. As psychologists have noted: “The affect heuristic appears at once both wondrous and frightening: wondrous in its speed, and subtlety, and sophistication, and its ability to ‘lubricate reason’; frightening in its dependency upon context and experience, allowing us to be led astray or manipulated—inadvertently or intentionally—silently and invisibly.”<sup>82</sup>

For judges, the danger of the affect heuristic is obvious. Judicial reliance on an emotional reaction to a litigant alone goes far beyond what President Obama meant when he articulated his desire for empathetic judges.<sup>83</sup> One of us (Rachlinski) encountered the affect heuristic early on in his legal career. Appearing in front of a judge as a young attorney, the judge asked him a single question: “Your client is basically an 80-year-old

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77. KAHNEMAN, *supra* note 55, at 139.

78. See Zajonc, *supra* note 46, at 155 (explaining that while “[w]e sometimes delude ourselves that we proceed in a rational manner and weigh all the pros and cons of the various alternatives,” that is “seldom the actual case” because “often ‘I decided in favor of X’ is no more than ‘I liked X’”). Zajonc believes that “[w]e buy the cars we ‘like,’ choose the jobs and houses we find ‘attractive,’ and then justify those choices by various reasons that might appear convincing to others . . . .” *Id.*; see also JOHN A. FARRELL, CLARENCE DARROW: ATTORNEY FOR THE DAMNED 287 (2011) (“If a man wants to do something, and he is intelligent, he can give a reason for it. . . . You’ve got to get [the juror] to want to do it . . . That is how the mind acts.”).

79. See Zajonc, *supra* note 46, at 170 (contending that before humans developed higher order language and cognitive capabilities, “it was the affective system alone upon which the organism relied for its adaptation”).

80. See KAHNEMAN, *supra* note 55, at 139 (“The affect heuristic is an instance of substitution, in which the answer to an easy question (How do I feel about it?) serves as an answer to a much harder question (What do I think about it?).”).

81. See DAMASIO, *supra* note 70, at 50–51 (illustrating this principle with a case study suggesting that individuals with certain brain abnormalities lack the ability to feel emotion, which impairs their ability to make decisions).

82. Slovic et al., *supra* note 75, at 339.

83. See *supra* note 9 and accompanying text.

widow, is that correct?" She was. The judge then granted the pending motion in her favor without further inquiry. However valuable empathy might be for a judge, single-minded reliance on an emotional reaction to a litigant reflects a lawlessness that most judges would repudiate.<sup>84</sup> Judicial reliance on the affect heuristic would create one law for the sympathetic and another for the unsympathetic.

Furthermore, prejudice is the pernicious cousin of sympathy. Emotion pervades our reactions to people who are different from us. Two psychologists describe reactions to groups much like others describe the affect heuristic:

[T]he mere perception of belonging to two distinct groups—that is, social categorization per se—is sufficient to trigger intergroup discrimination favoring the in-group. In other words, the mere awareness of the presence of an out-group is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.<sup>85</sup>

In effect, we tend to view in-group members with sympathy and solidarity and out-group members with suspicion and hatred.<sup>86</sup>

Groups may be based on a variety of characteristics, such as gender, race, religion, political ideology, Manchester United fan, and so on. Membership in these groups provokes sympathy or suspicion. Once we join a group, our membership in it forms part of our identity.<sup>87</sup> We immediately begin to prop up our self-image by seeking and exaggerating the negative traits of out-group members and by seeking and exaggerating the positive traits of in-group members.<sup>88</sup> As a consequence, "in-group members will favour their own group over other groups."<sup>89</sup> Quite consistently, people readily share more resources with in-group members

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84. See *supra* text accompanying notes 13–16.

85. Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *PSYCHOLOGY OF INTERGROUP RELATIONS* 7, 13 (Stephen Worchel & William G. Austin eds., 2d ed. 1986).

86. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* para. 15, at 13 (1906) ("[Ethnocentrism is the] view of things in which one's own group is the center of everything, and all others are scaled and rated with reference to it. . . . Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders.").

87. See Yan Chen & Sherry Xin Li, *Group Identity and Social Preferences*, 99 *AM. ECON. REV.* 431, 431 (2009) ("When we belong to a group, we are likely to derive our sense of identity, at least in part, from that group.").

88. See ANNE S. TSUI & BARBARA A. GUTTEK, *DEMOGRAPHIC DIFFERENCES IN ORGANIZATIONS: CURRENT RESEARCH AND FUTURE DIRECTIONS* 51 (1999).

89. See Charles Stangor & John T. Jost, *Commentary: Individual, Group and System Levels of Analysis and Their Relevance for Stereotyping and Intergroup Relations*, in *THE SOCIAL PSYCHOLOGY OF STEREOTYPING AND GROUP LIFE* 336, 346 (Russell Spears et al. eds., 1997).

than with out-group members<sup>90</sup> and tend to treat transgressions of in-group members more leniently than those of out-group members.<sup>91</sup> These tendencies create widespread problems in a pluralistic society and can cause injustice if they also influence judges.

The assertion that judges manage to suppress their emotional reactions represents a clear rejection of the idea that the affect heuristic influences judges. Even when people do not rely wholesale on an affective reaction, however, emotions can guide their judgment. People try to avoid experiencing the cognitive dissonance that accompanies making positive assessments of people they dislike or negative assessments of people they like.<sup>92</sup> It is unpleasant to think of an enemy as competent or a friend as incompetent. To avoid this dissonance, affective preferences “trigger . . . the operation of cognitive processes that lead to the desired conclusions.”<sup>93</sup> Emotions influence how people perceive others,<sup>94</sup> what they remember about others,<sup>95</sup> and how they process information about others.<sup>96</sup> Emotions guide “people’s attitudes, beliefs, and inferential strategies”<sup>97</sup> so that they see people they like as having positive qualities and people they do not like as possessing negative ones.<sup>98</sup> Consequently, even deliberative reasoning can be influenced by intuitive, emotional reactions.<sup>99</sup> Psychologists often refer to this tendency to seek consistency between judgment and emotion as “motivated cognition.”<sup>100</sup>

90. See Mark Van Vugt & Tatsuya Kameda, *Evolution and Groups*, in GROUP PROCESSES 297, 316 (John M. Levine ed., 2012)

91. *Id.* (“People also tend to be more forgiving of moral transgressions from outgroup members than ingroup members.”).

92. See FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS 204–05 (1958) (presenting statistical evidence in support of a theory of a “balance theory” whereby individuals exhibited a “significant tendency for harmonious situations” over “unbalanced ones”). See generally LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957) (hypothesizing that the psychological stress of holding contradictory beliefs motivates individuals to strive toward internal consistency and to avoid situations that highlight or enhance their inconsistent beliefs).

93. Ziva Kunda, *The Case For Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 493 (1990).

94. See Dan M. Kahan, David A. Hoffman, Donald Braman, Daniel Evans & Jeffrey J. Rachlinski, “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851, 853 (2012) (discussing how emotional loyalty to a group influences perceptions of a rival group).

95. See Kunda, *supra* note 93, at 494 (describing how motivated beliefs “enhance the accessibility of those knowledge structures—memories, beliefs, and rules—that are consistent with desired conclusions”).

96. See *id.* at 480 (hypothesizing that motivation may lead to reliance on biased cognitive processes).

97. *Id.* at 493.

98. See *id.* at 483 (explaining how people use memory and belief to construct support for their desired conclusions).

99. See *id.* at 495 (“People are more likely to arrive at those conclusions that they want to arrive at.”).

100. See Brent L. Hughes & Jamil Zaki, *The Neuroscience of Motivated Cognition*, 19 TRENDS COGNITIVE SCI. 62, 62–63 (2015) (describing motivated cognition as the phenomenon

Some judges have expressed concern that the tendency toward motivated reasoning affects their judgment. Tapping into the psychology of his day, Jerome Frank, quoting United States Circuit Judge Joseph Hutcheson, Jr, described this phenomenon among judges:

The vital motivating impulse for the decision is an intuitive sense of what is right or wrong in the particular case; and the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics.<sup>101</sup>

English trial and appellate judge Patrick Devlin echoed the claims of modern psychologists concerning motivation and perception when he observed that:

Once a judge has formed a view of the justice of the case, those facts which agree with it will seem to him to be more significant than those which do not. A judge's longhand note, necessarily incomplete, will consist mainly of what he thinks to be significant; the insignificant, being omitted, will disappear from memory.<sup>102</sup>

Dan Kahan and his coauthors provided a powerful demonstration of how motivated inferences work in legal settings.<sup>103</sup> In their study, they showed adults a short video of a protest that was dispersed by police. For half of the research participants, Kahan and his collaborators identified the protestors as pro-life activists picketing at an abortion clinic; for the other half, they were described as gay-rights advocates protesting the military's "don't ask, don't tell" policy at a military recruitment station. In both cases, the videos were identical. The researchers also quizzed the participants concerning their political orientation. When the protest was identified as a pro-life rally at an abortion clinic, liberal democrats branded it as a violent demonstration. When the protest was instead identified as a gay-rights rally at a military recruitment station, however, liberal democrats claimed they saw a peaceful protest. Socially conservative research participants expressed a mirror image of the experience, seeing violence when the protestors were labeled as a gay-rights group but not when they were labeled as a pro-life group. People's perceptions of the very same video depended upon their affinity for the position adopted by the group undertaking the protest.

The influence of political attitudes on judgment is widely thought to be powerful,<sup>104</sup> and Kahan's results confirm that belief by demonstrating that

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"by which the goals and needs of individuals steer their thinking towards desired conclusions" and explaining that it affects a "wide array of judgments and perception").

101. JEROME FRANK, *LAW AND THE MODERN MIND* 112 (Anchor Books 1963) (1930).

102. PATRICK DEVLIN, *THE JUDGE* 91 (1979).

103. Kahan et al., *supra* note 94.

104. *See supra* note 42 and accompanying text.

political affinity even influences how people perceive events. Other research, however, shows that ordinary, apolitical affinities can influence legal judgments. Dan Simon, for example, has shown that people make legal judgments so as to reward or punish litigants with whom they have positive or negative associations.<sup>105</sup> In one example, Simon and his collaborator, Keith Holyoak, described a case in which the legal issue was whether a posting to a website bulletin board was more like a newspaper article (and hence subject to liability for libel) or a telephone call (and hence not subject to such liability).<sup>106</sup> They also described the plaintiff as either a likeable individual or a somewhat odious character.<sup>107</sup> These background characteristics were not relevant to the legal judgment as to whether the Internet posting was more like a newspaper article or a telephone call, but their subjects nevertheless manipulated their legal assessments so that the likeable litigant won or the odious litigant lost.<sup>108</sup> What is more, the researchers found that the subjects' determinations as to whether the posting was more like a newspaper article or a telephone call carried over into an unrelated case that presented the same legal issue.<sup>109</sup> Simon and Holyoak's research shows that people seek consistency in their judgments of individual litigants, even to the point of bending legal rules and repudiating or distinguishing precedent in order to achieve it.

Sometimes the characteristics that make a litigant seem repugnant or sympathetic are relevant to the decision a judge must make. But as Simon and Holyoak and others<sup>110</sup> have shown, emotional reactions reach far beyond rational bounds. In particular, one of the more pernicious manifestations of motivated cognition for judges is the tendency for in-group favoritism to produce motivated reasoning. People treat others whom they like more leniently and make more forgiving judgments about their character;<sup>111</sup> give greater weight to evidence that supports their preference

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105. See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 537–38 (2004) (demonstrating that subjects were more likely to return a verdict in favor of a hypothetical defendant if they received positive information about him).

106. Keith J. Holyoak & Dan Simon, *Bidirectional Reasoning in Decision Making by Constraint Satisfaction*, 128 J. EXPERIMENTAL PSYCHOL.: GEN. 3, 5 (1999).

107. *Id.* at 11–12.

108. *Id.* at 13–14.

109. See *id.* at 14–16 (“Perhaps most remarkably, the experimental manipulation of Smith’s character in the Quest case influenced the Q-score for Credit in the Infoscience case.”).

110. See Rainer Greifeneder, Herbert Bless & Michel Tuan Pham, *When Do People Rely on Affective and Cognitive Feelings in Judgment?: A Review*, 15 PERSONALITY & SOC. PSYCHOL. REV. 107, 134 (2011) (concluding that people use feelings as information “much more frequent[ly] than is often assumed” and calling for “more faith in the evidentiary status of feelings”).

111. See Peter H. Ditto, David A. Pizarro & David Tannenbaum, *Motivated Moral Reasoning*, in 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION: MORAL JUDGMENT AND DECISION

than to evidence that undercuts it;<sup>112</sup> believe that people whom they like bear less responsibility for negative outcomes than people whom they dislike;<sup>113</sup> remember facts about conduct differently for people whom they like than for people whom they dislike;<sup>114</sup> and are more inclined to conclude that those whom they dislike had the ability to control consequences and intended them to occur when those consequences are negative.<sup>115</sup> Even if emotional reactions sometimes arise from factors relevant to the legal judgment being made, emotional reactions arising from favoritism toward a litigant of the judge's own race or gender are indefensible.

The power of motivation is not unlimited, of course. Unless people view themselves as crusaders or care nothing about their reputation for objectivity, there is a limit on how far they will go. As psychologist Ziva Kunda stated:

People do not seem to be at liberty to conclude whatever they want to conclude merely because they want to. Rather, . . . people motivated to arrive at a particular conclusion attempt to be rational and to construct a justification of their desired conclusion that would persuade a dispassionate observer. They draw the desired conclusion only if they can muster up the evidence necessary to support it. In other words, they maintain an "illusion of objectivity."<sup>116</sup>

Thus, where objective factors clearly dictate one outcome and make it impossible to justify the opposite result with a straight face, one's desire to maintain a self-image of objectivity will prevail over achieving the desired outcome. In the face of uncertainty, however, the desired outcome can be plausibly justified while preserving the illusion of objectivity.<sup>117</sup>

A desire to remain objective might be an especially effective constraint for judges. Most people may want to appear (both to themselves and to others) to be fair and objective. For judges, however, being impartial is a key element of their official role and their personal identity.<sup>118</sup> They are

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MAKING 307, 310 (Daniel M. Bartels et al. eds., 2009) (explaining that "[p]eople make more charitable attributions for the behavior of people they like than for those they dislike").

112. *See id.*

113. *See id.* at 316.

114. *See id.* at 317.

115. *See id.* at 316–17.

116. Kunda, *supra* note 93, at 482–83 (citations omitted).

117. *See* Ditto et al., *supra* note 111, at 314 ("People only bend data and the laws of logic to the point that normative considerations challenge their view of themselves as fair and objective judges, and motivated reasoning effects are most pronounced in situations where plausibility constraints are loose and ambiguous." (citations omitted)); Kunda, *supra* note 93, at 495 ("[M]otivation will cause bias, but cognitive factors such as the available beliefs and rules will determine the magnitude of the bias.").

118. *See* POSNER, *supra* note 32, at 106 ("A judge is likely to set some emotional reactions to one side, such as a personal liking for a litigant or his lawyer, because they are forbidden moves in the judicial game . . ."); Terry A. Maroney, *Emotional Regulation and Judicial Behavior*, 99

strongly motivated to project such an image of themselves.<sup>119</sup> As Karl Llewellyn put it:

He *can* throw the decision this way or that. *But not freely.* For to him the logical ladder, or the several logical ladders, are ways of keeping himself in touch with the decisions of the past. This, as a judge, he wishes to do. This, as a judge, he would have to do even if he did not wish. This is the public's check upon his work. This is his own check on his own work. For while it is possible to build a number of divergent logical ladders up out of the same cases and down again to the same dispute, *there are not so many that can be built defensibly.* And of these few there are some, or there is one, toward which the prior cases pretty definitely press. Already you see the walls closing in around the judge.<sup>120</sup>

The idea that judges suppress the sway of their emotional reactions is certainly the model most judges embrace.<sup>121</sup> Nevertheless, the many pathways by which emotion can influence judgment all undermine the idea that judges can (or perhaps even should)<sup>122</sup> avoid emotional influences.

Systematic empirical research as to whether emotion guides judicial reasoning is lacking, however. Political ideology influences judges' judgment,<sup>123</sup> but it is unclear whether that influence arises from an emotional response to a case presenting a potential conflict between the law and their beliefs or a conscious attempt to implement their social policy preferences. One experimental study concluded that judges appeared to engage in motivated cognition about social science, although this too was prompted by social or political attitudes rather than affect.<sup>124</sup> The recent study indicating that conservative judges who have daughters decide cases involving gender issues differently than conservative judges who have sons suggests that empathy plays a role in judging,<sup>125</sup> although it cannot pinpoint the mechanism by which the effect occurs. The studies by Kahan and

CALIF. L. REV. 1485, 1496 (2011) ("For judges, the ideal of judicial dispassion supplies the workplace norm; they are expected both to feel and project affective neutrality.").

119. See BAUM, *supra* note 43, at 158 ("[J]udging can be understood as self-presentation to a set of audiences. Judges seek the approval of other people, and their interest in approval affects their choices on the bench."); POSNER, *supra* note 32, at 61, 62 ("Most judges . . . derive considerable intrinsic satisfaction from their work and want to be able to regard themselves and be regarded by others as good judges." (footnote omitted)).

120. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY* 73 (1930).

121. See *supra* notes 13–33 and accompanying text.

122. See Maroney, *supra* note 118, at 1494 (arguing that judges should embrace, rather than suppress, emotion in their decision making).

123. See *supra* note 42 and accompanying text.

124. Richard E. Redding & N. Dickon Reppucci, *Effects of Lawyers' Socio-Political Attitudes on Their Judgments of Social Science in Legal Decision Making*, 23 *LAW & HUM. BEHAV.* 31, 51 (1999).

125. Glynn & Sen, *supra* note 44, at 38.

Simon show the kind of motivated reasoning that would be of concern to judges but these researchers do not investigate decisions by judges.<sup>126</sup> We therefore recruited judges to participate in experimental research designed to assess whether judges' emotional reactions to litigants influence their judgments.

### III. Methodology

The methodology that we employed to study the influence of emotion on judicial decision making is the same methodology we have used to study the influence of other factors on judicial decision making for over a decade.<sup>127</sup> Essentially, we are invited to make presentations at continuing education programs for judges. Before describing our research, we ask the judges to respond to a written questionnaire containing three to five hypothetical cases. We use presentation titles that are vague (such as "judicial decision making") so as not to reveal what our research involves before the judges respond to the questionnaire. Most of our presentations are made during plenary rather than parallel sessions, so the judges who participated did not attend our presentation because they had a special interest in psychology.

We collected the data described in this Article during the period 2008–2013 at eighteen separate presentations made by one or more of us at judicial education programs. At each of these programs, we gave judges one of the scenarios listed in Table 1. We describe each scenario in detail in discussing the individual experiments, and all scenarios are included in the appendices.

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126. *See supra* notes 103–09 and accompanying text.

127. Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 7k84–87 (2001) (describing our methodology).

**Table 1: Summary of Presentations**

| Scenario            | Judges (N)                             | % Female | Experience (Median Years) | % Democrat |
|---------------------|--|----------|---------------------------|------------|
| Illegal Immigration | U.S. District & Magistrate Judges (34) | n/a      | 7.5                       | 85         |
|                     | U.S. Magistrate Judges (new) (66)*     | 30       | 0                         | 72         |
|                     | New York (new, trial) (86)*            | 31       | 0                         | 70         |
|                     | Ohio (trial) (242)                     | 20       | 14                        | 62         |
|                     | Orlando (appellate) (80)               | 26       | n/a                       | 62         |
| Medical Marijuana   | Canada (mixed**) (33)                  | 35       | 6.5                       | n/a        |
|                     | Canada (criminal) (37)                 | 44       | 6                         | n/a        |
|                     | New York (criminal) (68)*              | 42       | 5                         | 89         |
| Strip Search        | Minnesota (231)                        | 28       | 12                        | 72         |
| Credit Card         | U.S. Bankruptcy Judges(201)            | 37       | 10                        | 77         |
| Narcotics Search    | New York City ALJs (53)                | 59       | 8                         | 88         |
|                     | Nevada (trial) (103)                   | 42       | 7                         | 41         |
|                     | Connecticut (trial) (145)              | n/a      | n/a                       | n/a        |
|                     | New York (new, trial) (65)             | 35       | 0                         | 74         |
| Pollution           | Minnesota (mixed) (115)                | 29       | 12.5                      | 68         |
|                     | New Jersey (mixed) (157)               | 26       | 12.4                      | 61         |
|                     | Ohio (trial) (116)                     | 53       | 13.0                      | 59         |

\*The New York judges, U.S. Magistrate Judges, and new New York judges each consisted of two sessions.

\*\* In all cases of mixed trial and appellate sessions, the vast majority of the judges were trial judges.

We used a between-subjects experimental design throughout.<sup>128</sup> That is, we created two (or more) versions of a hypothetical case in which one factor varied from version to version. Each judge was randomly assigned to only one condition and thus reviewed only one version of each scenario. Differences between the aggregated decisions made by the individual judges comprising the two (or more) conditions can thus be attributed to the factor that we varied. We also usually ask the participants to provide demographic information, such as gender, political affiliation, and years of judicial experience.<sup>129</sup> We do not, however, ask participants to identify themselves. We give judges the opportunity to complete the survey for pedagogical purposes but to opt out of allowing us to use their questionnaire in any further research. Nearly all of the judges who attended

128. See generally ROBERT M. LAWLESS, JENNIFER K. ROBBENNOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 104 (2010) (describing “between-subjects” experimental designs).

129. When we do not mention demographic effects in describing the results of an experiment it is because we did not observe any significant effects.

our presentations completed the voluntary survey and authorized us to use their results in the research described below.<sup>130</sup>

In employing controlled experiments with anonymous responses, our research fills a gap in the existing research about the role of affect in judicial decision making.<sup>131</sup> “[E]xpressions of judicial emotion are heavily stigmatized”<sup>132</sup> and, consequently, often concealed.<sup>133</sup> Because the judges in our study were not told what we were studying, were not aware that we varied the emotional content of the materials, and were responding anonymously, we do not believe that judges engaged in any kind of strategizing about what we are studying.

#### IV. Experiments and Results

##### A. *Illegal Immigration*

Few contemporary social issues produce the kind of polarizing, emotional responses that immigration does. Not only do people hold strong views concerning immigration policy, but that policy might conflict with the emotionally charged reality of individual stories confronting judges on a daily basis. One can adopt a hard line on immigration policy and yet be moved by the plight of individual illegal immigrants. One can also strongly favor more open immigration policies and yet be horrified at a violent crime committed by an illegal immigrant. Not surprisingly, decisions in immigration cases are highly unpredictable.<sup>134</sup> Hence, we chose an immigration problem as a vehicle for studying the role of emotion in judicial decision making.

We gave versions of a hypothetical case involving an immigration case<sup>135</sup> to six groups of judges: three groups of federal trial judges from a variety of districts, totaling 100 in all; 80 state and federal appellate judges;

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130. Typically only one or two judges in each session indicated that they would prefer that we do not use their surveys in our analysis, and we always honor such requests. We report the number of judges who failed to respond to a particular hypothetical in our description of the results of each experiment.

131. See Avani Mehta Sood & John M. Darley, *The Plasticity of Harm in the Service of Criminalization Goals*, 100 CALIF. L. REV. 1313, 1357 (2012) (“Judicial samples are difficult to come by, but further experimental research is needed to explore the extent to which judges may be subconsciously susceptible to the type of motivated cognition demonstrated in the present studies.”).

132. Maroney, *supra* note 118, at 1496.

133. See 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 and intuition . . . is concealed” in judicial opinions because such a basis for decision “would not provide helpful guidance to bench or bar”).

134. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (documenting wide disparities between judges in asylum cases).

135. See *infra* Appendix A.

86 newly appointed New York trial judges; and 242 Ohio judges, most of whom served in trial courts. Altogether, 508 judges responded to this problem. We varied the wording of the problem slightly from one jurisdiction to another so that the judges would be applying the law of their own jurisdiction. The structure of the problem, however, remained the same except as described below.

In Ohio, for example, the judges were told that they were presiding over the prosecution of an illegal immigrant. The defendant was a Peruvian citizen who had purchased a forged United States entry visa, which he then pasted into his genuine Peruvian passport. The judges were informed that the defendant had filed a motion to dismiss the charges. The issue raised by the motion to dismiss was whether pasting a false United States entry visa into a genuine foreign passport constitutes “forging an identification card” under Ohio Revised Statutes § 2931.13(B)(1), which we cited and quoted. If the answer is “no,” then the motion to dismiss should be granted, with the consequence that the defendant will simply be turned over to federal immigration authorities for deportation. But if the answer is “yes,” then the motion to dismiss should be denied, with the result that the defendant will almost certainly be convicted of a misdemeanor and sentenced to serve up to 180 days in prison before he is deported. The New York judges reviewed a similar problem, except that the materials referred to New York law governing forgery.<sup>136</sup>

The version of this problem that we presented to federal judges differed somewhat. We asked the federal judges to sentence the defendant instead of ruling on a motion to dismiss. The materials indicated that if the act constituted forgery, it would add two levels under the U.S. Sentencing Guidelines,<sup>137</sup> increasing the total offense level from eight (which would yield a sentencing range of 0–6 months) to ten (which would yield a sentencing range of 6–12 months). The federal judges were making the same determination as the state judges: that is, assessing whether pasting a fake visa onto a genuine passport constituted forgery of an identification document. The effect of an adverse ruling, however, differed slightly. Rather than ruling to dismiss the case, the federal judges were determining the appropriate range for sentencing. We also asked the federal judges to assign a sentence.

Each group of judges reviewed one of two versions of this problem. For half of the judges, the materials indicated that the defendant had been hired to sneak into the United States illegally to track down someone who had stolen drug proceeds from the cartel (“killer”). For the other half of the judges, the materials indicated that the defendant was a father who had tried

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136. N.Y. PENAL LAW § 221.15 (McKinney 2008).

137. U.S. SENTENCING COMM’N, GUIDELINES MANUAL § 2L2.1(b)(5)(B) (2013).

to sneak into the United States illegally to earn more money so that he could pay for a liver transplant needed to save the life of his critically ill nine-year-old daughter (“father”).

Obviously, there is a yawning gap in the level of sympathy elicited by these two defendants. Did this difference influence the judges’ rulings? Yes, it did. Among the judges who reviewed the father version, 44% (102 out of 234) ruled that the act constituted forgery, as compared to 60% (154 out of 257<sup>138</sup>) of the judges who reviewed the killer version. This difference was statistically significant.<sup>139</sup>

Table 2 reports the sentences that the federal judges assigned, by condition and ruling. Regardless of how they ruled, the average sentence was higher for the killer than for the father. Among the 21 judges who ruled against the father, 7 assigned sentences of less than six months (which is why the average is below six months), thereby sentencing outside the guidelines range. All of the other judges sentenced within the guideline range. Analysis of the sentence on the condition, ruling, and an interaction revealed a significant effect of condition and ruling, but no significant interaction.<sup>140</sup>

**Table 2: Average Sentence by Condition, in Months (and N)**

| Ruling                      | Condition |          |
|-----------------------------|-----------|----------|
|                             | Father    | Killer   |
| Not Forgery<br>(0–6 months) | 2.9 (20)  | 5.3 (21) |
| Forgery<br>(6–12 months)    | 5.2 (19)  | 7.9 (36) |

Because our data include two groups of newly appointed or elected judges, we were able to test the effect of inexperience on susceptibility to sympathy. The results showed that the variation in the defendant affected both new and experienced judges, although the newer judges seemed less sympathetic to both defendants overall. Logistic regression of the choice on the condition, experience, and an interaction revealed only significant main effects for condition and experience<sup>141</sup>—meaning that the new judges were neither more nor less sympathetic than the experienced judges.

138. Among the judges who reviewed the version with the father, 10 did not respond; among those who reviewed the version with the killer, 7 did not respond.

139. Fisher’s exact test,  $p = 0.0003$ .

140.  $F(1, 95) = 23.8$ ,  $p < 0.001$ ;  $F(1, 95) = 26.4$ ,  $p < 0.001$ ;  $F(1, 95) = 0.16$ ,  $p > 0.5$  (respectively for condition, ruling, and interaction).

141.  $z = 3.09$ ,  $p = 0.003$ ;  $z = 1.97$ ,  $p = 0.05$ ;  $z = 0.25$ ,  $p = 0.81$  (respectively for condition, experience, and interaction).

**Table 2A: % Ruling Against the Defendant by Experience of Judge, Condition (and N)**

| Judge       | Condition |          |
|-------------|-----------|----------|
|             | Father    | Killer   |
| New         | 54 (67)   | 67 (83)  |
| Experienced | 40 (167)  | 56 (174) |

Male and female judges reacted differently to the materials. The male judges were more inclined to rule against the defendant. Female judges were more influenced by the condition, exhibiting a twenty-two percentage point difference, as opposed to the fourteen percentage point difference exhibited by the male judges. Logistic regression of the ruling on the condition, gender, and an interaction revealed that all three parameters were significant or marginally significant statistically.<sup>142</sup>

**Table 2B: % Ruling Against the Defendant by Gender of Judge, Condition (and N)**

| Gender | Condition |          |
|--------|-----------|----------|
|        | Father    | Killer   |
| Male   | 47 (168)  | 61 (168) |
| Female | 28 (47)   | 50 (59)  |

Logistic regression of the ruling on the condition, political party, and an interaction revealed that political orientation did not have a statistically significant main effect or interaction.<sup>143</sup>

The dramatic difference between the two defendants influenced the judges. In a sense, this is understandable. Almost anyone would feel sympathy for the father's plight, while, in light of the highly publicized concerns about violent drug-cartel-related crime spilling into the United States from Mexico, the judges probably reacted quite negatively toward the cartel's assassin. As one judge has observed: "[W]here two results are almost equally defensible he would be an inhumane judge who, in deciding between them, succeeded in pushing the merits out of his mind."<sup>144</sup> Nevertheless, the judges were asked to decide a pure question of law. Pasting a forged visa into a genuine passport either does or does not constitute "forging an identification card" under the relevant statute. The ultimate objective of the forgery is not an element of the offense, so it should be irrelevant. So should the likability of the defendant. Both

142.  $z = 2.17, p = 0.03$ ;  $z = 2.68, p = 0.007$ ;  $z = 1.98, p = 0.05$  (for condition, gender, and interaction, respectively).

143.  $z = 0.71, p = 0.48$ ;  $z = 0.44, p = 0.66$  (for party and interaction, respectively).

144. DEVLIN, *supra* note 102, at 94.

defendants performed the same act (pasting a fraudulent visa into their genuine passport) for the same purpose (illegal entry into the United States). Accordingly, the decision should have been the same regardless of how the defendant was described. But it was not.

The federal judges also sentenced the defendants differently. This difference is normatively defensible. Judges should consider a wide variety of factors in sentencing, including the background and motives of the defendant.<sup>145</sup> The federal judges, in fact, could have channeled their emotional reaction to the litigants entirely into the sentence. Like their state counterparts, however, the federal judges allowed their sympathies to spill over into their interpretation of the law.

Even as the results show that emotion influences judges, they also support the view that judges try to suppress their emotional reactions. The character and motives of the defendants could hardly have been more extreme, and yet the difference between the defendants produced only a sixteen-percentage-point shift. In effect, most judges would have decided these two scenarios the same way. We also find the lack of a political influence on these results notable, given the widespread findings that politics influences appellate judges.<sup>146</sup> At the trial level, facts might matter much more than politics. Review of facts, however, should not necessarily influence a judgment of law—and yet that is what we found.

### B. *Medical Marijuana*

To determine whether the results of the first experiment could be replicated with a different problem and different judges, we performed an experiment on 138 judges: 68 trial judges serving in New York City's criminal court, 37 Canadian judges specializing in criminal trials, and 33 non-specialist Canadian judges. A few of the Canadian judges were appellate judges, but the majority were trial judges serving in various courts throughout Canada.

The judges were told that they were presiding over the prosecution of a defendant charged with possession of marijuana.<sup>147</sup> The judges were asked to imagine that the state of New York had enacted the Medical Marijuana Access Law. The fictional statute provides that an individual should not be arrested for possession or use of no more than 2.5 ounces of marijuana if he or she holds a valid medical-marijuana registration card. It further provides that individuals who have not obtained such a card may raise an affirmative

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145. *See, e.g.*, 18 U.S.C. § 3553(a) (2012) (requiring judges to consider a number of factors separate from the elements of a given offense, such as “the nature and circumstances of the offense and the history and characteristics of the defendant,” so as to impose a sentence that is “sufficient, but not greater than necessary”).

146. *See supra* note 42 and accompanying text.

147. *See infra* Appendix B.

defense if a “physician *has stated* in an affidavit or otherwise under oath . . . that the person is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the person’s serious or debilitating medical condition or symptoms.” The Canadian version of the problem was similar but referred instead to a governing regulation that had been adopted by the relevant Canadian health agency.

The materials indicated that the defendant was caught with the maximum amount of marijuana allowed by statute during a routine traffic stop and was arrested because he lacked a valid medical-marijuana registration card. The judges were informed that the defendant had filed a motion to dismiss the charges because he had obtained an affidavit from a physician after his arrest. The issue raised by the motion to dismiss was whether a physician’s affidavit containing the testimony required by the statute, but obtained after the defendant has been arrested, satisfies the “has stated” requirement under the statute. If the answer is “no,” then the motion to dismiss should be denied, and the defendant would almost certainly be convicted of illegal marijuana possession. But if the answer is “yes,” then the motion to dismiss should be granted, and the charges will be dropped.

The judges were divided into two groups. One group read about a defendant who was nineteen years old, currently unemployed, on probation for beating his ex-girlfriend, and had a juvenile record for drug possession and drug dealing. The physician’s affidavit indicated that the defendant was being treated for occasional mild seizures and that the illness was not debilitating and might abate within a year. The second group read about a defendant who was fifty-five years old, married with three children, employed as an accountant, and lacked a criminal record. The physician’s affidavit stated that the defendant was being treated for severe pain caused by bone cancer and that the illness was debilitating and would likely kill him within a year. For both defendants, the physician added that marijuana had been shown to be effective for patients suffering from similar symptoms.

Would the greater level of sympathy inspired by the older, gravely ill defendant lead the judges before whom he appeared to interpret the same statutory language differently than the judges who encountered the younger, less sympathetic defendant? The results are summarized in Table 3.

**Table 3: % Granting Motion to Dismiss by Condition (and *N*)**

| Version     | Jurisdiction             |                        |                        | Total   |
|-------------|--------------------------|------------------------|------------------------|---------|
|             | New York<br>(Specialist) | Canada<br>(Generalist) | Canada<br>(Specialist) |         |
| 19-year-old | 38 (34)                  | 65 (17)                | 74 (19)                | 54 (70) |
| 55-year-old | 81 (32)                  | 100 (15)               | 76 (17)                | 84 (64) |

Overall, 54% of the judges (38 out of 70) dismissed the charges against the nineteen-year-old defendant, while 84% of the judges (54 out of 64<sup>148</sup>) dismissed the charges against the fifty-five-year-old defendant. This difference was statistically significant.<sup>149</sup> Male judges and female judges did not differ much in their reactions to the problem. Among male judges, 55% (21 out of 38) ruled in favor of the nineteen-year-old defendant, while 82% (28 out of 34) ruled in favor of the fifty-five-year-old defendant, and among female judges 58% (15 out of 26) and 83% (19 out of 23) ruled in favor of the two defendants, respectively. Years of experience on the bench also did not affect the judges' willingness to side with the defendant overall, nor did their decision interact significantly with the age of the defendant.<sup>150</sup>

The three groups of judges differed somewhat in their reactions. The non-specialist Canadian judges were the most sympathetic to both defendants, with 65% (11 out of 17) ruling in favor of the nineteen-year-old defendant versus 100% (15 out of 15) ruling in favor of the fifty-five-year-old defendant. The Canadian judges who specialized in criminal trials, however, displayed little difference, with 74% (14 out of 19) and 76% (13 out of 17) ruling in favor of each defendant, respectively. The New York judges were somewhat less sympathetic to the defendants overall compared to the non-specialist Canadian judges but also exhibited a large difference between the two defendants, with 38% (13 out of 34) ruling in favor of the nineteen-year-old defendant and 81% (26 out of 32) ruling in favor of the fifty-five-year-old defendant. Analysis of these variations suggests that the New York judges were affected more by the variation of the defendant than the other judges.<sup>151</sup>

Once again the difference between the two defendants was stark. The sympathetic defendant was a respectable family man suffering from a grave illness. The unsympathetic defendant was a disreputable slacker who suffered from a much milder illness. Clearly the former inspires more sympathy, seems more likeable, and poses a lesser risk of manipulating the statutory scheme than the latter. Judges also might have felt that the gravely ill defendant had suffered enough because of his illness.<sup>152</sup> Such

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148. Among the judges who reviewed the case of the nineteen-year-old, three did not respond; among the judges who reviewed the case of the fifty-five-year-old, one did not respond.

149. Fisher's exact test,  $p = 0.0002$ .

150. This analysis was performed by running a logistic regression of the decision on the condition, years of experience, and an interaction term. Neither experience nor the interaction term was significant ( $z = 0.90$ ,  $p = 37$ ;  $z = 0.57$ ,  $p = 57$ , respectively).

151. A logistic regression of the ruling was run on the condition—a dummy code for the Canadian criminal judges, a dummy code for the New York judges, and interaction terms for these dummy codes. In addition to the significant effect of condition ( $z = 12.6$ ,  $p < 0.001$ ), only the dummy code for the interaction term for the New York judges was significant in this model ( $z = 8.04$ ,  $p = 0.001$ ).

152. See KALVEN & ZEISEL, *supra* note 8, at 194 n.5 ("If the defendant has suffered certain misfortunes between crime and trial, the jury may take the view that life or providence has

considerations, however, are not reflected in the text of the statute. A post-arrest physician's affidavit is either sufficient to qualify as a defense or it is not.

It is possible that the age of the defendant was a factor in the judges' decisions. We cannot rule out that possibility. However, the research concerning whether older offenders are sentenced either more harshly or more leniently than younger offenders is equivocal.<sup>153</sup> Moreover, even if age was a factor, the judges were simply basing their decisions on a different consideration that is not contemplated by the statute.

Presumably, if we had asked, the judges could have provided plausible rationales for their decisions. Those granting the motion to dismiss could have pointed to the plain language of the statute, which draws no distinction based on when the physician's affidavit is obtained. Those denying the motion to dismiss could have pointed to the danger of manipulation as suggesting that the legislature likely intended that the affidavit be acquired before marijuana was used rather than as a belated attempt to thwart prosecution. But for many of the judges, those were not the reasons that actually drove their decisions; instead, they coated a decision that had already been made based upon affect with a patina of legitimacy.

### C. *Strip Search*

To explore whether the influence of emotion might vary based on the procedural posture of a case, we constructed a third hypothetical.<sup>154</sup> We gave this problem to 231 Minnesota judges. The overwhelming majority of them were trial court judges.

The judges were told that they were presiding over a case presenting a facial challenge<sup>155</sup> to the constitutionality of a city's recently instituted blanket policy requiring that all arrestees who were to be introduced into the general jail population be strip searched. The plaintiff had been arrested,

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sufficiently punished him and that further legal punishment would serve no useful social purpose.”).

153. See Ronald H. Aday & Jennifer J. Krabill, *Aging Offenders in the Criminal Justice System*, 7 MARQ. ELDER'S ADVISOR 237, 241–42 (2006) (stating that, although “[r]esearch is mixed regarding whether age plays a substantial role in sentencing,” the weight of scholarly opinion tends toward leniency against elderly offenders); Darrell Steffensmeier & Mark Motivans, *Older Men and Older Women in the Arms of Criminal Law: Offending Patterns and Sentencing Outcomes*, 55 J. GERONTOLOGY, SERIES B: PSYCHOL. & SOC. SCI. S141, S149 & tbl.4 (2000) (concluding that older offenders of both genders were sentenced less harshly than younger offenders, except for drug-related offenses).

154. See *infra* Appendix C.

155. A so-called “facial challenge” to the constitutionality of a state, local rule, or policy alleges that the rule or policy is unconstitutional in every context in which it might be applied. See, e.g., *United States v. Stevens*, 559 U.S. 460, 472 (2010) (“To succeed in a typical facial attack [the plaintiff] would have to establish that no set of circumstances exist under which [the statute, rule, or policy] would be valid, or that the statute lacks any plainly legitimate sweep.” (citations omitted) (internal quotations marks omitted)).

forcibly strip searched by an officer of the same gender in the jail hallway, and then kept naked in a cold room for two hours, where he or she was regularly viewed by other officers of the same gender. The search uncovered no contraband.

The materials stated that the parties had filed cross-motions for summary judgment. The issue raised by the motions was whether the city's blanket strip-search policy was reasonable under the then-controlling case, *Bell v. Wolfish*,<sup>156</sup> which established that the constitutional rights of prisoners could be restricted based on legitimate institutional needs and objectives, that prison officials must be free to take appropriate actions to ensure prison safety, and that courts should defer to their judgments.<sup>157</sup> If the answer is "yes," then the city's motion for summary judgment should be granted (and the plaintiff's motion should be denied). But if the answer is "no," then the plaintiff's motion for summary judgment should be granted (and the city's motion should be denied), with the consequence that the plaintiff will receive declaratory relief and damages for the violation of the plaintiff's Fourth Amendment rights.

The materials then described the arguments the parties made. The city argued that its policy was reasonable under *Bell*, which upheld a blanket search policy for persons choosing to participate in contact visits with prisoners. The plaintiff responded that *Bell* is distinguishable because, unlike arrests, contact visits are elective (so that the visitor can choose to not be searched by agreeing to forego the visit) and planned (so that they pose greater risk of smuggling). The plaintiff also argued that a blanket policy fails to distinguish among those as to whom jail officials possess a reasonable suspicion that the arrestee may be carrying or concealing contraband and those as to whom they lack such reasonable suspicion. At the time we ran this experiment, the federal circuits were deeply divided on whether blanket strip-search policies were reasonable under *Bell*.<sup>158</sup> Since then, however, the Supreme Court has resolved the issue.<sup>159</sup>

The judges were divided into four conditions. The first group of judges read that the plaintiff was male, thirty-four years old, unemployed, and had a violent criminal record. He had been arrested for attempted murder and armed robbery after attacking a liquor-store clerk with a razor blade and was eventually convicted and sentenced to eleven years in prison. The second group of judges read about the same male plaintiff, but they

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156. 441 U.S. 520 (1979).

157. *Id.* at 545–58.

158. See Daphne Ha, Note, *Blanket Policies for Strip Searching Pretrial Detainees: An Interdisciplinary Argument for Reasonableness*, 79 *FORDHAM L. REV.* 2721, 2744–52 (2011).

159. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1518–20 (2012) (holding that even persons arrested for minor offenses or traffic violations may be strip searched before being introduced into the general population of a jail).

were told that he was bringing the claim as a representative of a class of plaintiffs rather than as an individual. The third group of judges read that the plaintiff was female, nineteen years old, a student at a public university in the city, and had no criminal record. She had been arrested for trespassing at a protest targeting planned tuition increases at her university. She was released the next day, and no charges were ever filed against her. The fourth group of judges read about the same female plaintiff, but they were told that she was bringing the claim as a representative of a class of plaintiffs. By creating a class action condition and an individual condition, we sought to determine whether the judges' response to the particular plaintiff before them would vary depending on how strongly they were reminded that their decision would impact not only that plaintiff but also others who may be dissimilar to that plaintiff.<sup>160</sup>

**Table 4: % Ruling in Favor of the Plaintiff  
(Against City) by Condition (and *N*)<sup>161</sup>**

| Procedural Posture | Plaintiff        |             |
|--------------------|------------------|-------------|
|                    | Student (female) | Thug (male) |
| Individual Action  | 84 (62)          | 50 (44)     |
| Class Action       | 65 (60)          | 51 (61)     |

Among the Minnesota judges in groups one and three, where the plaintiffs were suing as individuals, the gender and characteristics of the plaintiff made a large difference. Among judges who assessed the female plaintiff, 84% (52 out of 62) granted her motion for summary judgment (and denied the city's motion), while only 50% (22 out of 44) of the judges granted the male plaintiff's motion.

Although we also observed a difference between the male plaintiff and the female plaintiff in groups two and four, where the plaintiff was suing as a class representative rather than an individual, it was less pronounced: 65% (39 out of 60) of the judges granted the female plaintiff's motion for summary judgment (and denied the city's motion), while 51% (31 out of 61) of the judges granted the male plaintiff's motion. Logistic regression of the judges' rulings on plaintiff, procedure, and an interaction revealed a main effect of plaintiff and a marginally significant interaction.<sup>162</sup> As the

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160. We have previously found that steering judges' attention toward one aspect of a case and away from another can influence their decisions. Jeffrey J. Rachlinski, Andrew J. Wistrich & Chris Guthrie, *Altering Attention in Adjudication*, 60 *UCLA L. REV.* 1586, 1589–90 (2013) (summarizing the results of four experiments examining the effects of drawing a judge's attention to a specific part of a case).

161. One judge in the female–individual condition, one judge in the female–class action condition, and two judges in the male–individual condition did not respond.

162.  $z = 0.08$ ,  $p = 0.93$ ;  $z = 3.60$ ,  $p < 0.001$ ;  $z = 1.80$ ,  $p = 0.07$  (for procedure, plaintiff, and interaction, respectively).

results in Table 4 show, the judges treated the male plaintiff identically in the individual and class action cases but were less favorably disposed toward the female litigant in the class action variation. Gender, years of judicial service, and political orientation did not influence the judges' reactions to this problem significantly.<sup>163</sup>

Like the judges in the first two experiments, the judges in this study were asked to decide a question of law: specifically, was the city's blanket strip-search policy unconstitutional in every possible context involving every conceivable plaintiff? Both plaintiffs were subjected to the same degrading treatment, but they could not have been more different. The male plaintiff was a violent adult career criminal who had just used a dangerous but easily concealed weapon. He was accustomed to jail procedures and the prototype of the kind of arrestee that prison officials would legitimately most need to search. The female plaintiff, by contrast, was an apparently harmless and vulnerable student. The judges evidently felt sympathy for the teenager, who was probably terrified to be in a jail and traumatized by the search.<sup>164</sup>

A facial challenge to the constitutionality of a statute, regulation, ordinance, or policy can be thought of as an "implicit class action." The sole plaintiff is also "representing" others. In a broader sense, this element of implicit representation is present not merely in the strip-search experiment but also (albeit less clearly) in the illegal-immigration experiment and medical-marijuana experiment. In the latter two as well as the former, the judges' attention was directed to the individual plaintiff or defendant, and they were misled into giving undue emphasis to the characteristics of the particular litigant appearing before them, thereby neglecting adequately to consider the absent "litigants" who would also be affected by their ruling.

The fact that the outcome in conditions one and three, in which the plaintiff was male, was essentially fifty-fifty suggests what a close legal issue this scenario posed for the judges. One aspect of the results, however, is puzzling. Why did the percentage of the judges ruling for the plaintiff

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163. Logistic regression produced no significant main effects or interactions.

164. We also presented a different version of these materials to 60 Ohio appellate judges. We asked these judges to reverse or affirm a lower court ruling declaring the city's policy unconstitutional. We described the plaintiff either as an armed robber (who was nearly identical to the one in the problem above) or as a Catholic nun arrested in an antiwar protest. Among the 24 judges who read about the robber, 63% upheld the lower court ruling declaring the policy unconstitutional, but only 48% of the 29 judges who read about the nun did so. Although that trend is in the reverse direction of what we predicted, it was not significant. Fisher's exact test:  $p = 0.41$ . Concern that the politics of antiwar protests might also be influencing the judges and that we needed all four conditions to assess whether and to what extent the judges were being influenced by sympathy led us to conduct the study we report in full. Furthermore, unlike virtually all of our other studies, our initial study involved appellate review of a trial court decision.

decline in condition four (where the female plaintiff was a class representative) relative to condition two (where the female plaintiff was suing as an individual) but not in condition three (where the male plaintiff was suing as a class representative) relative to condition one (where the male plaintiff was suing as an individual)? We suspect the explanation is that the male plaintiff was viewed by the judges as typical of the class of all arrestees, while the female was viewed by the judges as an exceptionally vulnerable and sympathetic outlier. Therefore, when the judges were prompted to think of arrestees other than the plaintiff appearing before them by the presence of the class action context, the other arrestees they imagined closely resembled the male plaintiff but were very different from the female plaintiff. In effect, the procedural posture of the case as a class action served as a reminder to judges to think about the bulk of litigants who were not appearing before them. Doing so then muted the influence that the emotional reaction had on the judges.

One possible alternative explanation is that the judges based their decisions on the plaintiff's gender rather than on sympathy or some other aspect of affect. Of course, we cannot entirely rule that out. Research indicates that women are treated more leniently in the sentencing context, perhaps because, on average, they are stereotyped as being less dangerous.<sup>165</sup> Similarly, courts appear to treat women more protectively than men in the context of prison guards viewing inmates of the opposite gender naked.<sup>166</sup> Nevertheless, gender was just one of the several differences between the male plaintiff and the female plaintiff. And in our next experiment, changing the gender of the litigant did not produce a significant difference.

#### D. Credit Card Debt

To explore whether affect might influence non-law determinations, we performed an experiment on 201 bankruptcy judges, approximately 57% of all sitting bankruptcy judges at the time.<sup>167</sup> They were instructed to assume that a debtor, who had filed for relief under Chapter 7 of the Bankruptcy Code, sought to have all of her debt discharged, including the balance owed on a new credit card. The bank holding the credit card debt opposed the discharge, arguing that the debtor had run up the charges knowing perfectly

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165. See, e.g., Cassia Spohn, *The Effects of the Offender's Race, Ethnicity, and Sex on Federal Sentencing Outcomes in the Guidelines Era*, 76 LAW & CONTEMP. PROBS. 75, 96 (2013) ("Males also received longer sentences than females.").

166. See John Dwight Ingram, *Prison Guards and Inmates of Opposite Genders: Equal Employment Opportunity Versus Right of Privacy*, 7 DUKE J. GENDER L. & POL'Y 3, 14–15 (2000).

167. See *Status of Bankruptcy Judgeships*, U.S. COURTS (Sept. 30, 2013), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/status-bankruptcy-judgeships.aspx#t12>, archived at <http://perma.cc/XQ7D-MWQU> (listing 350 authorized bankruptcy judgeships in 2012).

well that she could not pay them off, so that discharging the credit card debt would facilitate the commission of a fraud.<sup>168</sup> The circumstances were that the debtor was a single, twenty-nine-year-old female who had struggled with debt for much of her adult life.<sup>169</sup> She had never earned more than the minimum wage, had been delinquent in making credit card payments, and was once evicted for nonpayment of rent. Fortunately, she had recently landed a job, but she lost it when she almost immediately took a trip, even though her new employer had warned her that she would be fired if she went. During the trip, she ran up \$3,276 in charges on a credit card she had recently obtained. The debtor had essentially no assets, had consulted attorneys about filing for bankruptcy in the past, and had filed for bankruptcy about three months after returning from her trip.

We created four conditions. Half of the judges read a version of the problem in which the debtor had incurred the credit card debt during a vacation to Florida for spring break, where she charged her hotel room, meals, and rounds of drinks for friends on her new credit card. The other half of the judges read a version of the problem in which the debtor had incurred the credit card debt during a visit to her mother in Florida. Her mother, the judges were told, was battling cancer, lacked health insurance, and needed assistance recovering from a recent surgery. The credit card charges were for the cost of the trip and the mother's medicine. We also varied the gender of the debtor. Half of the judges in each condition were told that the debtor was Janice, while the other half were told that the debtor was Jared.

Would the bankruptcy judges be influenced by the reason—whether laudable or deplorable—for the debt? It arguably should not matter because in either event the debtor incurred the debt knowing perfectly well that he or she could not repay it, so the debt was equally fraudulent.<sup>170</sup> The debtor's gender also should not make a difference, of course, but since the justice system occasionally treats women differently than men,<sup>171</sup> we decided to determine whether that was true in this context. Table 5 summarizes the results.

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168. See 11 U.S.C. § 523(a)(2)(A) (2012) (exempting from discharge a debt obtained by “false pretenses, a false representation, or actual fraud”).

169. See *infra* Appendix D.

170. See 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2009) (defining “actual fraud” as “any deceit, artifice, trick, or design involv[ing] direct and active operation of the mind, used to circumvent and cheat another”); 1 CONSUMER BANKRUPTCY LAW AND PRACTICE § 15.4.3.2.2.6 (Henry J. Sommer ed., 10th ed. 2012) (describing factors considered in determining whether a debtor intended to deceive).

171. See *supra* notes 165–66 and accompanying text.

**Table 5: % Granting Discharge of Debt (and *N*)**

| Version    | Gender  |         | Combined |
|------------|---------|---------|----------|
|            | Male    | Female  |          |
| Vacationer | 28 (53) | 36 (39) | 32 (92)  |
| Caretaker  | 51 (55) | 53 (51) | 52 (106) |

Among the judges who reviewed the “spring break” version of the problem, 32% (29 out of 92) discharged the debt, as compared to 52% (55 out of 106) of the judges who reviewed the “sick mother” version.<sup>172</sup> This difference was statistically significant.<sup>173</sup>

The gender of the debtor did not affect the results. Among judges who read about a female debtor, 36% (14 out of 39) discharged the debt in the vacationer condition, and 53% (27 out of 51) discharged the debt in the caretaker mother condition. Among judges who read about the male debtor, 28% (15 out of 53) and 51% (28 out of 55) discharged the debtor in the two versions, respectively. These differences were not statistically significant.<sup>174</sup> Thus, our hypothesis that the judges might be influenced by gender stereotypes, which could lead them to reward the female debtor for performing a traditional caretaker role in the sick mother condition or to punish her for the supposedly “unladylike” behavior of spring-break partying in the vacation condition, was not borne out by the results.

Male judges and female judges did not differ much in their reactions. Among male judges, 27% (15 out of 55) ruled for the vacationer, while 51% (35 out of 68) ruled for the caretaker, and among female judges 34% (12 out of 35) and 54% (18 out of 35) ruled in favor of the vacationer and the caretaker, respectively. The gender differences were not statistically significant.<sup>175</sup>

Other demographic variables had little impact. Years of experience did not affect the judges’ willingness to side with the debtor overall, but older judges were somewhat more harsh on the vacationer and more lenient on the caretaker than their younger counterparts.<sup>176</sup> Political affiliation also

172. Among the judges who reviewed the version involving the sick mother, three did not respond. All of the judges who reviewed the version involving the spring break responded.

173. Fischer’s exact test,  $p = 0.0041$ .

174. Logistic regression of the decision on condition, gender of debtor, and an interaction revealed no significant effect of gender ( $z = 0.21$ ,  $p = 0.83$ ) or of the interaction ( $z = 0.45$ ,  $p = 0.63$ ), respectively.

175. Logistic regression of the decision on condition, gender, and an interaction revealed no significant effect of gender ( $z = 0.27$ ,  $p = 0.79$ ) or of the interaction ( $z = 0.35$ ,  $p = 0.73$ ), respectively.

176. This analysis was performed by running a logistic regression of the decision on the condition, years of experience, and an interaction term. Neither experience nor the interaction term were significant ( $z = 0.92$ ,  $p = 0.36$ ;  $z = 1.66$ ,  $p = 0.098$ , respectively).

had no effect. Republican and Democratic judges did not differ much in their reactions.<sup>177</sup>

Deciding whether debt should be discharged is a task bankruptcy judges perform frequently. They are intimately familiar with the relevant law. This problem asked them to do something that they had done hundreds—perhaps even thousands—of times. Nevertheless, the judges apparently allowed their sympathy or respect for the debtor who fraudulently incurred the credit card debt to care for his or her mother to influence their decisions.

#### E. *Narcotics Search*

One curious aspect of Fourth Amendment law is that the seriousness of the offense is not considered when assessing the reasonableness of a search or seizure.<sup>178</sup> Allowing a defendant guilty of low-level marijuana possession to be released because of infirmities in a police search seems much less troublesome than releasing a major drug kingpin owing to similar deficiencies, even though the law requires that they be treated exactly the same. We wondered whether judges really follow this regime.<sup>179</sup>

Our fifth experiment involved another task that judges perform frequently: ruling on a motion by the defendant to suppress allegedly improperly obtained evidence.<sup>180</sup> This time we had a total of 366 judges as participants: 103 Nevada state judges, 145 Connecticut state judges, 65 newly elected New York judges, and 53 administrative law judges serving in New York City. The Nevada, Connecticut, and New York judges were trial court judges.

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177. The political party differences were not significant. Logistic regression of the decision on condition, party, and an interaction revealed no significant effect of political party ( $z = 0.11$ ,  $p = 0.91$ ) or of the interaction ( $z = 0.18$ ,  $p = 0.86$ ), respectively. This result conflicts with a previous study in which we found that political party influenced bankruptcy judges' willingness to discharge debt. Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B.U. L. REV. 1227, 1247–48 (2006).

178. See Jeffrey Bellin, *Crime-Severity Distinctions in the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 4–5 (2011) (noting that “the legal standard for evaluating a search (or seizure) is the same whether a police officer suspects that a person jaywalked or is the Green River Killer”); William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and The Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869 (2001) (“Fourth Amendment law generally treats all crimes alike.”).

179. Costs and benefits of suppressing evidence are weighed in some aspects of Fourth Amendment law but are not based on the severity of the offense. See *Herring v. United States*, 555 U.S. 135, 141 (2009) (holding that, when applying the exclusionary rule, “the benefits of deterrence must outweigh the costs”); *United States v. Calandra*, 414 U.S. 338, 348 (1974) (explaining that the application of the exclusionary rule “has been restricted to those areas where its remedial objectives are thought most efficaciously served”).

180. See *infra* Appendix E. This scenario was inspired by Sood & Darley, *supra* note 131, at 1328.

We asked the judges to assume that they were presiding over a case against a maintenance worker in a ferryboat terminal run by the Department of Transportation for the relevant jurisdiction. The materials indicated that the defendant had failed a random test for use of illicit drugs, and a subsequent search found illicit drugs in his locker. He was then charged with possession of the drugs. The defendant moved to suppress the test results and the drugs, arguing the drug test was unconstitutional because although he is a public employee, he is not one who performs a job “fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences” under *Skinner v. Railway Labor Executives Association*.<sup>181</sup>

The materials described the defendant’s job duties and the contentions of the parties in detail. Although federal regulations permit random drug testing of employees who perform unsupervised “safety-sensitive tasks,”<sup>182</sup> which can include ferryboat maintenance,<sup>183</sup> the defendant pointed out that he did not work on a ferryboat but as a janitor in the terminal buildings. Further, although he was theoretically available to perform “minor electrical repairs” on ferryboats in emergencies, he had never been asked to do so in five years on the job. The Department responded that even though the bulk of the defendant’s work was onshore and custodial, he might be asked to perform unsupervised repairs on a ferryboat, thereby placing ferryboat riders at risk.

Unbeknownst to the judges, there were two conditions. Half of the judges read that the defendant had tested positive for marijuana and that an unsmoked joint was found in his locker. The other half of the judges were told that the defendant had tested positive for heroin and that heroin was found in his locker.

All of the judges were then asked whether they would suppress the evidence. They were told that the parties had stipulated that if the drug test was improper then both the test results and the drugs found in the locker room should be suppressed. Table 6 summarizes the results.

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181. 489 U.S. 602, 628 (1989).

182. *Id.* at 633–34.

183. *Am. Fed’n of Gov’t Emps., AFL-CIO v. Skinner*, 885 F.2d 884, 886–87 & n.4 (D.C. Cir. 1989).

**Table 6: % of Judges Who Admitted the Evidence (and *N*)**

| Version   | Jurisdiction     |                   |            |             |          |
|-----------|------------------|-------------------|------------|-------------|----------|
|           | New York<br>ALJs | New York<br>(new) | Nevada     | Connecticut | Combined |
| Marijuana | 52<br>(31)       | 38<br>(32)        | 50<br>(52) | 34 (29)     | 44 (144) |
| Heroin    | 50<br>(22)       | 59<br>(32)        | 63<br>(51) | 46 (46)     | 55 (151) |

In total, 366 judges in four jurisdictions reviewed the question involving the search of the employee locker that revealed either marijuana or heroin. Among the judges who reviewed the marijuana version, 44% (64 out of 144)<sup>184</sup> admitted the evidence, while 55% (83 out of 151)<sup>185</sup> of the judges in the heroin version suppressed it. This difference was marginally statistically significant.<sup>186</sup>

The responses varied by jurisdiction. The lack of an effect among the New York administrative law judges is likely attributable to the facts of the version we used with these judges. The New York judges suggested that finding \$4,000 worth of heroin as the materials indicated had been uncovered in the search might not seem remarkably more troublesome than finding marijuana. For the other three groups, we therefore increased the amount to \$15,000 worth of heroin and indicated that the search also revealed “a list of contacts at a local high school.” Among these three groups of judges, 42% (48 out of 113) of those who reviewed the marijuana case admitted the evidence as opposed to 56% (72 out of 129) of those who reviewed the heroin case. This difference was statistically significant.<sup>187</sup>

When analyzing the effect of the variation by demographic data, we omitted the New York City administrative law judges, who showed no effect. We also did not have demographic data on the Connecticut judges. Finally, the New York trial court judges were all newly elected, so they were omitted from the analysis of whether experience affected the judges’

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184. The high rate of nonresponses among the Connecticut judges is attributable to the format used at the Connecticut presentation. Judges responded to the questions using both audience response cards and by completing the questionnaire on paper. In Connecticut, 27 judges responded only with the response cards or responded occasionally; these judges are not included in the analysis (and were not counted, as we cannot be certain they read and responded to this scenario). Only the 145 judges who turned in paper surveys were included in the analysis.

185. Among the judges reviewing the marijuana version, 36 did not respond; among the judges reviewing the heroin version, 35 did not respond.

186. Fisher’s exact test,  $p = 0.08$ .

187. Fisher’s exact test,  $p = 0.04$ .

assessments. The analysis on what remained revealed no significant main effects or interactions of gender, experience, or political party.<sup>188</sup>

Of course, it should not matter whether the defendant used marijuana or heroin. The judges responded as if there is a Fourth Amendment for marijuana that is different than the Fourth Amendment for heroin. The fruits of the search are irrelevant.<sup>189</sup> Regardless of which illicit drug he was using, the defendant's job responsibilities either did or did not render him subject to random drug testing under *Skinner*, from which the search of his locker emanated. The defendants are obviously different, however—one is likely a casual drug user while the other is likely selling a dangerous narcotic to high school kids. And the judges treated them differently.

These results suggest that judges bend the law to adapt to the severity of crimes. Other studies show similar effects. We have found that judges were able to disregard an unlawfully obtained confession more easily when the underlying crime was less severe.<sup>190</sup> Archival research on the application of the exclusionary rule also concludes that “judges take into account the egregiousness of an alleged crime when making search and seizure exclusionary rule decisions . . . .”<sup>191</sup> In effect, even though the exclusionary rule does not permit judges to consider the gravity of the offense, judges nevertheless seem to use a sliding scale that takes it into account.

#### F. *Environmental Pollution*

Federal diversity of citizenship jurisdiction<sup>192</sup> was created by the Judiciary Act of 1789<sup>193</sup> and has endured ever since. Diversity jurisdiction was designed to protect out-of-state litigants against local bias in state courts.<sup>194</sup> It was controversial when it was enacted, and it remains so

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188. For each demographic parameter, we ran a logistic regression on the condition, the demographic parameter, and an interaction term. In all cases,  $z$ 's < 1.5 and  $p$ 's > 0.15.

189. See SATTER, *supra* note 30, at 148 (“When faced with motions to suppress, I disregard the incriminating nature of the evidence being challenged and rigorously concentrate on the constitutional question of whether or not the evidence was obtained legally.”).

190. See Rachlinski, Wistrich & Guthrie, *supra* note 160, at 1613–15 (summarizing findings showing that judges were less able to disregard a confession obtained as a result of severe police misconduct when the crime was murder than when the crime was robbery).

191. Jeffrey A. Segal & Benjamin Woodson, *Motivated Cognition on the Bench: Does Criminal Egregiousness Influence Judges' Beliefs About Police Wrongdoing?* 23 (April 23, 2014) (unpublished manuscript), available at <http://isps.yale.edu/sites/default/files/files/segal-woodson.pdf>, archived at <http://perma.cc/5KNE-NXE5>.

192. 28 U.S.C. § 1332 (2012).

193. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79 (codified as amended at 28 U.S.C. § 1332).

194. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 553–54 (2005); ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 5.3.2 (6th ed. 2012); Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 614–15 (2004).

today.<sup>195</sup> The contemporary debate “centers on whether state courts are likely to be biased against out-of-staters”<sup>196</sup>: “Critics of diversity jurisdiction argue that there is insufficient proof of bias against out-of-staters in state courts. . . . The defenders contend that bias still exists against out-of-staters . . . .”<sup>197</sup> The debate has resisted resolution because “the question of whether state courts are biased against out-of-staters is an empirical question, and it is extremely difficult to devise studies that can adequately measure the differences between court systems.”<sup>198</sup> We decided to gather empirical data that might inform it.

Do judges actually favor in-state litigants in this day and age? Although it seems unlikely, consider what a former Chief Justice of the West Virginia Supreme Court had to say on the topic:

[A]s long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else’s money away, but so is my job security, because in-state plaintiffs, their families, and their friends will reelect me.<sup>199</sup>

Assuming that he was serious, Justice Neeley’s remark suggests that he was openly biased against out-of-state litigants.<sup>200</sup> Other judges might

195. See Debra Lyn Bassett, *The Hidden Bias in Diversity Jurisdiction*, 81 WASH. U. L.Q. 119, 123 (2003) (“The historical purpose behind diversity jurisdiction is unclear, and its utility has long been controversial.” (footnotes omitted)); Tammy A. Sarver, *Resolution of Bias: Tort Diversity Cases in the United States Court of Appeals*, 28 JUST. SYS. J. 183, 186 (2007) (“[J]ust as controversy and debate plagued the Framers in the establishment of such a powerful grant of federal jurisdiction, disagreement continues to characterize the discussions regarding the modern propriety of retaining diversity jurisdiction.”).

196. CHEMERINSKY, *supra* note 194, § 5.3, at 313.

197. *Id.* § 5.3, at 311–12. Lawyers appear to disagree about whether state court bias against out-of-state litigants still exists. Compare Nima Mohebbi, Craig Reiser & Samuel Greenberg, *A Dynamic Formula for the Amount in Controversy*, 7 FED. CTS. L. REV. 95, 110 (2013) (“[T]he original justifications for diversity jurisdiction have eroded over time.”), with Jerry Goldman & Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 98 & tbl.1 (1980) (reporting that 40% of attorneys surveyed cited “bias against an out-of-state resident” as a reason for choosing a federal forum), and Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178, 179 & tbl.1 (1965) (reporting that 60.3% of attorneys surveyed considered local prejudice against an out-of-state plaintiff as a reason for preferring a federal forum).

198. CHEMERINSKY, *supra* note 194, § 5.3, at 313.

199. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 142 n.248 (1993) (quoting Joani Nelson-Horchler, *Lobby the Courts, State Judge Says, but Critics Balk*, IND. WK., Nov. 1988, at 36, 36.) (internal quotation marks omitted).

200. This might be an example of so-called “cause judging.” See JAN PAULSSON, *THE IDEA OF ARBITRATION* 259 (2013) (“Judicial corruption or bias (such as local favoritism) involves pathologies that need to be studied as such.”); Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 10 (2014) (“[T]he cause judge rejects the core idea of non-accountability so important to the standard conception of the judge’s role, . . . and instead takes moral responsibility for the impact of his or her rulings on the community.”).

share that attitude, but we suspect that most do not and instead do their best to treat both in-state and out-of-state litigants impartially.<sup>201</sup> We wondered, however, whether even judges who were not openly biased, and who believed themselves to be fair, might nevertheless be biased against out-of-state litigants.

To attempt to find out, we performed an experiment on 391 state judges from Minnesota, New Jersey, and Ohio.<sup>202</sup> The materials asked them to assume that they were presiding over a bench trial. The plaintiff alleged that the defendant had polluted the plaintiff's lake and downstream waters, by surreptitiously dumping toxic chemicals generated by his dental-adhesive manufacturing business into the lake at night. The defendant had been doing this for several months to avoid the hassle and expense of safe disposal. Shortly thereafter, the plaintiff swam in the lake and suffered acute arsenic poisoning. His injuries were severe and included loss of a kidney, persistent nausea and headaches, and facial disfigurement. The judges were informed that the parties had reached a partial settlement, pursuant to which the defendant conceded liability and agreed to pay \$500,000 in compensatory damages, but that the amount of punitive damages, if any, that should be awarded still needed to be decided. The judges were told that the defendant's business was highly profitable and had a book value of approximately \$10,000,000. They were then asked how much, if anything, they would award in punitive damages.

For all three groups of judges, we used two conditions. For the Minnesota judges, either the defendant lived and worked in Minnesota, making adhesives for Minnesota dentists, or he lived and worked in Wisconsin, making adhesives for Wisconsin dentists. We wanted to determine whether Minnesota judges would render higher punitive damage awards against a Wisconsin resident who crossed the state border to pollute a precious natural resource and caused serious injury than they would if the defendant was a Minnesota resident. One potential difficulty with this version of the problem, however, is that it confounds the variation in the defendant's residency with whether the tort involves travelling across a state line. Although whether the defendant travelled across a state line has no legal significance, the judges might have thought that crossing the border to commit the tort against a Minnesotan was somehow worse than committing it without crossing a state border. (The problem identifies the distance travelled as twenty miles in both cases.). To account for this, in New Jersey and Ohio, we described the defendant's actions as consistently

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201. *See* Thomas v. Gillen, 491 F. Supp. 24, 26 n.1 (E.D. Va. 1980) ("This Court will not conceal its disaffection for the notion that federal jurisdiction over disputes between citizens of different States is necessary to protect out-of-State parties from local prejudice. State judges, no less than federal judges[,] are obligated to provide a neutral forum.").

202. *See infra* Appendix F.

involving a cross-border tort but varied the residency of the parties: in New Jersey, the judges either read about a New Jersey plaintiff being poisoned by a Pennsylvania resident or about a Pennsylvania resident being poisoned by a New Jersey resident; in Ohio the judges either read about an Ohio plaintiff being poisoned by a Michigan resident or about a Michigan resident being poisoned by an Ohio resident.<sup>203</sup>

Thus, in all three states, the scenario either provided the judges with an opportunity to benefit an in-state resident at the expense of an out-of-state resident, or it did not. Could the judges put the natural human tendency toward in-group favoritism aside? On the one hand, bias against an out-of-state resident seems plausible because he is a member of an out-group.<sup>204</sup> On the other hand, the conduct, the intent, and the harm are exactly the same, and judges are steeped in the norm of judicial impartiality.

Among the 371 judges who responded to this problem,<sup>205</sup> 350 (or 94%) awarded punitive damages (10 in the in-state and 11 in the out-of-state versions did not. We scored these judges as having awarded \$0 in damages in assessing the size of the judges' awards.).

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203. The only other variation among the states was that we used the appropriate standard for punitive damages in that state. Under Minnesota law, punitive damages are allowed where clear and convincing evidence shows that the defendant deliberately disregarded the rights or safety of others. MINN. STAT. ANN. § 549.20(1)(a) (West 2010). The law in New Jersey and Ohio is similar. Compare N.J. STAT. ANN. § 2A:15-5.12(a) (West 2000) (requiring a showing by clear and convincing evidence that acts or omissions were actuated by actual malice or wanton and willful disregard for an award of punitive damages), with OHIO REV. CODE ANN. § 2315.21(C) (West Supp. 2014) (mandating a demonstration of malice or aggravated or egregious fraud and requiring the trier of fact to return a verdict on compensatory damages before a plaintiff may recover punitive damages).

204. Some have argued that punitive damage awards are based on emotion rather than cognition. See, e.g., Slovic et al., *supra* note 75, at 415 (“[A] punitive damage award is a personal injury lawsuit seem[s] to be derived from attitudes based on emotion rather than on indicators of economic value.”).

205. 17 judges did not respond: 8 in the in-state version and 9 in the out-of-state version.

**Table 7: Damage Awards (in \$1,000s) by Condition**

| State      | Defendant (N)         | 25th Percentile | Median | 75th Percentile | Average |
|------------|-----------------------|-----------------|--------|-----------------|---------|
| Minnesota  | In-State (56)         | 500             | 1,000  | 2,000           | 1,954   |
|            | Out-of-State Def (58) | 1,000           | 1,750  | 3,000           | 2,060   |
| New Jersey | In-State (75)         | 1,000           | 1,500  | 2,500           | 2,432   |
|            | Out-of-State (73)     | 1,000           | 2,000  | 2,500           | 2,553   |
| Ohio       | In-State (59)         | 500             | 1,000  | 1,500           | 1,417   |
|            | Out-of-State (50)     | 500             | 1,000  | 2,000           | 1,674   |
| Total      | In-State (190)        | 500             | 1,000  | 2,000           | 1,982   |
|            | Out-of-State (181)    | 1,000           | 1,500  | 2,500           | 2,151   |

Table 7 reveals that judges punished the out-of-state defendant more harshly than the in-state defendant. The average award was higher for out-of-state defendants than for in-state defendants in all three states, although the differences were small. The average can be a misleading statistic, however. Like most distributions of damage awards, these damage awards are positively skewed, with a small number of high awards having a disproportionate effect on the average. The percentiles are more stable and reveal that the amounts awarded against out-of-state defendants tended to be higher. The overall difference was statistically significant.<sup>206</sup>

We also performed a parametric analysis (a *t*-test) on a transformation of the damage awards that produced a distribution that was not skewed; this test showed a marginally significant overall effect.<sup>207</sup> ANOVA of the transformed awards on the condition, gender (or party or experience), and an interaction term revealed no significant main effect for the demographic variables (gender, years of experience, and political orientation) nor any significant interactions.<sup>208</sup>

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206. The Mann–Whitney test (a non-parametric analysis based only on the rank order of the awards) was significant:  $z = 2.36, p < 0.05$ .

207. The transformation was a Box–Cox transformation:  $t(348) = 1.93, p = 0.06$ .

208. All  $F$ 's  $> 0.90, p$ 's  $< 0.35$  for the main effect of demographics and interactions.

The results suggest that in-group preferences are about as salient to judges as they are to jurors.<sup>209</sup> The effect was more pronounced among the judges in Minnesota, thereby raising the possibility that judges might also have been reacting more negatively to a tort that involved crossing a state line. That said, we doubt it, as the judges surely knew that fact has no legal significance.<sup>210</sup> It is also possible that variation in the degree of interstate rivalries played a role. Perhaps New Jersey judges see Pennsylvania (and Ohio judges see Michigan) as less foreign or as less of a rival than Minnesota judges see Wisconsin. Nevertheless, the effect persisted across the three jurisdictions, which—taken as a whole—showed a notable bias against out-of-state defendants.

The implications of our results for the debate over the continued need for diversity of citizenship jurisdiction are murky. Our experiment does not directly compare, for example, Minnesota state judges with Minnesota federal judges. Whether a Minnesota federal judge who enjoys life tenure would treat a Wisconsin defendant the same as a Minnesota defendant, we cannot say.<sup>211</sup> Merely because Minnesota state judges exhibit in-group bias does not mean that a federal judge who also lives and works in Minnesota would do so as well, although it is possible that a lifetime of ties to Minnesota would trump her membership in the federal—rather than state—judiciary. If that is true, then a Wisconsin defendant who removed a case from a Minnesota state court to a Minnesota federal court might simply be substituting one forum biased by in-group favoritism for another.

## V. Discussion

### A. Summary

With the aid of 1,800 state and federal judges from all over the United States and Canada, we uncovered clear evidence that emotions influence judges. Our results encompass civil and criminal cases and a wide range of tasks (interpreting and applying law, exercising discretion, awarding damages) and procedural contexts (motion to dismiss, motion for summary judgment, motion to suppress, motion to discharge debt, award of punitive damages, sentencing). Sympathetic parties fared better—often far better—

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209. See Reid Hastie, David A. Schkade & John W. Payne, *Juror Judgments in Civil Cases: Effects of Plaintiff's Requests and Plaintiff's Identity on Punitive Damage Awards*, 23 LAW & HUM. BEHAV. 445, 466 (1999) (finding that mock jurors awarded local plaintiffs significantly more in punitive damages than geographically remote plaintiffs).

210. They might have thought that the defendant believed it had legal significance or perhaps that crossing the border reflected a greater effort to cover up his crime.

211. One study suggests that federal appellate judges do not exhibit in-group bias in diversity cases. Sarver, *supra* note 195, at 195 (“[I]t seems that the citizenship of neither the litigant nor the federal judge was found to exert any influence on the outcome of a tort diversity case in the courts of appeals.”).

than unsympathetic ones in our study. On the other hand, we did not observe any party preference in the judges' responses. They did not favor either plaintiffs or defendants systematically. We also found little support for the proposition that political ideology drives much judicial decision making at the trial level. Further, the gender of the judges hardly mattered either. Except for a small variation in the first experiment, male and female judges reacted similarly. Overall, judges simply favored the litigant who generated the more positive affective response.

Some have assumed that affect may influence jury—and even judge—fact-finding at trial.<sup>212</sup> Our experiments go a step further, showing that affect influences law interpretation and application and that it does so even in the relatively emotionally arid (compared to trial) setting of pretrial motions,<sup>213</sup> where some have argued that law is most likely to be correctly applied.<sup>214</sup>

Although we cannot say for certain, we doubt that the judges in our study consciously intended to do what they did. More likely, it was the result of motivated cognition. When the judges decided our hypothetical cases, they were not saying to themselves: “I like or feel sympathy for X so I am going to resolve this uncertain legal issue in his favor.” Rather, they likely were arguing (in their minds) in conventionally relevant terms, such as the language of the statute, the legislative history, the dictates of precedent, or policy implications. But without being consciously aware of it, their thumbs were on the scale, covertly tipping the balance toward the more likeable or sympathetic litigant so that she consistently prevailed more often than the less likeable or sympathetic litigant on seemingly objective and legitimate grounds.

Our problems placed judges in a dilemma between “heart” and “head,” requiring them to choose between faithfully applying the law and reaching an unjust result in the particular case before them or bending the law to achieve justice.<sup>215</sup> To the extent that the law and the facts are distinct,<sup>216</sup>

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212. See Mark Spottswood, *Emotional Fact-Finding*, 63 U. KAN. L. REV. 41, 101 (2014) (“Evidence at trial will inevitably induce emotional responses in factfinders, whether the cases are being tried to judges or juries.”).

213. Many pretrial motions are decided on the papers. Even when a hearing is held, it is usually limited to oral arguments by counsel. The litigants themselves are seldom seen and almost never heard, except in criminal cases, of course. See generally Morton Denlow, *Justice Should Emphasize People, Not Paper*, 83 JUDICATURE 50 (1999) (arguing that the lack of face-to-face interaction among parties, judges, and lawyers is detrimental to the federal justice system).

214. See Robert P. Burns, *The Rule of Law in the Trial Court*, 56 DEPAUL L. REV. 307, 319–20 (2007) (suggesting that legal rules may be applied more accurately in motions than in trials, in part because exposure to extraneous factors is less likely).

215. See generally PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 8–15 (1997) (noting that the nineteenth century saw the emergence of new or modified legal doctrines designed to preserve a sense of justice).

facts are notoriously uncertain,<sup>217</sup> so one might expect that the former is less subject to affective influence than the latter. That may be true and might suggest that our experiments, which did not involve fact-finding, actually underestimate the impact of emotion on judicial decision making. What our experiments show, however, is that whatever the impact of emotion on fact-finding, legal determinations are also malleable.

The results of our experiments involving interpretation of law tend to confirm a relatively “tame” version of legal realism, specifically, one in which judges are presumed to follow the law when it is clear and to be influenced by emotional and other extralegal factors only when it is not. They do not, however, confirm the stronger, “untamed” version of legal realism, in which it is hypothesized that judges decide cases based on emotion or other extraneous factors even when the law is clear.<sup>218</sup> Therefore, rather than indicating that judges are lawless, our results merely suggest that affect influences how judges use their discretion.

Our experiments also indicate that judges react in much the same way that jurors do but perhaps require a stronger affective influence to do so. Although we did not test jurors or juries using our problems, partly because that is not our research focus and partly because our problems were tailored to tasks judges, rather than jurors, perform, we would expect the divergence between conditions to be even larger with jurors or juries than it was with judges. We know from prior research that judges and jurors do not react in the same way to affective motivation.<sup>219</sup> What our results show is that although judges may be less susceptible than jurors, they are not immune.

In sum, as one British judge put it: “Does the wind of the law blow equally upon the meritorious and the unmeritorious litigant? No, it does not. At all judicial levels and in all systems the law is sometimes stretched, a little shamefacedly perhaps.”<sup>220</sup>

### B. *Limitations*

Like all studies, ours has limitations. First, our experiments are unavoidably artificial. They did not involve real cases or take place in a courtroom. It is possible that a judge presiding over a real case might not be as influenced by affect as our experimental subjects were. The serious

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216. See Ronald J. Allen & Michael S. Pardo, Essay, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (proposing that the distinction between fact and law is inherently flawed and instead questions of law are part of the larger category of questions of fact).

217. See FRANK, *supra* note 3, at 16 (“Accordingly, the court, from hearing the testimony, must guess at the actual, past facts. Judicially, the facts consist of the reaction of the judge or jury to the testimony.”).

218. See Frederick Schauer, *Legal Realism Untamed*, 91 TEXAS L. REV. 749, 779–80 (2013) (distinguishing between “tame” and “untame” versions of legal realism).

219. See KALVEN & ZEISEL, *supra* note 8, at 217.

220. DEVLIN, *supra* note 102, at 92.

consequences of a real case, the accountability to an appellate court, and the like could cause judges to behave differently. On the other hand, a real case simply raises the stakes; it does not necessarily trigger a different way of thinking. Moreover, real litigants will obviously provoke more emotional responses than hypothetical ones.<sup>221</sup> We find it somewhat remarkable, for example, that the judges reacted to the severity of the underlying crime in our materials involving the search of a locker, even though the judges knew perfectly well that the issue was only hypothetical.

Second, some of the litigant characteristics we manipulated arguably might be relevant to the underlying legal issue in some of the scenarios. In the bankruptcy scenario, for example, the debtor who was caring for a sick parent is obviously more responsible than the spring breaker. The judges might have thus viewed the caregiver as less likely to run up credit card debt with the knowledge that they will be filing for bankruptcy and never pay it back. We think this is the only one of our scenarios, however, that is vulnerable to this criticism. In the first (illegal-immigration) and second (medical-marijuana) experiments, the relevant statute either did or did not cover identical conduct. While it might seem more likely that the nineteen-year-old defendant in the medical-marijuana scenario was faking his medical condition (which was seizures) than the fifty-five-year-old defendant (who suffered from a terminal illness), the statute is either best construed as covering post-arrest medical affidavits or it is not. Distinguishing between the more and less sympathetic litigants in these criminal scenarios as a matter of sentencing discretion might make sense, but interpreting the statute to include the same conduct if defendant *A* committed it but not if defendant *B* committed it sets the law off on an uneven path. The differential reaction to the strip-search problem also cannot be reconciled with a rational response to the characteristics of the parties because the judges in all cases are responding to a facial challenge—in effect deciding the case for all potential litigants. They should not be swayed by the particular one who happened to be appearing in front of them, and yet they were. Likewise, in our search-and-seizure problem, the defendant is either in a safety-sensitive position or he is not; the outcome of the search simply does not speak to that legal question. Finally, we can construct no reasonable basis for penalizing a Wisconsin defendant more severely than the Minnesota defendant for the same conduct.

Third, judges also have more information in real cases than they have in our one-page hypothetical cases. That said, we consistently provided the

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221. See Vicki L. Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention, and Level of Emotionality*, 20 LAW & HUM. BEHAV. 565, 568–69 (1996) (finding that subjects who watched a video of portions of a trial experienced greater emotional reactions than those who read transcripts); Piotr Winkielman, *Bob Zajonc and Unconscious Emotion*, 2 EMOTION REV. 353, 359 (2010) (“[A]ffective pictures are more efficient than words in eliciting physiological reactions, which reflect changes in core affective systems.”).

gist of the facts and the applicable law just as judges would receive in an actual case. Because, in life, people form attitudes about others immediately using superficial traits or “thin slices” of information, which then tend to persist because subsequent information is viewed through the lens of that first impression,<sup>222</sup> it is unlikely that making our scenarios more detailed would have made much difference. Across all six scenarios, it is clear that the judges reacted to extralegal feelings or sympathies.

Fourth, our problems presented extreme contrasts between the sympathetic litigant and the unsympathetic litigant. Although judges encounter litigants occupying all points on the affective continuum, in many of our experiments our litigants occupied either one end or the other. The dramatic differences might have exaggerated the strength of the affective responses likely to be observed in most cases. We cannot say whether the influence we observed would occur in cases in which the motivational intensity or strength of the affect or feeling is less, but we expect that it might be reduced. On the other hand, the way in which we presented the differences between the litigants was restrained. We did not, for example, show the judges gruesome photographs of severed limbs, or the like.

Fifth, most of our hypothetical cases were challenging. In the illegal-immigration, medical-marijuana, and strip-search problems the legal issues were toss-ups, and in the credit card debt, environmental pollution, and narcotics-search scenarios the tests the judges were supposed to apply were vague and standardless. The mix of cases in actual courtrooms includes both easy cases and hard cases. It certainly contains more of the former than of the latter.<sup>223</sup> Although it could be argued that challenging cases are the most likely to be litigated (because easy cases are not filed or are quickly settled),<sup>224</sup> they are also relatively rare. Usually, even in cases that are litigated through trial, the facts, the law, or both are clear enough that the judge is at least nudged in one direction rather than the other. That might leave less room for affect to influence the outcome in ordinary cases.<sup>225</sup> None of our scenarios invited out-and-out nullification by judges into the teeth of clear law. We expect that few judges would intentionally

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222. See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *PSYCHOL. REV.* 814, 819–20 (2001).

223. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 60 (1924) (“Nine-tenths perhaps more, of the cases that come before a court are predetermined . . . by inevitable laws that follow them from birth to death. The range of free activity is relatively small. . . . None the less, those are the fields where the judicial function gains its largest opportunity and power.”).

224. See Schauer, *supra* note 218, at 757–58 (arguing that “the field of litigated cases thus systematically under-represents the easy cases and over-represents the hard ones”).

225. Cf. Frank B. Cross, *Law as Courtesy?*, 47 *TULSA L. REV.* 219, 223 (2011) (“An indeterminate law leaves more room for other influences on decisions.”).

do that. Our expectation is consistent with the research on juries.<sup>226</sup> On the other hand, maybe unclear cases matter most.<sup>227</sup>

Relatedly, we severely limited the choices that were available to the judges. Judges have great discretion to find creative remedies so as to avoid the kinds of difficult choices we asked our judges to make. A judge in our medical-marijuana case, for example, might convict the fifty-five year old but issue a suspended sentence—an option we did not provide. Judges in the search-and-seizure problem might well do the same thing for the defendant convicted only of marijuana possession. The combination of difficult legal questions and constrained outcomes might have exacerbated the effect of emotion in our scenarios.

Sixth, our experiments were limited in scope. For example, we did not attempt to manipulate judges' moods directly, such as by attempting to make them feel happy, sad, or angry, as opposed to manipulating their feelings about a particular litigant. Although the line separating them is blurry, mood and affect are distinct.<sup>228</sup> Our experiments focused on the latter. Some have concluded that the mood of a decision maker can have a profound impact on decision making.<sup>229</sup> The narrowness of our study may

226. Acknowledging the role of the jury as legislator, Harry Kalven, Jr. and Hans Zeisel note: [T]he jury imports its values into the law not so much by open revolt in the teeth of the law and the facts, although in a minority of cases it does do this, as by what we termed the liberation hypothesis. The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values. It will not often be doing this consciously; as the equities of the case press, the jury may, as one judge put it, "hunt for doubts." Its war with the law is thus both modest and subtle. The upshot is that when the jury reaches a different conclusion from the judge on the same evidence, it does so not because it is a sloppy or inaccurate finder of facts, but because it gives recognition to values which fall outside the official rules.

KALVEN & ZEISEL, *supra* note 8, at 495.

227. See Charles E. Clark, *The Limits of Judicial Objectivity*, 12 AM. U. L. REV. 1, 5 (1963) ("Turning now to the small area requiring creative effort in the treatment of the new cases, its importance of course far transcends its numbers. For these cases are what give tone and color to the entire judicial process.").

228. Moods are "less intense, more diffuse, relatively enduring, and tend[] to lack a readily identifiable source." Neal Feigenson & Jaihyun Park, *Emotions and Attributions of Legal Responsibility and Blame: A Research Review*, 30 LAW & HUM. BEHAV. 143, 144 (2006); see also Jeremy A. Blumenthal, *Does Mood Influence Moral Judgment? An Empirical Test with Legal and Policy Implications*, 29 LAW & PSYCHOL. REV. 1, 3 (2005) ("The distinction is important; emotion[s]—anger, fear—tend to be more stable, focused, and attributable to a particular source; moods—anxiety, elation, depression—tend to be more transient, diffuse, and less attributable to particular sources.").

229. See, e.g., ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 120 (George A. Kennedy trans., 1991) ("[T]hings do not seem the same to those who are friendly and those who are hostile, nor . . . to the angry and the calm . . ."); Feigenson & Park, *supra* note 228, at 147 ("Many studies . . . have shown that people in moderately positive moods tend to think more creatively and to be better at drawing associations and at inductive reasoning than people in a neutral mood, whereas people in moderately negative moods tend to be better at analytical and deductive reasoning.").

have caused us to overlook the potential role of mood as a mediator of affect.

Seventh, our experiments also were limited to the interpretation or application of law and the exercise of discretion. They did not involve pure fact-finding. The impact of affect could be either greater or lesser for factual uncertainty than for legal uncertainty. We cannot say for sure, of course, but we believe that emotion exerts even greater influence on fact-finding. Many believe that facts are more uncertain than law,<sup>230</sup> and the greater the indeterminacy the greater the opportunity for extrinsic influences, such as affect, to intrude.

Eighth, sympathy might not be the only factor influencing judges in these scenarios. We did not measure judges' sympathies or antipathies for the parties directly, preferring instead to frame our questions in the way that they would appear to judges at trial. We are nevertheless confident that the litigants in our scenarios vary markedly in the degree to which they are sympathetic. Other differences between the scenarios might have produced the effects we observed as well—such as variations in the gender or age of the litigants. Furthermore, the variation in the search-and-seizure scenario changes the cost of suppressing the evidence to society considerably, which might have driven the effect more than sympathy for the parties. At the very least, we have demonstrated that a wide range of extralegal factors influence judges. And across six different scenarios, the dominant variation is the relative degree of sympathy the two parties evoked.

Finally, we only examined aggregate results. No two judges are alike and some might have been unaffected by the characteristics of the parties. Any attempt to predict the outcome of a particular case based on our data must be viewed with suspicion. Our results are merely probabilistic. Some judges might be impervious to the affect altogether, while others may be susceptible to merely a subset of potential affective stimuli or may be influenced only if the affective stimulus is very strong.

The results, however, indicate that emotion will often influence judges in real cases. In our study, the judges performed familiar, common judicial tasks and were unable to avoid reacting to the sympathetic or unsympathetic character of the parties. Even though the features we varied were largely unrelated to the legal judgments they had to make, the judges ruled more favorably for the sympathetic litigants.

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230. See FRANK, *supra* note 3, at 4 (“[T]rial-court fact-finding is the toughest part of the judicial function.”); Clark, *supra* note 227, at 3–4 (“At the trial level the ratio of cases turning upon certain substantive principles is obviously yet higher [than on the appellate court], though the then open contest of facts—the actual events—may well make the outcome less predictable.”).

### C. Implications

1. *For Lawyers.*—Our results have several implications for lawyers. First, when they have a choice, lawyers should attempt to select clients that are likeable, sympathetic, or otherwise appealing. This applies most clearly to the selection of representative litigants in class actions, but also to long run institutional reform litigation strategies, such as the approach taken by Charles Hamilton Houston in crafting a long-term strategy to overturn segregation for the NAACP.<sup>231</sup> This will not make a difference in every case, but it might increase the odds in some cases and be decisive in few. Of course, this is not always possible. Typically, lawyers must take their clients as they find them.

Second, lawyers might think twice before accepting cases from unappealing clients—especially if they represent plaintiffs in contingent fee cases. The client’s lack of appeal might reduce the odds of success and hence the value of the claim, at least in close cases. We expect that savvy lawyers do this and also take the appeal of their clients into account when valuing cases for settlement purposes.<sup>232</sup> This preference for sympathetic clients is troubling, however, because it suggests that less appealing or less sympathetic clients may have more difficulty obtaining counsel (or at least competent counsel) than more appealing or more sympathetic ones, thereby widening the gap between their relative rates of success even further.

Third, contrary to the advice of Justice Scalia,<sup>233</sup> lawyers should not neglect emotion in presenting their cases. “Provocations of emotion are much superior to provocations of the mind alone.”<sup>234</sup> Like jurors, judges are susceptible to emotional appeals, although they may be both less responsive than jurors<sup>235</sup> and more sensitive to lawyers’ attempts to manipulate them.<sup>236</sup> To maximize their effectiveness, lawyers need to do

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231. See *NAACP History: Charles Hamilton Houston*, NAACP, <http://www.naacp.org/pages/naacp-history-charles-hamilton-houston>, archived at <http://perma.cc/ZVB6-SGYB> (noting that Houston’s litigation strategy to attack Jim Crow segregation included exploiting the inequality of “separate but equal” as applied to public education).

232. See James E. Fitzgerald & Sharon A. Fitzgerald, *Settlements*, in 3 *LITIGATING TORT CASES* § 33:4 (Roxanne Barton Conlin & Gregory S. Cusimano eds., 2003) (including client likeability in a list of factors to consider when valuing a case for the purposes of settlement).

233. See *supra* note 29 and accompanying text.

234. *WORDS OF POWER: VOICES FROM INDIAN AMERICA* 34 (Norbert S. Hill, Jr. ed., 1994) (quoting Vine Deloria, Jr., *Standing Rock Sioux*).

235. See *KALVEN & ZEISEL*, *supra* note 8, at 497–98 (“The judge very often perceives the stimulus that moves the jury, but does not yield to it. . . . The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude.”); *SCALIA & GARNER*, *supra* note 29, at 32 (suggesting judges are impervious to and resentful of strong emotional arguments).

236. See Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contribution in the Courtroom: Do Apologies Affect Adjudication?*, 98 *CORNELL L. REV.* 1189, 1193 (2013)

everything reasonably possible to ensure that their motions, arguments, and trial presentations are emotionally, as well as logically, appealing.<sup>237</sup> Devoting more attention to helping their clients appear more appealing or more sympathetic, by making them more presentable, by “humanizing” them during direct examination, and by assembling the facts into a compelling story that places the client in a favorable light is worth the effort. We suspect that most talented and experienced lawyers already do these sorts of things intuitively, but our results provide an empirical basis for doing them and underscore their significance, even in the context of pretrial motions and bench trials.

2. *For the Justice System.*—Is the effect we observed good or bad? For strict formalists, who believe that legal rules are clear and should be applied consistently,<sup>238</sup> our results probably are deeply troubling. The rest of us may feel more conflicted. The answer depends on the relative importance one places on technically accurate as opposed to societally acceptable outcomes. To the extent that one comes down on the side of the latter—which many would agree cannot be ignored altogether—the decisions may seem acceptable when considered solely in terms of their outcomes on the specific facts presented. The perceived legitimacy of the justice system is important to maintaining social order. Where the law is unclear or discretion is available, it may be sensible for decisions to conform to the community’s intuitions about fairness and morality.<sup>239</sup> The law perhaps can be bent at times without it breaking.

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(“Because judges so frequently hear apologies, judges might become inured to their influence and might even react cynically or negatively to apologies.”).

237. See FARRELL, *supra* note 78, at 287 (quoting Clarence Darrow, in part: “‘You try to throw around the case a feeling of pity, of love, if possible, for the fellow who is on trial,’ he said. If the jurors can be made to identify with the defendant and his ‘pain and position’ they will act ‘to satisfy themselves.’”).

238. See Burt Neubourne, Essay, *Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques*, 67 N.Y.U. L. REV. 419, 421 (1992) (“Pure formalists view the legal system as if it were a giant syllogism machine, with a determinate, externally-mandated legal rule supplying the major premise, and objectively ‘true’ pre-existing facts providing the minor premise. The judges’ job is to act as a highly skilled mechanic . . . .”); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 520–23 (1988) (defining formalism (or legalism) as the view that judicial decisions are determined and bound by law, which is a clear set of rules contained in preexisting canonical legal materials such as statutes and case precedents).

239. See Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 811–13 (2012) (emphasizing that compliance with criminal law in “borderline cases” is accomplished through “deference” to the criminal system’s “moral credibility,” which is in part premised upon punishments conforming with a community’s view on what is morally condemnable); cf. FRANK, *supra* note 101, at 188 (explaining that the public “turns to the jury for relief from . . . dehumanized justice,” which relief is often accomplished by means of occasional hidden case-by-case bending or nullification of law); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910) (“Jury lawlessness is the great corrective of law in its actual

The common law process, which influences not merely the evolution of case law, but also the interpretation of statutes, regulations, and constitutions,<sup>240</sup> places judges in an awkward position because they must focus on deciding the case before them based on the past, but they must also keep one eye on the future and the ramifications of the ruling in the case before them for the class of eventual cases that is not before them.<sup>241</sup> Considered in that context, emotion could have two negative implications.

First, judges' emotional reactions can be unfair to individual litigants. If litigant *A* wins and litigant *B* loses simply because litigant *A* is more appealing than litigant *B*, that is problematic. Litigants who are alike in all relevant respects ought to be treated alike.<sup>242</sup> The relative appeal of *A* and *B* should be irrelevant. Both are entitled to equal justice on the merits (both substantive and procedural) of their claims. Our results suggest that cases that are alike in all legally relevant respects will nonetheless sometimes be decided differently. Judges might be creating one set of rules for the sympathetic and a different set for the unsympathetic.

Second, emotion might cause doctrinal distortion because the law could evolve in one direction if litigant *A*'s case is decided first and in a different direction if litigant *B*'s case is decided first.<sup>243</sup> The sequence in which cases arise can shape the evolution of the law. Assume two plaintiffs, *A* and *B*, and that *A* is likeable but *B* is not. On a close question of statutory interpretation *A* may prevail but *B* may not. As a result, the scope of a statute may either be broadened (to provide *A* with a remedy) or

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administration.”). That judges may also play a role in this process is not necessarily a bad thing. For example, it allows the law to flex “without tampering with the brittle rule-structure.” Lawrence M. Friedman, *Some Notes on the Civil Jury in Historical Perspective*, 48 DEPAUL L. REV. 201, 209 (1998). Nevertheless, because there are fewer trials and more dispositions on pretrial motions, relying on jurors to perform this function may no longer be adequate.

240. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 5 (1949) (explaining that courts reason by example or analogy regardless of whether they are applying cases, statutes, or constitutions); POSNER, *supra* note 32, at 83 (“Ours is a case law system that includes but is not exhausted in common law. Not only constitutional law (obviously), but also to a considerable extent statutory law, is shaped by judicial decisions . . .”).

241. See Anthony D’Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 51–52 (1983) (“[T]he impact of judicial dispute-resolution looks forward; future potential litigants are affected by a case they did not participate in.”).

242. See *Ward v. James*, [1966] 1 Q.B. 273 (C.A.) 293–94 (opinion of Denning, L.J.) (“It is an essential attribute of justice in a community that similar decisions should be given in similar cases . . .”); RUPERT CROSS, PRECEDENT IN ENGLISH LAW 4 (3d ed. 1977) (“It is a basic principle of the administration of justice that like cases should be decided alike.”).

243. See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 127 (2006) (“[A] doctrine of precedent . . . produces a form of path-dependence: the content of law becomes highly sensitive to the order in which cases arise . . .”); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) (noting that courts’ decisions are “path-dependent” in the sense that “courts’ early resolutions of legal issues can become locked-in and resistant to change”).

narrowed (to deny *B* a remedy).<sup>244</sup> Now when *C*, a plaintiff of average or neutral likeability comes along, the likeability of the plaintiff who preceded him may matter. If it was *A*, and the statute received a broad interpretation, then *C* may prevail. But if it was *B*, and the statute received a narrow interpretation, then *C* may lose. Even if the next plaintiff to come along is *D*, who is likeable, he may lose if he was preceded by *B*, an unlikeable plaintiff who generated a narrow interpretation of the statute, even though he would have prevailed if he had been preceded by *A*, a likeable plaintiff who would have generated a broad interpretation of the statute, or even if his case had been the first to arise.

Perhaps appellate courts can avoid the influence of emotion. If so, then the danger of doctrinal distortion is limited. After all, trial courts are not bound by each other's decisions,<sup>245</sup> although they may be influenced by them. If court 1 decides likeable litigant *A*'s case first, and gives a statute a generous interpretation, court 2, which subsequently decides unlikeable litigant *B*'s case next, is not obligated to follow court 1's generous interpretation of the statute and is free to adopt a narrower one instead. Although trial court decisions can operate as persuasive precedents for other trial courts, the most serious danger of distortion by affect is at the appellate level.

Appellate courts differ from trial courts in several potentially relevant ways: (1) typically three (or more) judges decide as a group rather than one judge deciding alone; (2) they have merely indirect contact with litigants and witnesses; (3) they enjoy a favorable decision-making situation that allows greater opportunity for reflection and better appreciation of the big picture; and (4) they review a lower court decision rather than starting from scratch. These differences might or might not make appellate courts less susceptible to the impact of affect than trial courts.

As to the first factor, it seems likely that appellate judges, at least when deciding individually rather than as a panel, would also be vulnerable to the affect effect.<sup>246</sup> It is also not clear whether groups are better than individuals at avoiding the influence of emotion.<sup>247</sup> One would expect the

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244. See LEVI, *supra* note 240, at 23 (“[A] court’s interpretation of legislation is not dictum. The words it uses do more than to decide the case. They give broad direction to the statute.”).

245. *Camreta v. Greene*, 131 S. Ct. 2020, 2033 n.7 (2011).

246. See Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 781 (1957) (“If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges.”). *But see* POSNER, *supra* note 32, at 74 (“[A] former trial judge promoted to the court of appeals may be more likely to focus more on the ‘equities’ of the individual case—the aspects of the case that tug at the heartstrings—and less on its precedential significance than would . . . colleagues who had never been trial judges.”).

247. See Hastie et al., *supra* note 209, at 467 (“The conclusion of a substantial empirical literature is that deliberating groups exhibit no general advantage over individuals in the performance of judgment tasks.”).

second factor to aid appellate judges in avoiding emotional responses to litigants, but the distance from which appellate judges view a case—the “cold record”—might not matter. The judges in our research, after all, decided on the basis of an equally cold record, in which they did not see people or even photographs, but instead—like appellate judges—based their decisions on verbal descriptions alone. The third factor should tend to diminish the influence of affect by offering appellate judges a greater opportunity to second-guess their intuitive responses and by helping them to focus on all potential litigants rather than merely the particular litigants before them.<sup>248</sup> The impact of the fourth factor may be to reinforce the trial judge’s affect-based error. Although appellate review of issues of law is *de novo*,<sup>249</sup> the phenomenon of social proof<sup>250</sup> and high affirmance rates<sup>251</sup> suggest that the trial judge’s decision, even on a question of pure law, may exert some persuasive influence on appellate judges in close cases. These structural differences between trial courts and appellate courts, then, do not strongly suggest that appellate judges are better able to place affect aside than are trial judges.

3. *For Judges.*—First, judges should be cognizant of their susceptibility to affect. Most people fail to recognize its hidden influence.<sup>252</sup> Awareness is not sufficient to ensure that judges keep emotional responses in check, but it is a necessary first step.<sup>253</sup>

Second, avoidance—a technique commonly relied upon to attempt to evade affective stimuli—is foreclosed for judges. Judges cannot control what is presented to them, and it would be inappropriate for them to attempt to distract themselves from attending to litigants’ submissions. On the other hand, courts might be able to do more to separate case management and admissibility functions from case resolution functions by assigning two

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248. See POSNER, *supra* note 32, at 119 (“One value of a system of precedent is that it invites judges to think about the impact of their decisions on future litigants.”).

249. See Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U. L. REV. 11, 27 (1994) (“Judicial review of issues of law is straightforward. The standard is always *de novo*. There are no exceptions.”).

250. See generally ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 95 (3d ed. 1993) (“We view a behavior as correct in a given situation to the degree that we see others performing it.”).

251. See Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the “Affirmance Effect” on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 359 (2005) (stating that federal circuit courts affirm over 90% of the cases they review).

252. See Emily Balcatis & David Dunning, *See What You Want to See: Motivational Influences on Visual Perception*, 91 J. PERSONALITY & SOC. PSYCHOL. 612, 623 (2006) (“If they knew that they believed some pleasant thought merely because they wanted to believe it, they would also know, at least in part, how illegitimate that thought was.”).

253. See Bennett & Broe, *supra* note 69, at 17 (“It is only by accepting, and expecting, that emotion may be playing a role in decision-making, that it can be actively evaluated, and rejected if inappropriate.”).

judges to each case.<sup>254</sup> This might shield the judge deciding the case from exposure to emotionally laden suppressed evidence, for example.

Third, judges should attempt to consider the opposite, a technique that has proven successful in mitigating some cognitive biases.<sup>255</sup> As an example, harkening back to the strip-search experiment, judges confronted by a vulnerable, sympathetic, and unthreatening female arrestee should ask themselves whether the case would appear differently to them if the arrestee was a male career criminal.

Fourth, judges should engage with their reactions to emotional stimuli rather than attempt to repress them. Although some judges profess to follow suppression strategies,<sup>256</sup> there is no evidence that such strategies are effective. In general, trying not to think about something not only is ineffective but may even have an ironic rebound effect.<sup>257</sup> Moreover, repression is effortful and cognitively costly, so it may diminish decision making quality.<sup>258</sup> Analyzing and sharing feelings, stepping through a multifactor test or other decision protocol, explaining the basis for decision in a written opinion, or simply allowing the force of affective responses to dissipate with the passage of time, by contrast, can facilitate helpful deliberation.<sup>259</sup>

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254. Andrew J. Wistrich, Chris Guthrie & Jeffrey Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1325 (2005).

255. See Charles G. Lord, Elizabeth Preston & Mark R. Lepper, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984) (concluding that considering the opposite was more effective at correcting judgment biases than admonitions to be fair and unbiased).

256. See, e.g., *People v. Carter*, No. C053369, 2009 WL 626113, at \*5 n.2 (Cal. Ct. App. Mar. 12, 2009) (“I’m not moved by emotion one way or the other. I’m just kind of like an iceberg . . .”); Anleu & Mack, *supra* note 35, at 612 (describing how judges, in attempting to manage emotions, may “grow a skin . . . as thick as a rhino”). *But see* Spottswood, *supra* note 212, at 100 (arguing that “the current regime is clearly suboptimal because it treats judges as if they have a mystical superiority in terms of their levels of emotional control”).

257. See Wistrich et al., *supra* note 254, at 1262–64 (describing how refraining from thinking a thought can actually result in an individual thinking that thought more often as the brain continuously monitors mental activity to verify that suppression is successful, thereby keeping the thought constantly available).

258. See Maroney, *supra* note 118, at 1511 (concluding that when an individual expends effort to regulate emotions, that expenditure consumes cognitive resources and leaves a person with fewer resources with which to perform other tasks).

259. See Maroney, *supra* note 36, at 1273–79 (delineating a similar approach to controlling and channeling judicial anger with three factors: preparing realistically for emotion, responding thoughtfully to emotion, and integrating lessons about emotion into judging).

## VI. Conclusion

In the war between judicial heart and judicial head,<sup>260</sup> we do not doubt that judicial head prevails most of the time. Frequently, the law is perfectly clear and there is little doubt about the relevant facts. Emotion likely exerts little influence in such cases. The results of our experiments, however, suggest that judicial heart wins many skirmishes. Most judges try to faithfully apply the law, even when it leads them to conclusions they dislike,<sup>261</sup> but when the law is unclear, the facts are disputed, or judges possess wide discretion their decisions can be influenced by their feelings about litigants. This may occur without their conscious awareness and despite their best efforts to resist it. In such circumstances, where the judge is in equipoise and judicial head does not plainly indicate which decision is correct, if the case creates a strong affective response, judicial heart can carry the day.

Our results are somewhat troubling. The notion of a motivated judge swayed by her feelings about litigants is anathema to our justice system. It unacceptably blurs the boundary between two roles we endeavor to keep separate: the partisan advocate and the detached magistrate.<sup>262</sup>

Troubling or not, judges' emotional reactions are inevitable. Judges are not computers. By design, the justice system is a human process, and, like jurors, judges are influenced by their emotions to some degree, even when we would prefer that they were not, and however sincerely they may try to prevent it.<sup>263</sup> This is simply reality. If we criticize judges for this "shortcoming"—which, of course, entails advantages as well as disadvantages—then we might as well criticize successful species such as alligators for their inability to fly. The problem is not that judges cannot do something that they are supposed to do; rather, the problem is that we ought

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260. See KARSTEN, *supra* note 215, at 4 (describing the concepts of the "Jurisprudence of the Head" and "the Heart" and emphasizing that Jurisprudence of the Head is driven by the existence of rules and precedent while Jurisprudence of the Heart is driven by conscience, principle, and "justice").

261. See ROBERT E. KEETON, *JUDGING* 54 (1990) ("The obligation sometimes to reach a result one considers unjust, by one's own standards of right and wrong, is inherent in the role of judging lawfully."); POSNER, *supra* note 32, at 119 (explaining that "setting aside one's natural sympathies is a big part of playing the judicial game").

262. See *Sotomayor Confirmation Hearing*, *supra* note 12, at 7 (statement of Sen. Jeff Sessions, Member, S. Comm. on the Judiciary) ("Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other. Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law."); Avani Mehta Sood, *Motivated Cognition in Legal Judgments—An Analytic Review*, 9 ANN. REV. L. & SOC. SCI. 307, 319 (2013) ("[T]he infiltration of motivated cognition into the judgments of [legal] decision makers can undermine the rule of law.").

263. See Maroney, *supra* note 118, at 1494 (noting that emotion plays an "inevitable" role in the judicial decision-making process).

never to have expected them to be able to do it in the first place.<sup>264</sup> Our unrealistic expectations set them up for failure and set us up for disillusionment. The more constructive approach is to acknowledge the reality that judges are influenced by affective responses to litigants, and to the extent that we are uncomfortable with that fact, to take steps to ameliorate it.

We do not believe that judicial decisions are based upon “feelings/ nothing more than feelings.”<sup>265</sup> We do believe, however, that in some circumstances a judge’s feelings about the litigants can nudge him in one direction or the other. That may be good or bad, but it is a reality which an honest theory of judging must take into account.

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264. See Hayley Bennett and GA (Tony) Broe, *Judicial Neurobiology, Markarian Synthesis and Emotion: How Can the Human Brain Make Sentencing Decisions?*, 31 CRIM. L.J. 75, 90 (2007) (“Judges can only make decisions according to the rule of law, however, to the extent that their neurobiology allows.”).

265. MORRIS ALBERT, *Feelings*, on OLDIES BUT GOODIES VOL. 3 (Original Sound Entertainment 1987).

## Appendix A: Illegal Immigration

You are presiding over a case in which the defendant, Joe Hernandez, was charged with “forging an identification card” under Ohio Revised Code § 2913.31(B)(1) (which is a “misdemeanor of the first degree,” and can be punished by a prison sentence of up to 180 days).<sup>266</sup> Hernandez, a Peruvian citizen, was arrested in Ohio after cashing a check using his passport. He was carrying a genuine Peruvian passport, but he had a forged U.S. entry visa pasted into his passport. This was discovered when a teller at a check-cashing service noticed that the forged visa had expired. She called immigration officials and Hernandez was arrested.

**Option 1:** Hernandez admits that he used the false documentation to try to enter the United States to find a job that would allow him to earn money to pay for a liver transplant for his critically ill nine-year-old daughter.

**Option 2:** Hernandez admits that he used the false documentation to try to enter the United States to track down a rogue member of a drug cartel who had stolen drug proceeds from the cartel.

The Immigration and Naturalization Service plans to deport Hernandez without other penalties. A local prosecutor, however, is concerned with illegal immigration and wants to impose a greater penalty in this case. He has charged Hernandez with forgery, arguing that affixing the fake visa into the passport means that the passport was used fraudulently. Hernandez’s lawyer has moved to have this case dismissed, arguing that although the visa was a fake, the passport was still valid. This appears to be a question of first impression under Ohio law and under Federal law. Hernandez will be deported after he serves his sentence in either case.

How would you rule in this case:

\_\_\_The attachment of the fake visa does not make the passport a “forgery” and thus the case should be dismissed.

\_\_\_The attachment of the fake visa does make the passport a “forgery” and thus the case should not be dismissed.

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266. OHIO REV. CODE ANN. § 2913.31(B)(1), (C)(2) (West 2006 & Supp. 2014). We gave this problem to three groups of federal magistrate judges from a variety of districts, to state judges from New York and Ohio, and to appellate judges from a variety of state and federal appellate courts. The New York and Ohio judges were mostly trial court judges. In each jurisdiction we varied the text of the problem in minor ways to refer to the applicable law in that jurisdiction. The version presented above was given to Ohio judges.

## Appendix B: Medical Marijuana

Imagine that the State of New York acts to legalize the consumption of medical marijuana through the adoption of the Medical Marijuana Access Law (MMAL). The MMAL provides that a person may not be arrested for possessing and consuming marijuana if he or she holds a valid medical-marijuana registration card, which can be obtained from State Health authorities with the support of a treating physician. The MMAL also provides that individuals who do not obtain a registration card may raise an affirmative defense against prosecution for possession of marijuana if a “physician *has stated* in an affidavit or otherwise under oath . . . that the person is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the person’s serious or debilitating medical condition or symptoms.”

Imagine that after the MMAL has gone in effect, you preside over a case in which the defendant, John Nyquist, has been charged with violating § 221.15 of the New York Penal Law for possession of 2.5 ounces of marijuana (which is a Class A Misdemeanor, punishable by up to one year in prison).<sup>267</sup> Police officers found the marijuana in Nyquist’s car during a routine traffic stop and arrested him.

**Option 1:** Nyquist is 19 years old and has a juvenile record for drug possession and drug dealing. He is currently unemployed and on probation for beating his ex-girlfriend.

**Option 2:** Nyquist is 55 years old, married, and has three adult children. He is employed as an accountant and has no criminal record.

Nyquist has moved to have the charges against him dismissed pursuant to the MMAL. Nyquist does not have a registration card for the use of medical marijuana. At the time of his arrest, he also lacked a physician’s affidavit that would support an affirmative defense under the MMAL.

**Option 1:** After his arrest, however, Nyquist’s treating physician provided an affidavit indicating that he had been treating Nyquist for experiencing two low-level seizures and that marijuana use would be of therapeutic or palliative benefit to him to prevent these seizures. The physician indicated that Nyquist’s illness was not debilitating and might abate within a year. He also stated that marijuana has been demonstrated to be effective at controlling seizures in patients with Nyquist’s symptoms.

**Option 2:** After his arrest, however, Nyquist’s treating physician provided an affidavit indicating that he had been treating Nyquist for

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267. N.Y. PENAL LAW § 221.15 (McKinney 2008); *id.* § 70.15(1).

severe pain caused by bone cancer and that marijuana use would be of therapeutic or palliative benefit to him to reduce his pain. The physician indicated that Nyquist's illness was debilitating and would likely kill him within a year. He also stated that marijuana has been demonstrated to be effective at controlling pain in patients with Nyquist's symptoms.

Medical records confirm that the physician had been treating Nyquist before his arrest. The physician also stated that Nyquist's condition would have made him eligible to use marijuana at the time of his arrest. Furthermore, 2.5 ounces is the maximum amount of marijuana that a person may possess under the MMAL.

Based on the affidavit, Nyquist has moved to have his case dismissed. Because the statute is new, this is a question of first impression under the MMAL.

How would you rule on the motion to dismiss:

\_\_\_\_ "Has stated" should be interpreted to mean that a physician stated medical marijuana use would be beneficial to the defendant before his arrest. Therefore, I would deny the motion to dismiss.

\_\_\_\_ "Has stated" should be interpreted to mean that a physician stated that medical marijuana use would be beneficial to the defendant either before or after the arrest. Therefore, I would grant the motion to dismiss.<sup>268</sup>

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268. This is the version given to New York judges. The version given to Canadian judges varied only slightly.

## Appendix C: Civil Rights Claim

You are presiding over a civil rights suit against a small city in Minnesota. The City recently instituted a blanket policy requiring that all arrestees who were to be introduced into the general jail population were to be strip searched. The complaint alleges that this policy is unconstitutional on its face and demands declaratory relief and damages for violations of Fourth Amendment rights. Because the facts are not in dispute and the case presents purely legal issues, the parties have filed cross-motions for summary judgment.

**Option 1:** The plaintiff [class representative] is Joe Smith. He is unemployed, is 34 years old, and has previously been convicted of shoplifting, burglary, spousal battery, and selling drugs at a local high school. He was arrested for attempted murder and armed robbery after he attacked a liquor-store clerk with a razor blade. He was forcibly strip searched by a male officer in a hallway and then was kept naked in a cold room for two hours, where he was regularly viewed by other male officers. No contraband was found. Smith eventually was convicted of attempted murder and armed robbery and sentenced to 11 years in prison.

**Option 2:** The plaintiff [class representative] is Joan Smith. She is 19 years old, is a student at a public university in the City, and has no criminal history. She was arrested for trespassing at a protest targeting planned tuition increases at the university she attends. She was forcibly strip searched by a female officer in a hallway and then was kept naked in a cold room for two hours, where she was regularly viewed by other female officers. No contraband was found. Smith was released the next day. No charges were ever filed.

The controlling case is *Bell v. Wolfish*. That case established the following principles: (1) the constitutional rights of prisoners are subject to restrictions and limitations based on legitimate institutional needs and objectives; (2) prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel; and (3) courts should defer to the judgments of prison officials regarding what policies and practices are necessary to preserve internal order and discipline and to maintain institutional security.<sup>269</sup> *Bell* applies to arrestees and pretrial detainees, such as the plaintiff.

The City argues that its policy is reasonable under *Bell*, which upheld a blanket strip-search policy for persons choosing to participate in contact visits with prisoners. The plaintiff[s] responds that *Bell* is distinguishable because, unlike arrests, contact visits are elective (so that a visitor can

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269. See *supra* note 157 and accompanying text.

choose not to be searched by foregoing the visit) and planned (so that they pose greater risk of smuggling). The plaintiff[s] also argues that a blanket policy of strip searching every arrestee fails to distinguish among those as to whom jail officials possess a reasonable suspicion that the arrestee is carrying or concealing contraband and those as to whom they lack such reasonable suspicion.

How would you rule on cross motions for summary judgment?

\_\_\_ Grant the City's motion for summary judgment because the City's blanket strip-search policy does not violate the Constitution (and deny the plaintiff's motion).

\_\_\_ Grant the plaintiff's motion for summary judgment because the City's blanket strip-search policy violates the Constitution (and deny the defendant's motion).<sup>270</sup>

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270. This is the version of the problem given to Minnesota. We varied the text of the problem in insubstantial ways when we gave it to judges in other jurisdictions.

## Appendix D: Credit Card Debt

Janice has filed for relief under Chapter 7. Janice is single, twenty-nine years old and has had debt problems for much of her adult life. She has never held a job that paid more than minimum wage. She has never filed for bankruptcy protection before but has defaulted on a prior loan and is often delinquent in making credit card payments. She was also once evicted from an apartment for nonpayment of rent.

**Option 1:** Nevertheless, Janice frequently manages to find the money to take vacations in Florida with her friends. They have been taking trips together for years. Many of Janice's financial problems arise from the fact that she frequently uses what money she has to travel with her friends. She often drives hundreds of miles to Florida with them, especially during the times when the beaches there fill up with college students out on spring break.

**Option 2:** Nevertheless, Janice frequently manages to find the money to support her sick mother. Her mother has been battling cancer for years and has no health insurance. Many of Janice's financial problems arise from the fact that she frequently uses what money she has to visit her mother and help buy her mother medicine. She often drives hundreds of miles to Florida to see her mother, especially during the times when she is having surgery or other treatments.

This past year, Janice has been particularly short of cash because of several periods of unemployment. She had just begun working at a minimum wage job at a fast food restaurant, known as Gino's Pizza, when she learned her [**Option 1:** friends were planning a trip to Florida on spring break; **Option 2:** mother would be having surgery].

At the time, Janice's income from Gino's was barely enough for her to meet her rent, car insurance, food, and payments on debt that she had run up while unemployed. Despite her financial problems, Janice was able to obtain a new credit card with a credit limit of \$3,500. Janice used the card to pay for her trip. When she asked for time off, her employer informed her that she would be fired if she took a week off so early in her new job. Janice went anyway. While there, she charged all of her expenses, including a motel room and meals. [**Option 1:** She also bought many rounds of drinks for friends with her new credit card. **Option 2:** She also purchased several months of medication for her mother with her new credit card.]

Gino's Pizza fired Janice upon her return. She sank more deeply in debt, as it took her some time to find another job. Janice ultimately filed for bankruptcy in Chapter 7, three and a half months after taking her trip.

Janice is seeking to have all of her debt discharged, including the \$3,276 on her new credit card. She has essentially no assets (her car is worth very little) and no savings. The bank that issued her the credit card has brought an adversary proceeding under 11 U.S.C. § 523(a)(2)(A) (which excepts from discharge a debt for “false pretenses, a false representation, or actual fraud”)<sup>271</sup> to have her debt deemed to be nondischargeable. The bank contends that Janice knew that she would have no way of repaying this debt when she essentially maxed out the card. Janice asserts that although she knew she was deeply in debt and that her income would not be adequate to pay the debt, she was hopeful that she might be able to obtain a promotion quickly, which would increase her income. She stated that she had considered filing bankruptcy in the past and there is evidence she had consulted bankruptcy attorneys at several points over the past two years.

How would you rule on the bank’s claim?

\_\_\_ I would find in favor of the bank and rule that this debt is nondischargeable

\_\_\_ I would find against the bank and rule that this debt is dischargeable.<sup>272</sup>

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271. 11 U.S.C. § 523(a)(2)(A) (2012).

272. In the male debtor version of the problem, we changed the debtor’s name from “Janice” to “Jared,” and switched the gender of the pronouns “she” and “her” to “he,” “his,” or “him,” as appropriate.

## Appendix E: Employment Case

You are presiding over a disciplinary proceeding against D.H., a maintenance worker employed by the Staten Island Ferry Division of the Department of Transportation (the Department). D.H. tested positive for [marijuana/heroin] in a random drug test. Immediately after the results, a search of his locker revealed [an unsmoked marijuana cigarette/several bags of heroin worth about \$4,000 on the street]. Based on the evidence the Department has brought this disciplinary proceeding against D.H.

D.H. has moved to suppress evidence of the test results and the contents of his locker on the ground that the drug test was an unreasonable search under the Fourth Amendment to the United States Constitution. The parties agree that under relevant statutes and regulations, if the respondent's drug test was unreasonable, the remedy is suppression of this evidence and dismissal of the charges. The results of a drug test that is undertaken in violation of the Constitution cannot provide grounds for disciplinary action. The parties also agree that the search of D.H.'s locker was founded on the drug test and cannot be admitted unless the drug test was reasonable.

The U.S. Supreme Court has upheld random testing of public employees who perform jobs that are "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."<sup>273</sup> The Court's decision has been codified into federal regulations that allow—and even require—random drug testing on employees who perform "unsupervised safety-sensitive functions," which can include maintenance work on a ferryboat.<sup>274</sup>

D.H. does not work on a ferryboat, however, he works in the terminal buildings. His job entails performing daily inspections of the grounds and building, changing light bulbs, repairing broken doors, and fixing broken equipment in the restrooms. He also assists in the office by moving supplies or equipment and cleaning. He is available for "minor electrical repairs" on ferryboats if regular ferry maintenance personnel are unavailable, although he has never been asked to perform such repairs in five years on the job. Furthermore, his job description does not allow him to perform unsupervised electrical repair work absent emergency circumstances. A supervisor who would supervise him is almost invariably present on ferryboats.

D.H. argues that his job description does not qualify him as an employee for whom "momentary lapses" can have disastrous consequences. He asserts that his position in the terminal amounts to custodial work that puts no one at risk. He also contends that should he be asked to work on a

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273. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 628 (1989).

274. *See supra* notes 182–83 and accompanying gtext.

ferry on an emergency basis, he would not be allowed to do any unsupervised repairs. The Department contends that any workers who might perform repairs on the ferries, particularly electrical work, could put thousands of commuters at risk if they try to perform their duties while under the influence of controlled substances.

Based on the information provided, how would you rule in this case?

\_\_\_\_ Suppress the evidence against D.H. because he does not perform a “safety-sensitive” function.

\_\_\_\_ Admit the evidence against D.H. because he performs a “safety-sensitive” function.

## Appendix F: Environmental Pollution

Imagine that you are presiding over a bench trial of a tort case brought by Eric Swensen against Fred Brewster. Swensen owns a large farm in a rural area of Minnesota. Brewster lives nearby [also in Minnesota/in Wisconsin] where he operates, as a sole proprietorship, a small business making and selling adhesive used by dentists in [Minnesota/Wisconsin]. (Brewster could have removed the case to federal court on diversity jurisdiction, but chose not to do so.) Some of the chemicals he mixes are toxic and contain arsenic and other poisons. They must be carefully disposed of by a licensed hazardous waste disposal facility for a hefty fee.

During his deposition, Brewster admitted that he got tired of paying the expenses associated with proper disposal of his waste chemicals. Instead, he began driving his pickup truck loaded with 40-gallon plastic containers a few miles (across the border into Minnesota) to a lake that he remembered swimming in as a child. Month after month, Brewster rinsed the residue of the toxic chemicals from the 40-gallon plastic containers into the lake in the middle of the night without anyone noticing.

The lake lies in a forested corner of Swensen's property, far from his farmhouse. Water from the lake drains into a stream and then into other lakes (in Minnesota) used by local residents for swimming, fishing, and boating. Normally, no one uses the lake, but on one hot summer day, Swensen decided to go for a swim in his lake. He noticed nothing unusual about the water. He became very ill that evening with severe cramps, vomiting, and a debilitating headache. Swensen was eventually diagnosed with arsenic poisoning. Although he was treated immediately, he has suffered some long term effects. One of his kidneys was severely damaged and doctors had to remove it. He continues to suffer from chronic nausea and headaches that have made it hard for him to work. His skin has become severely mottled, and his face looks quite disfigured as a result. Doctors attribute all of the effects to arsenic poisoning.

Brewster agreed to pay \$500,000 to cover all of Swensen's compensatory damages, including medical expenses, lost wages, and pain and suffering. The case proceeded to trial on Swensen's claim that Brewster's conduct "showed deliberate disregard for the right and safety of others" and therefore warrants an award for punitive damages. Brewster admits that his conduct was wrong, but denies that he showed "deliberate disregard." He testified that "I did not know anyone still swam in that lake, and I did not think anyone could get so sick from those chemicals."

Evidence at trial revealed that Brewster's business is highly profitable, and had a book value of approximately \$10 million before this lawsuit.

Would you award punitive damages against Brewster?

Yes \_\_\_\_\_.

If Yes, how much would you award? \_\_\_\_\_

No \_\_\_\_\_.